EN

Case No COMP/M.6541 - GLENCORE / XSTRATA

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) in conjunction with Art 6(2)
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.6541 – GLENCORE/XSTRATA
Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004[1]

1. On 2 October 2012**,** the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Glencore International Plc ("Glencore", incorporated in Jersey and headquartered in Switzerland) ("the Notifying Party") acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Xstrata Plc ("Xstrata", Switzerland) by way of purchase of shares ("the Proposed Transaction").[2] The undertaking resulting from the Proposed Transaction will be referred to as the "Merged Entity".

I. THE PARTIES

2. Glencore is an integrated producer and trader of a wide range of commodities. Glencore's business is organised around three segments: (i) metals and minerals – e.g. aluminium, alumina, zinc, copper, lead, ferroalloys, nickel, cobalt, and iron ore; (ii) energy products – e.g. crude oil, oil products, coal and coke; and (iii) agricultural products – e.g. wheat, maize, barley, edible oils, oilseeds, cotton and sugar.

3. Xstrata is an international group active in mining, mineral processing and metals extraction. The group comprises five major businesses: (i) an alloys business, comprising ferrochrome and vanadium operations and a platinum group metals business; (ii) a coal business; (iii) a copper business; (iv) a nickel business; and (v) a zinc-lead business.

II. THE OPERATION

4. Pursuant to the Proposed Transaction, Glencore will acquire all of the outstanding shares in Xstrata by way of a scheme of arrangement under Part 26 of the UK Companies Act 2006. Xstrata shareholders will receive new shares in Glencore as consideration. When the scheme is approved, sanctioned by the Court and registered, all Xstrata shares (other than the shares the Glencore group already holds) will be cancelled and new Xstrata shares will be issued to Glencore, giving it a 100% shareholding in Xstrata. Xstrata's Board of Directors recommended Glencore's offer on 1 October 2012. On 20 November 2012, Xstrata's shareholders' meeting voted in favour of the Proposed Transaction.

1 OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

2 Publication in the Official Journal of the European Union No C 304, 9 October2012, p.6.

III. THE CONCENTRATION - ACQUISITION OF CONTROL OVER AN INDEPENDENT UNDERTAKING

III.1. Background

5. Xstrata was created in 2002 as a spin-off of Glencore's coal mining activities in Australia and South Africa and floated on the London Stock Exchange in 2002. At the time, Glencore maintained a shareholding of around 40% in Xstrata.

6. While Glencore did not hold the majority of shares, Glencore enjoyed a stable majority at Xstrata's shareholders' meetings until 2006. In 2006, Xstrata's shareholding was diluted and Glencore lost its majority at the shareholders' meeting which since then has not been regained.

7. Prior to that moment, the Commission concluded at several occasions that there was *de facto* control by Glencore over Xstrata in the sense of paragraph 59 of the Jurisdictional Notice.[3] The last instance where the Commission made this conclusion was the 2006 case M.4256 *Xstrata / Falconbridge*.[4]

8. After a number of share issuances, in particular the USD 5.9 billion share issuance in January 2009, Glencore now owns only 33.65% of Xstrata's shares.

III.2. Position of the Notifying Party

9. The Notifying Party does not claim or argue in the Form CO that currently it exercises 'decisive influence' over Xstrata also after the dilution of its shareholding in Xstrata. The exercise of decisive influence pre-merger within the meaning of paragraph 54 of the Jurisdictional Notice is decisive in order to determine whether the Proposed Transaction will lead to the acquisition of control and hence constitutes a concentration.

10. It merely notes that it continues to exercise "*significant influence*" over Xstrata as it did when the Commission investigated the *Xstrata/Falconbridge* transaction and that this should be taken into account in the substantive assessment.[5]

11. In this context, the Notifying Party argues that it remains *"by far the largest shareholder and has a strategic interest in Xstrata"* and that the remainder of the shareholder base is highly fragmented and made up of financial investors.

12. The Notifying Party further argues that it has "*considerable influence*" on the nature and content of resolutions that are put to Xstrata shareholders through the directors it nominates to the Xstrata Board.[6] Furthermore, it submits that Xstrata's Board resolutions […].

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3 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) (the "Jurisdictional Notice") of 16.4.2008.

4 Case COMP M.4256 Xstrata/Falconbridge, Commission decision of 13 July 2006, points 3 and 4.

5 Form CO §§ 19 and 77.

6 Form CO § 79.

13. Finally, the Notifying Party considers that its influence over Xstrata is increased as a result of various agreements governing their relationship and commercial activities.[7] These concern, *inter alia*, the Notifying Party's right to appoint at least three members of the Xstrata Board as well as different agency, services, marketing and distribution agreements.

III.3. Assessment of the Commission

III.3.1. Applicable legal standard

14. Sole control is defined as a situation where one undertaking alone can exercise decisive influence over another undertaking.[8] Such sole control can be "positive sole control" where one undertaking determines the strategic commercial decisions of another undertaking or "negative sole control" where only one shareholder is able to veto strategic decisions in another undertaking without having the power to impose such decisions on its own.

15. This means that when Article 3(2) of the Merger Regulation and the Jurisdictional Notice refer to decisive influence they require at least the power to veto important strategic business decisions, such as the appointment of senior management or the adoption of the budget and business plans. In order to attain the threshold of control, the ability to influence the strategy of the business must go beyond the typical rights of a minority shareholder designed to protect its financial interests, such as the right to veto the sale of the undertaking in question.[9]

16. However, the evidence available to the Commission shows that Glencore currently no longer has the ability to exercise decisive influence over Xstrata either on a *de jure* or a *de facto* basis:

III.3.2. *De jure* control

17. According to the Jurisdictional Notice, control is normally acquired on a legal basis where an undertaking acquires a majority of the voting rights of a company. However, even in the case of a minority shareholding, control may occur on a legal basis in situations where specific rights enable that shareholder to determine the strategic commercial behaviour of the company, such as the power to appoint more than half of the members of the supervisory board or the administrative board.[10]

18. The Commission takes the view that Glencore does not currently hold *de jure* sole control over Xstrata, since Glencore currently only holds the minority of Xstrata's shareholding and voting rights, and can only appoint significantly less than half of Xstrata's Board[11] where decisions are taken by simple majority. There are also no indications as to the existence of *de jure* joint control. There is no equality in voting rights between the large number of Xstrata shareholders and none of the

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7 Form CO § 80.

8 See paragraph 3(2) of the Merger Regulation and paragraph 54 of the Jurisdictional Notice.

9 See in connection with joint control paragraphs 65-73 of the Jurisdictional Notice.

10 See paragraphs 56-58 of the Jurisdictional Notice.

11 The Board is in charge of the main commercial/strategic decisions, such as budget and business plans, major capital expenditures, major acquisitions and disposals.

shareholders has significant veto rights. There are also no legally binding agreements in place to ensure the joint exercise of voting rights.[12]

III.3.3. *De facto* sole control

19. A large minority holding in another undertaking can confer *de facto* control in situations where the shareholder is likely to achieve a stable majority of the votes cast at future shareholders' meetings. Whether the minority shareholder has *de facto* control has to be assessed in view of the level of its shareholdings, the presence of shareholders in previous shareholders' meetings, the historic voting patterns at the shareholders' meetings and the position of other shareholders.[13] Furthermore, the Jurisdictional Notice acknowledges that, in exceptional circumstances, a situation of economic dependence may lead to *de facto* control where, for example, very important long-term supply agreements or credits provided by suppliers or customers, coupled with structural links, confer decisive influence.[14]

20. The Commission takes the view that Glencore's shareholdings and the various distribution, agency, advisory and service agreements between Glencore and Xstrata do not suffice to currently confer Glencore decisive influence over Xstrata. This is based in particular on the following elements:

    a) Glencore has lost its majority of the votes cast in Xstrata's shareholders' meetings. In all of the shareholders' meetings held since June 2006, Glencore achieved between […]% (May 2012) and […]% (March 2009) of the votes cast. Furthermore, Glencore's percentage of the votes cast has […] since March 2009.

    b) Glencore today only holds 3 out of the 13 members of Xstrata's Board, which is in charge of the main commercial/strategic decisions, such as budget and business plans, major capital expenditures, major acquisitions and disposals. According to the information available to the Commission, issues such as business plans are […].

    c) Glencore no longer holds the Chairman position in Xstrata's Board (which it had held since 2002). The chairman has a casting vote. Therefore, Glencore now needs the support of four other members on Xstrata's Board in order to approve a resolution that Glencore wishes to pass.

    d) Glencore has no representatives in Xstrata's Board's Executive Committee, responsible for implementing Xstrata's strategy, overseeing various businesses and setting financial and non-financial performance targets. Out of all the Board Committees of Xstrata, Glencore is only present in the Nominations Committee, where it only has one member out of four.[15]

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12 See paragraphs 64-82 of the Jurisdictional Notice.

13 See paragraphs 16, 54 and 62 of the Jurisdictional Notice

14 See paragraph 20 of the Jurisdictional Notice.

15 The Nominations Committee is responsible for reviewing structure, size and composition of Xstrata's Board and making recommendations with regard to any changes as well as identifying and nominating candidates for election in the shareholders' meeting.

e) Glencore has [explanation regarding pattern of proposals in Xstrata's shareholders' meeting] in Xstrata's shareholders' meeting. Instead, it is [explanation regarding pattern of proposals in Xstrata's shareholders' meeting] that has [explanation regarding pattern of proposals in Xstrata's shareholders' meeting] at Xstrata's shareholders' meeting.[16]

f) Shareholding in Xstrata is no longer widely dispersed. For example, Qatar Holdings owns 12.29% (as of 29 August 2012[17]) and Black Rock 4.36% (as of 20 September 2012) of Xstrata's shares.[18]

g) Although Glencore remains an important shareholder in Xstrata, Qatar Holdings has vested interests in the company. Qatar Holdings has played a decisive role as to whether and when the Proposed Transaction would take place and has shown in this context that it is able to forge alliances with other small shareholders in Xstrata.[19]

h) In the products which are most important for Xstrata in terms of operating profit, such as copper, zinc and coal,[20] Xstrata has its own marketing department and sells a large proportion of its production independently of Glencore. Furthermore, according to results of the Commission's market investigation[21] and internal documents,[22] Xstrata sells products in direct competition with Glencore at least to some extent. With regard to copper and zinc, Glencore's role is limited to providing market intelligence for a fixed annual fee under contracts that can be terminated with a one-year notice.[23] With regard to thermal coal, Glencore has only entered into a

16 Therefore, a vote in favour of a given proposal in the shareholders' meetings cannot be […], but in support of […].

17 Qatar Holding has been building up its share in Xstrata substantially in 2012. Its shareholding in Xstrata reached 10% for the first time at the beginning of June 2012.

18 Form CO § 78.

19 A 16.5% share of Xstrata voting shares is sufficient to block the Proposed Transaction in Xstrata's shareholders' meeting. Qatar Holdings has successfully objected to certain aspects of the Proposed Transaction, leading twice to a postponement of the vote by Xstrata's shareholders' meeting (first form 12 July to 7 September 2012 and, subsequently, to 20 November 2012) and, most significantly, an increase of the price Glenore had to pay for Xstrata's outstanding shares.

E.g. see WSJ: "Glencore, Xstrata Set September Date for Merger Vote", Full article available at: http://online.wsj.com/article/SB10001424052702303740704577521022947773852.html, (retrieved on 18 July 2012); WSJ: "Glencore-Xstrata Deal Gets Boost from Qatar", full article available at http://online.wsj.com/article/SB10000872396390443675404578058402573567838.html (retrieved on 15 November 2012); FT: "Qatar PM backs Glencore/Xstrata tie-up" full article available at: http://www.ft.com/intl/cms/s/0/3bee3e6c-16ea-11e2-8989-00144feabdc0.html#axzz2CDbiV9i4 (retrieved on 15 November 2012); WSJ: "Complex Voting Puts Glencore-Xstrata Merger at Risk", full article available at: http://online.wsj.com/article/SB10001424127887323894704578112950324301088.html, (retrieved on 15 November 2012).

20 Copper, zinc and coal represent about 91% of Xstrata's operating profit in 2011. In particular, copper accounts for 47%, coal for 34%, and zinc for 9% of Xstrata's operating profit in 2011; Annual accounts of Xstrata for 2011, page vi and vii.

21 See for instance Q1 – Question 88.

22 For zinc, see for example [internal document of the Notifying Party] of 25 January 2012[…].

23 The information provided by Xstrata for zinc demonstrates that […]. Arrangements of this type account for […]: for copper, zinc and lead […].

non-exclusive[24] agency-advisory agreement with Xstrata according to which it presents sales opportunities to Xstrata for a remuneration per tonne sold.

i) The only products sold by Xstrata that are covered by exclusive distribution agreements with Glencore are ferronickel, nickel, cobalt and ferrochrome, which together represent about 10% of Xstrata's operating profits in 2011. Furthermore, […] of the exclusive distribution agreements on ferronickel and cobalt was […]. Internal documents from Xstrata show […].[25]

j) Furthermore Xstrata, at least occasionally, does not refrain from acting against the interests of Glencore, e.g. by selling to competing traders.

k) Moreover, the Notifying Party expects to realize annual synergies of at least EUR 359 million post-merger.[26] Certain of these synergies concern actions that Glencore would like Xstrata to take, but that the latter currently does not undertake, e.g. with respect to cost-savings through blending of different types of coal or more efficient handling of logistics. This further confirms that the pre-merger situation is one where Glencore is unable to exert decisive influence over Xstrata.

l) Finally, it is noteworthy that Glencore's IPO documents refer to Xstrata as a "non-controlled" industrial asset.[27]

III.3.4. Conclusion

21. On the basis of the above, the Commission concludes that Glencore no longer holds decisive influence over Xstrata within the meaning of paragraph 54 of the Jurisdictional Notice and Article 3 (2) of the Merger Regulation. Under the Proposed Transaction, Glencore would acquire 100% of the issued share capital. Consequently, the Proposed Transaction constitutes the acquisition of sole control over an independent undertaking within the meaning of Article 3 (1) (b) of the Merger Regulation.

IV. EU DIMENSION

22. The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (Glencore: EUR 133 730 million; Xstrata: EUR 24 336 million)[28]. Each of them has an EU-wide turnover in excess of EUR 250

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24 Contrary to the exclusive agency arrangements Glencore has with two other producers (namely Arutmin and KPC) in which it does not have shareholdings.

25 […] For example, these options were considered prior to […] as well as after […]; see for example Xstrata internal document […]. In that regard, it should also be recalled that according to the so-called Relationship Agreement (Form CO Annex 4.5) between […].

26 Form CO § 109; according to an internal synergies estimate, the synergies could be as high as EUR […], internal document […].

27 Glencore IPO prospectus of 4 May 2011, page 69, available at: http://de.scribd.com/doc/54605519/Glencore-IPO-Prospectus (retrieved on 14 November 2012).

28 Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

million (Glencore: […]; Xstrata: […]), but each does not achieve more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

23. The Proposed Transaction therefore has an EU dimension under Article 1 (2) of the Merger Regulation.

V. COMPETITIVE ASSESSMENT

V.1. Introduction

24. The proposed transaction gives rise to horizontal overlaps in the production and/or supply of the following products:

    a. Zinc and zinc concentrate;

    b. Copper and copper concentrate;

    c. Lead and lead concentrate;

    d. Refined nickel;

    e. Refined cobalt;

    f. Ferrochrome;

    g. Thermal coal and coking coal;

    h. And certain other, "non-core" products, in particular chrome ore, gold, molybdenum, platinum, palladium, sulphuric acid, vanadium/ ferrovanadium, and silver.

25. The Proposed Transaction also gives rise to a number of vertical relationships. These relationships concern metal concentrates or metal intermediates as input products for the smelting processes of downstream refined metals and the production of other downstream metal products.

26. In line with the Commission’s mandate under the Merger Regulation, the Commission's assessment in the present decision is limited to merger-specific competition issues and without prejudice to any future antitrust investigations.

V.2. Horizontal issues with regard to market definition

27. Certain issues are common to most market definitions for the products covered in this decision. These concern possible distinctions between: (i) spot and longer term contracts, (ii) purchases from traders and purchases from producers, and (iii) a worldwide market and a domestic Chinese market. These issues will be assessed here for all markets in common.

V.2.1. Product markets for spot and longer-term sales contracts

28. The commodities concerned by the Proposed Transaction are traded on the spot (i.e. with immediate delivery) and on the basis of longer-term contracts. The Commission has investigated if separate spot markets need to be defined based on the assumption that competitive conditions in sales on the spot and under longer-

term contracts might diverge and that Glencore, as a trader, might be a strong player on potential spot markets.

V.2.1.1. Position of the Notifying Party

29. According to the Notifying Party any distinction between spot and longer-term contract sales is artificial.[29] It argues that the prices for spot and contract sales are virtually indistinguishable and that spot premia are not consistently higher then contract premia. Furthermore, spot sales (i.e. sales with duration of less than three months)[30] and contract sales with short duration (i.e. sales with a duration of just above three months) are close substitutes. In this context, the Notifying Party submits that market participants aim at achieving maximum profits from the use of both types of sales: profitability can be increased by reducing longer-term contract sales when prices are low (and are expected to increase) and increasing longer-term contract sales when prices are high (and expected to fall).

V.2.1.2. Assessment of the Commission

30. The Commission has investigated the issue with market participants surveyed in the market investigation.

31. The overall picture emerging from the market investigation across the different commodities is that no separate spot markets can be defined. In particular, the vast majority of market participants consider that the competitive conditions in sales on the spot are not sufficiently different from competitive conditions in sales on the basis of longer-term contracts.[31] In addition, there is near-consensus that there are no important entry barriers for suppliers currently selling through longer-term contracts to sell on the spot.[32] Market participants are also of the view that although prices in spot and long-term contracts may differ, there is still strong interaction between the two.[33]

32. The Commission therefore finds that competitive conditions are not markedly different between sales on the spot and sales under longer-term contracts. Since prices interact strongly and there are no entry barriers to sales on the spot, there is not sufficient evidence for the Commission to conclude that separate product markets should be defined.

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29 Form CO § 173.

30 The Notifying Party understands that a spot sale is the sale of a commodity with prompt delivery. While there is no generally accepted industry definition of spot sales, the Notifying Party is of the view that spot sales include agreements that cover delivery within a period of less than three months, footnote 79 of the Form CO.

31 See the results of the market investigation on zinc metal (Q1 - Question 29; Q2 – Question 30), zinc concentrate (Q3 – Question 18; Q4 – Question 17) and lead metal (Q9 – Question 76; Q10 – Question 70). The results were similar for the other products investigated by the Commission.

32 See the results of the market investigation on zinc metal (Q1 - Question 30; Q2 – Question 31), zinc concentrate (Q3 – Question 19; Q4 – Question 18) and lead metal (Q9 – Question 77; Q10 – Question 73). The results were similar for the other products investigated by the Commission.

33 See the results of the market investigation on zinc metal (Q2 – Question 27), zinc concentrate (Q3 – Question 16; Q4 – Question 16) and lead metal (Q9 – Question 73; Q10 – Question 67). The results were similar for the other products investigated by the Commission.

V.2.1.3. Conclusion

33. On the basis of the above, the Commission concludes that there are no distinct markets for spot sales and sales under longer-term contracts in the metal commodity markets covered in this decision.

V.2.2. Product markets for purchases from traders and producers

34. Glencore and Xstrata pursue different business models in the commodity value chain. Glencore is both a producer and a commodity trader i.e. it does not only sell its own production but also purchases products for resale. Other companies, such as Trafigura, Transamine and the Noble group are also active in the trading business. In contrast, Xstrata is an integrated commodities producer that sells primarily its own production. Other companies such as BHP Billiton, Codelco, Freeport, Rio Tinto and Anglo American have a similar business model to Xstrata's in this respect.

35. Consequently, while it can be said that both companies offer metal and intermediaries for sale, the question is pertinent as to whether a distinction must be made between a supply market for traders and a supply market for producers.

V.2.2.1. Position of the Notifying Party

36. The Notifying Party submits that traders and producers compete for supplying metal and metal intermediates to customers and, hence, are part of the same product market.[34]

V.2.2.2. Assessment of the Commission

37. In its M.4256 Xstrata/Falconbridge decision of 2006, the Commission left open whether metal traders are active on the same relevant product market as metal producers although the market investigation provided evidence that such distinction was not appropriate.[35]

38. The Commission has investigated this matter in its market investigation. The overall view of market participants is that traders and producers compete for the same customer base in the market place since traders and producers offer substitutable products.[36] Traders and producers may offer different terms as regards prices, nature of the contract, or other factors.[37] Elements mentioned in the market investigation related for instance to the fact that traders may, in general, be more willing to offer smaller quantities and to do spot trades and have more flexible conditions, whereas producers may have a better product range and prices. However, these elements do not point to elements that render products less substitutable, but to different characteristics of otherwise similar product offerings.

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34 E.g. Form CO § 457.

35 Case COMP M.4256 Xstrata/Falconbridge of 13 July 2006, points 12-15.

36 Q3 – Question 22; Q4 – Question 54; Q5 – Question 54 ; Q7 – Question 40 ; Q8 – Question 36 ; Q9 – Question 49 ; Q11 – Question 34 ; Q12 – Question 28 ; Q13 – Question 80 ; Q14 – Question 77 ; Q15 – Question 77 ; Q16 – Question 74 ; Q17 – Question 60 ; Q18 – Question 58 ; Q19 – Question 58; Q20 Question 58 ; Q21 – Question 47 ; Q23 – Question 36.

37 See for example Q1 – Question 17 ; Q2 – Question 20 ; Q6 – Question 6.

39. Furthermore, the majority of customers buy indifferently from metal traders and metal producers.[38] Customers also appear to be able to switch between buying from traders and producers. Customers maintained that they would switch between traders and producers in response to a potential small but significant non-transitory change in the price (in the range of 5-10%) obtained from one group or the other, even if a given customer has a preference of buying from either traders or producers.[39]

40. The Commission therefore finds that traders and producers enter into competition for sales to customers. There is sufficient demand side substitutability between supplies from traders and producers to conclude that both types of suppliers are part of the same product market.

V.2.2.3. Conclusion

41. On the basis of the above, the Commission concludes that there are no distinct markets for sales from traders and producers in the metal commodity markets covered in this decision.

V.2.3. Domestic Chinese market

42. China is the most important consumer of metals in the world accounting for a large share of global consumption.[40] Due to its strong domestic demand exceeding domestic production, China is a net importer of many metal commodities. Accordingly, exports are limited, in part also due to export restrictions in the form of tariffs, export taxes or other export barriers. Furthermore, industry analysts appear to report figures for China and the rest of the world separately.[41] This situation might raise doubts whether domestic Chinese volumes enter into active competition with volumes traded in the rest of the world.

V.2.3.1. Position of the Notifying Party

43. In its IPO document of 2011, Glencore presented its "market shares" in the metals business segment in a global market excluding all production within the Chinese

38 Q5 – Question 53, Q17 – Question 57, Q20 - Question 57.

39 Q1 - Questions 19 and 20 ; Q1 – Question 18; Q2 – Question 21; Q18 –Question 58; Q 23 - Question 36. This is notwithstanding the fact that certain end-users are less able to quickly switch supplier in view of their supplier qualification requirements, their need for long term relations and their need to test new suppliers. This means that it may take time and resources to find a new supplier. However, whereas these factors imply that switching may not be easily possible for all end-users, they are pertinent for switching between any type of suppliers and not only with regard to switching between producers and traders.

40 For example, in 2011 Chinese consumption accounted for 37% of global zinc concentrate production, 41% of zinc metal production, 62% of lead concentrate production, 44% of lead metal production, 18% of copper concentrate production, 39% of refined copper production, 39% of nickel production, and 32% of refined cobalt production; data provided by the Parties in the Form CO based on industry publications by the International Lead and Zinc Study Group, Brook Hunt and CRU, Form CO §200.

41 See for example Brook Hunt, Metals Market Service Long Term Outlook – December 2011, pages 55-57 (CMS 235).

domestic market.[42] This was because Glencore aimed at presenting its market position in comparison with other traders and because Western traders currently have little penetration in China.[43]

44. In the present case, the Notifying Party argues that China is an integral part of the global commodity trade. According to the Notifying Party, global commodity trade flows are interconnected because sales into China compete with both sales outside of China and intra-Chinese sales.[44]

V.2.3.2. Assessment of the Commission and conclusion

45. The Commission has considered excluding China from the relevant geographic market in previous metal commodities cases.[45] In the present case, however, this issue can be left open for most of the markets at issue. The details of the Commission's analysis will be presented in the individual product sections below.

V.3. Horizontal issues with regard to the competitive assessment

46. Certain issues are common to the competitive assessment of all metal commodities covered in this decision. These concern: (i) industry practices in pricing concentrate and refined metals, (ii) the methodology for calculating market shares, (iii) the role of financial trading on the London Metal Exchange ("LME"), and (iv) the relevance of the LME warehousing rules. These issues will be discussed here for all metals markets covered in this decision.

V.3.1. Industry practices in pricing concentrate and metals

47. As regards price setting, the LME plays a central role in metals and concentrates. The LME is a commodity market in which standardised contracts (in terms of e.g. volume and grade) for metal are traded on a spot and futures basis. In non-ferrous metals, trading on the LME covers aluminium, copper, lead, nickel, tin and zinc. There is thus a global market price for these metals that is determined on the LME.[46]

48. The price set on the LME acts as a benchmark for metal and metal intermediate products traded in the physical market i.e. between suppliers and customers.

49. When trading refined metal for physical supply to customers, a premium is added to the LME price. This premium reflects, amongst other factors, the logistical costs of delivery from the actual location of the metal and the metal grade/purity. The

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42 Glencore IPO prospectus of 4 May 2011, page 44, available at http://de.scribd.com/doc/54605519/Glencore-IPO-Prospectus (retrieved on 14 November 2012).

43 See the Parties' presentation "Reconciliation of data in the IPO prospectus and in the Form CO" of 11/12 April 2012, Annex 6.08 of the Form CO (CMS 3410).

44 Form CO §§ 199-201.

45 See Case COMP/M.4494 Evraz/Highveld, decision of 20 February 2007, points 56-58 and 115, concerning the global vanadium market. However, the question was ultimately left open in this case.

46 There are also other exchanges, such as the Shanghai Metal Exchange, which are used for benchmarking purposes. However, the LME is more widely used, especially by European customers, and thus appear most relevant for the current analyses. The Shanghai Metal Exchange is pertinent in particular for intra-Chinese transactions (Form CO §296).

LME price reflects the metal grade/purity of metal meeting the LME specifications (e.g. SHG zinc metal). If a different grade/purity is delivered physically, the premia will be adapted to reflect these differences in grade/purity. Thus, contrary to the LME price, the premium varies between transactions.

50. When trading intermediate products, such as concentrates, refiners of metal, such as smelters, purchase their concentrate inputs with a rebate from the LME price, referred to as a "treatment and refining charge". The net difference between the LME price and the treatment and refining charge rebate is in effect the price that is paid to the concentrate supplier. The treatment and refining charge varies between transactions depending, for instance on transport costs. Zinc smelters typically also benefit from "free" zinc metal, which measures the difference between the zinc recovered and sold by the smelter, and the percentage of zinc contained in the concentrate that is paid to the miner.

51. A zinc refiner's gross margin is thus determined by the treatment and refining charges, the value of free metal and the premium on top of the LME price for supplies of refined metal in the physical market. In addition, zinc metal smelters earn revenues from the sale of by-products (e.g. sulphuric acid or different metals recovered in the smelting process). As both input and sales prices are expressed with reference to the LME price, variations in the LME price do not directly affect the margin for metal refiners. Instead, they mainly affect the price that producers of concentrate obtain.

52. LME prices but also regional premia, “benchmark premia”[47] and treatment and refining charges are published by the trade press on a regular basis and provide a basis for pricing in the market.

53. Producers of metal typically prefer to sell to end-customers (e.g. to maintain long established client relationships and generate good will).[48] In addition, metal producers always have the option of selling the metal instead on the LME, meaning that the metal will be stored in an LME warehouse, if the metal produced has the correct LME grade. The LME thus functions as a buyer of last resort for the physical metal markets.

54. Purchasing metal on the LME entitles a buyer to a warrant that represents a unit of that metal stored in one of the LME warehouses. When a warrant is cancelled, the owner is entitled to the physical delivery of the metal from the LME warehouse where the metal is located. The LME thus functions as a source of last resort for the physical metal markets. However, depending on whether a queue exists at the warehouse where the metal is located, physical delivery of the metal may take a significant time. In practice, few transactions are physically settled at the LME, with most physical trading taking place between suppliers and customers off the LME.

55. Thermal and coking coal are not traded on the LME and hence other pricing mechanisms apply. These will be described in the sections on these coal products below.

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47 Benchmark premia are premia set by major producers and costumers that serve as a guideline for the pricing behaviour of smaller players; Form CO §1286.

48 Form CO, Annex 6.10.

V.3.2. Methodology for calculating market shares

56. The Proposed Transaction combines a trader with significant production assets and a producer. In the metal commodity markets, traders aim at establishing long-term and possibly exclusive agreements with producers (at least on a de facto basis) to ensure access to material. A specific type of long-term agreement is the “off-take agreement” concluded between a producer and a buyer of a commodity to purchase/sell portions of the producer's future production. These relationships raise methodological issues with respect to the allocation of sales among producers and different traders in the assessment of market power.

V.3.2.1. Position of the Notifying Party

57. The Notifying Party argues that the Parties’ activities should be assessed at the production and the supply level of the relevant markets.

58. For the purpose of calculating market shares at the supply level, the Notifying Party suggests to include all transactions to end customers and to exclude sales to traders or other on-sellers. According to the Notifying Party, this is to avoid double-counting between direct and indirect sales and over-representation of the Parties’ market shares.[49]

V.3.2.2. Assessment of the Commission

59. The Commission broadly agrees with the Notifying Party’s approach of calculating market shares both at the production and supply level. This allows assessing market power both in terms of original access to volumes (production level) and in terms of market relations with customers (supply level). This approach also allows taking into account imports and exports influencing market conditions at the supply level.

60. As regards the assessment at the supply level, however, the Commission suggests a different allocation of sales among producers and different traders. Sales volumes should be attributed to a trader, independently of who they sell the product to, if they derive from (i) the trader’s own production, or (ii) the acquisition from a producer on the trader’s own account (including in particular through de facto long-term and/or exclusive off-take agreements). Consequently, also for sales that take place between traders, volumes should be attributed to the trader that produced the volumes or that first procured the volumes from a producer on its own account.

V.3.2.3. Conclusion

61. Differences in the methodology therefore mainly concern the attribution of volumes between different traders in the assessment of market power at the supply level. In cases where produced volumes are sold through a chain of traders, the different approaches allocate the volumes either to the first trader in the chain (Commission’s approach) or to the last trader in the chain (Notifying Party’s approach).

62. However, the Parties’ sales to traders are limited for most products. Therefore the practical differences between the approaches are generally not material. Where the

49 Form CO §§ 160 and 173.

approaches diverge materially, details will be discussed in the individual product sections below.

V.3.3. Financial trading on the LME

63. Following allegations in the press that Glencore might play a role in manipulating the LME price, which is the benchmark for most contracts of LME metals, the Commission has investigated these allegations to the extent that they are of relevance to the Proposed Transaction.

V.3.3.1. Position of the Notifying Party

64. The Notifying Party submits that post-transaction the Merged Entity will not be able to increase the LME price by virtue of Glencore's financial trading activities.[50] It claims that neither Glencore nor Xstrata has a privileged position in the LME organisation, that they trade financially relatively low volumes and that the LME has in place effective mechanisms to prevent abuses.

V.3.3.2. Assessment of the Commission

65. With respect to the Parties' position in the LME, Glencore has a stake of 0.5% in LME Holdings and both Glencore and Xstrata are Category 5 members of the LME with no access to the "ring"[51] and no special rights or privileges. While Glencore and Xstrata are represented on certain committees,[52] neither company can veto the recommendations of the committees on which they sit,[53] which are in any event not binding on the LME's Executive Committee. Therefore, neither Glencore nor Xstrata has a privileged position in the LME organisation.

66. In terms of trading volumes on the LME platform, Glencore's share of future trades – the main products traded on the LME – is […]. For example, out of the total volume of futures traded in the LME during 2011, Glencore accounted for [0-5]% in zinc metal, [0-5]% in refined copper, [0-5]% in lead, [0-5]% in refined nickel and [0-5]% in refined cobalt.[54] Xstrata has from time to time hedged volumes of copper on the LME, but as a general rule does not hedge with futures on the LME,[55] and its share of trades is […].

67. In addition, the LME trading platform is supported by supervision and regulations outlawing market abuses.[56] In particular, if at any time a member holds 50% or

50 Form CO §§ 268-275.

51 Only the LME's Category 1 members are entitled to trade in all of the LME's three trading platforms ("ring-dealing members"): (i) ring trading through an open outcry system; (ii) trading via an electronic platform; and (iii) telephone trading. For further information please consult the LME's website at www.lme.com.

52 Glencore is represented via its subsidiary warehousing company Pacorini Metals on the warehouse committee. Xstrata has representatives on the metal committees for copper, lead, nickel and zinc.

53 These committees have between 10 and 15 members, and no party has more than one member of any committee.

54 Notifying Party's Paper on LME Pricing dated 4 June 2012, p.2 and 3, Annex 6.9 of the Form CO.

55 Indeed board approval is needed if the company is to be allowed to hedge with futures.

56 As a "regulated market" for the purposes of the EU Market Abuse Directive and the United Kingdom's Financial Services and Markets Act 2000, any behaviour on the LME which gives a

more of the warrants and/or cash positions in relation to a metal, that member (or client) is deemed to hold a “dominant position” (in the terminology of the LME rules) and the LME’s "lending guidance" is automatically triggered. The "lending guidance" provides that any member that is short in a metal is entitled to borrow metal from the “dominant” member at a modest cost, so as to be able to fulfil its contractual delivery obligations.[57] Furthermore, special obligations are imposed on brokers acting for dominant clients to act in compliance with the UK Financial Services Authority (FSA) Code of Market Conduct and its Code of Business Rules. The obligation to lend applies for as long as the member’s holding of warrants and cash positions is not less than 50%. The *rationale* behind the "lending guidance" is that a member should not be able to exploit its long position in a metal to its financial advantage.

68. Since the rules are applied on a rolling day-to-day basis, it is not difficult for a member of the LME to build a substantial long position on a given day and to be deemed “dominant” and therefore subject to the lending guidance. In fact this happens regularly. For the period from 1 January 2012 to 25 May 2012, for instance, there were at least 346 “dominant positions” on the LME, of which […] were attributable to Glencore.[58] During the investigation, telephone calls with the LME and the FSA have also confirmed that "dominant positions" on the LME are a regular phenomenon and that other companies have acquired "dominant positions" more often than Glencore.

69. […][59]

V.3.3.3. Conclusion

70. On the basis of the above, the Commission concludes that the allegations in the press regarding the LME financial trading system do not raise competition concerns pertinent to the Commission's assessment of the Proposed Transaction.

V.3.4. LME warehousing rules

71. Glencore is also active in providing warehousing services within the LME. Following allegations in the press on alleged malfunctioning of the LME network of warehouses, the Commission has investigated these allegations to the extent that they are of relevance to the Proposed Transaction.

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false or misleading impression as to the supply and demand, or price or value, of any instrument which is traded on the LME, or otherwise distorts the market in that instrument, is prohibited by market abuse rules enforced by the UK Financial Services Authority, regardless of the place in the world where the behaviour is conducted.

57 The lending guidance applies automatically as soon as a member becomes “dominant” and requires the holder of the metal to lend (if asked) at no more than a premium of 0.5% of the cash price for the day. If the “dominant” player has 80% or more of the warrants and/or cash positions on any given date, the loan premium is no more than 0.25% of the cash price for a day; and if its holding is 90% or more, the member must be prepared to lend at the cash price, that is, at no premium.

58 Notifying Party’s Paper on LME Pricing dated 4 June 2012, p.13, Annex 6.9 of the Form CO.

59 […]

V.3.4.1. Position of the Notifying Party

72. The Notifying Party submits that post-transaction the Merged Entity will not be able to affect the LME price by virtue of Glencore's LME warehousing services,[60] because the Proposed Transaction will have no effect on Glencore's warehousing strategy.

V.3.4.2. Assessment of the Commission

73. The LME functions via a network of certified warehouses for the storage and delivery of metals traded on its platform. Glencore's subsidiary Pacorini Metals ("Pacorini") manages a number of warehousing facilities worldwide that are LME-certified to stockpile zinc and other LME traded metals. In contrast, Xstrata does not own or operate any LME-certified warehouses.

74. Currently, certain LME warehouses accumulate large quantities of metals while they only release relatively limited quantities even in periods of high demand. This can result in long "queues" in certain locations, where customers need to wait several weeks or months before they can retrieve the metal they purchased. This issue is for example relevant in New Orleans, where Glencore has recently shipped and stored significant amounts of zinc metal into LME warehouses operated by Pacorini. Most of the metal derived from its EEA activities. The presence of long "queues" at LME warehouses can have the effect of supporting premia in the physical market, as buyers cannot effectively turn to the LME as a source of last resort.

75. One important driver behind the accumulation of stocks in LME warehouses is of macroeconomic nature. In the course of the last five years, consistently low interest rates and access to cheap liquidity have reduced the costs, especially for banks, of financing holdings of LME metal. The LME has also confirmed that banks and other investors have increasingly entered the LME financial trading business in search of a relatively safe investment in the present economic environment.[61] Strategic considerations (whereby warehouse companies are able to pay high incentives to obtain metal due to the bottleneck effect created by the LME rules) may also be at play, as noted in the Notifying Party's internal documents.[62]

76. However, notwithstanding specific considerations applicable to zinc metal and analysed in the relevant section,[63] the allegations on the operation of the LME warehouses are not, as such, specific to the Proposed Transaction.

V.3.4.3. Conclusion

77. On the basis of the above, the Commission concludes that the allegations in the press regarding malfunctioning of the LME network of warehouses do not, as such,

60 Form CO §§ 268-275.

61 See minutes of conference call with the […] on 11 October 2012 (CMS 6942).

62 See [Internal document of the Notifying Party] dated 29 June 2010 and submitted in response to Question 99 of the Zinc Metal RFI of 31/05/2012 (CMS 943).

63 See paragraphs 201 and 202 below.

raise competition concerns pertinent to the Commission's assessment of the Proposed Transaction.

V.4. Zinc

V.4.1. Introduction

78. Zinc is mined as an ore, typically containing other metals such as copper, lead, silver and iron. Zinc ore usually contains 3-11% zinc and is rarely rich enough in zinc to be used directly in a zinc smelter. Therefore, the ore is processed into zinc concentrate at or near the mine by crushing, grinding, and a process called "flotation". The zinc concentrate is then transferred to a smelter/refinery for the production of zinc metal.

79. The conversion of zinc concentrate to zinc metal is accomplished through one of two methods: the electrolytic process ("EP") or the imperial smelting process ("ISP"). Both methods begin with the elimination of most of the sulphur in the zinc concentrate through a roasting process. Roasting involves heating the zinc concentrate to a high temperature to convert it to an impure zinc oxide called calcine.

80. The EP method converts calcine into zinc metal through a process of leaching, purification and electrolysis before the metal is melted and cast. The ISP method involves the sintering (crushing and mixing into a fine powder) of the zinc concentrate before it is fed into a furnace for smelting and then casting.

81. The Notifying Party considers that, for the purpose of the Proposed Transaction, zinc can be analysed in the following two main markets:

(a) zinc concentrate

(b) zinc metal

V.4.2. Zinc Concentrate

V.4.2.1. Relevant product market

82. In line with previous Commission decisions,[64] the Notifying Party submits that the market for zinc concentrate is not in the same product market as other metal concentrates and that each of zinc concentrate and zinc metal constitute separate product markets. The Notifying Party also submits that any further segmentation of a market for zinc concentrate is inappropriate. The Notifying Party's position was broadly confirmed by the market investigation.[65]

83. In a previous case,[66] the Commission also considered whether zinc concentrate and zinc secondary products are part of the same product market. However, the

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64 Case COMP/M.3284 Outokumpu/Boliden, decision of 8 December 2003, point 11; COMP/M.4256 Xstrata/Falconbridge, decision of 13 July 2006, point 16; Case COMP/M.4450 Umicore/Zinifex/Neptune, decision of 26 February 2007, point 14.

65 Q3 – Question 9; Q4 – Question 10.

66 Case COMP/M.4450 Umicore/Zinifex/Neptune, decision of 26 February 2007, point 16.

Commission ultimately left this question open. The Notifying Party's activities do not overlap in the production and supply of zinc secondary materials. Even on the basis of a more narrowly defined market comprising only zinc concentrate, the Proposed Transaction does not give rise to any competition concerns. Accordingly, for the purpose of the present decision, it is not necessary to establish whether zinc concentrate and secondary zinc products are part of the same product market. In the absence of overlaps for zinc secondary materials, the remainder of this decision will only address zinc concentrate.

V.4.2.2. Relevant geographic market

84. The Notifying Party submits that the market for zinc concentrate should be defined as worldwide in scope.

85. The Commission has previously concluded that the relevant market for the supply of zinc concentrate is worldwide in scope, given that its price is determined globally based on LME quoted prices, that zinc concentrate is transported from mines to smelting facilities across the globe and transport costs do not represent a significant proportion of the total cost of zinc concentrate.[67]

86. The market investigation broadly confirmed that the market can be considered global in scope.[68] Market participants confirmed that purchases and sales of zinc concentrate are generally organized at the worldwide level.[69] Customers also pointed to their flexibility to redirect purchases of zinc concentrate to suppliers located in other geographical regions in response to a potential price increase in the EEA.[70] Market participants also broadly confirmed that they would be able to switch purchases/sales to every region in the world.[71]

87. A minority of the market participants stated that the geographic market for zinc concentrate should be considered worldwide excluding Chinese production and intra-China sales.[72] On the one hand, none of the customers in the market investigation purchased zinc concentrate from China in the last two years.[73] The majority of the market participants also stated that zinc concentrate on offer in China does not compete with zinc concentrates on offer outside China.[74] On the other hand, most market participants maintained that sales of zinc concentrate into China influence the price and conditions of concentrate sales in other geographic areas[75] and that demand and supply conditions for zinc concentrate within China

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67 Case COMP/M.4256 Xstrata/Falconbridge, decision of 13 July 2006, point 19; Case COMP/M.4450 Umicore/Zinifex/Neptune, decision of 26 February 2007, point 17.

68 Q3 – Question 39; Q4 – Question 34.

69 Q3 – Question 23; Q4 – Question 20.

70 Q3 – Question 37.

71 Q3 – Question 38; Q4 – Question 33.

72 Q3 – Question 39; Q4 – Question 34.

73 Q3 – Question 30.

74 Q3 – Question 32.

75 Q3 – Question 33; Q4 – Question 28.

affect competitive conditions for the production and supply of zinc concentrate outside China.[76]

88. In any case, the geographic market definition can ultimately be left open as the Proposed Transaction does not give rise to competition concerns regardless as to whether the market for zinc concentrate is considered to be worldwide or worldwide excluding Chinese production and intra-China sales.

V.4.2.3. Assessment of effects on competition - Horizontal assessment

89. Glencore and Xstrata's activities overlap in the production and supply of zinc concentrate. The Merged Entity will become the world's most important producer and supplier of zinc concentrate.

90. Glencore and Xstrata's 2011 production market shares (in volume) exceed [10-20]% only on a potential worldwide market excluding Chinese production:[77]

	Worldwide			Worldwide excluding Chinese production		
	Glencore	**Xstrata**	**Combined**	**Glencore**	**Xstrata**	**Combined**
Zinc Concentrate production	[0-5]	[5-10]	**[10-20]**	[0-5]	[10-20]	**[10-20]**

91. The worldwide production of zinc concentrate is fragmented. Glencore and Xstrata's most important competitors at the production level include Vedanta Resources ([5-10]%, including Hindustan Zinc Sterlite Industries volumes), Teck ([0-5]%), China Minmetals Group ([0-5]%), Votorantim ([0-5]%), New Boliden ([0-5]%), Minera Volcan ([0-5]%), Sumitomo Corp ([0-5]%) and Chinese state owned enterprises (together [0-5]%).[78]

92. The Notifying Party estimates the combined market shares in the supply of zinc concentrate in 2011 as follows:[79]

	Worldwide			Worldwide excluding intra-Chinese sales		
	Glencore	**Xstrata**	**Combined**	**Glencore**	**Xstrata**	**Combined**
Zinc Concentrate supply[80]	[10-20]	[0-5]	**[10-20]**	[20-30]	[5-10]	**[20-30]**

76 Q3 – Question 34; Q4 – Question 29.

77 The market shares are based on Glencore and Xstrata company data and market size calculations of the research and consulting companies Brook Hunt and CRU.

78 Market shares as provided by the Notifying Party in the Form CO, §§ 353ff, based on market sizes as reported by Brook Hunt and CRU.

79 The market shares are based on Glencore and Xstrata' company data and the Notifying Party's market size estimates. The Notifying Party based its estimate of the size of the merchant market on the overall zinc concentrates production figures as reported by Brook Hunt and CRU and assumed that approximately […]% of total worldwide zinc concentrates production is sold on the merchant market while […]% of production is used internally.

80 Glencore and Xstrata's supply volumes include sales made to traders for on-sale following the Commission's methodology. If only sales to end customers are considered following the Notifying Party's' methodology, the supply share of the Merged Entity is reduced to [10-20]% at the worldwide level.

93. Glencore and Xstrata's most important competitors in zinc concentrate production as mentioned above, are also active at the supply level. Further supply competitors include commodity traders such as Trafigura, Transamine, Louis Dreyfus, MRI Trading and Ocean Partners. Trafigura and Teck have a supply share in the range of 5-10%. Others include MRI ([0-5]%), Boliden ([0-5]%), Goldcorp ([0-5]%) and Befesa ([0-5]%).[81]

94. Regarding supply shares in a potential market excluding intra-Chinese sales, the market shares of competitors Trafigura and Teck are in the range of [10-20]%. The market shares of other important competitors are as follows: MRI ([5-10]%), Boliden ([5-10]%), Goldcorp ([5-10]%) and Befesa ([5-10]%).[82]

95. Glencore has been […] over the past years, purchasing approximately […]% of Xstrata's total zinc concentrate production in 2011. In addition, the Parties entered into a service agreement in 2007 according to which Glencore advises Xstrata in relation to pricing and structural issues regarding its zinc concentrate business. Accordingly, the Notifying Party argues that the impact of the Proposed Transaction on the zinc concentrate market will be limited.[83]

96. Zinc smelters require specific zinc concentrate mixes to achieve an optimal level of zinc contained and impurities (i.e. lead, iron etc). Accordingly, they regularly purchase zinc concentrates from different mines in order to blend and achieve an optimal product mix for their smelting facilities and to reduce dependency on individual suppliers.[84] Furthermore, supply contracts are generally not exclusive.[85]

97. Overall, the majority of market participants surveyed in the market investigation – including the smelters based in the EEA – did not raise any substantiated competition concerns with respect to zinc concentrates.

98. Although some market participants stated that Glencore and/or Xstrata have a competitive advantage over their competitors due to their global reach, size and financial strength,[86] only a minority of market participants find that Glencore and/or Xstrata play a particular role in global zinc concentrate price setting, including in spot sales.[87] The market investigation also confirmed that market participants believe that the competitors are comparable to the Parties in their ability to supply similar quantities of zinc concentrate.[88] Accordingly, the vast majority market participants do not expect the Proposed Transaction to have an

81 Figures emerging from the market investigation, Q4 – Question 7.

82 Figures emerging from the market investigation. These figures include a room of error due to the fact that possible intra-Chinese sales by Chinese subsidiaries of the competitors are not excluded.

83 Form CO §§291 and 381.

84 Q3 – Questions 40 and 47; Q4 – Question 37.

85 Q3 – Question 42; Q4 – Question 35.

86 Q3 – Question 48 ; Q4 – Question 42.

87 Q3 – Questions 49 and 50; Q4 – Questions 43 and 44.

88 Q3 – Question 53.

impact on zinc concentrate prices[89] or on their business.[90] Customers also maintained that a sufficient number of zinc concentrate suppliers will remain after the Proposed Transaction.[91]

99. In light of the above, the Commission finds that a number of viable competitors will remain active in the market for zinc concentrates. The Commission also took into account that market participants use non-exclusive contracts and that customers adopt multi-sourcing strategies to achieve optimal product mix and accordingly reduce dependency on individual suppliers.

100. Consequently, and on the basis of the results of the market investigation, the Commission therefore concludes that the Proposed Transaction does not give rise to horizontal competition concerns on the market for zinc concentrate, regardless of its geographic scope.

V.4.2.4. Assessment of effects on competition – Vertical assessment

101. The Proposed Transaction also leads to vertically affected markets with respect to Glencore and Xstrata's activities in zinc concentrate and zinc metal. However, no substantiated foreclosure concerns were raised by market participants surveyed in the market investigation.

102. The Parties submit that they will continue to buy and sell zinc concentrate on the market because of their own need to blend zinc concentrate from different mines.[92] As mentioned in paragraph 98 above, market participants – including European zinc smelters – considered that a sufficient number of zinc concentrate suppliers will remain after the Proposed Transaction and that the merger will have no negative impact on zinc concentrate prices.[93] Accordingly, due to the Parties' incentives to keep supplying concentrate to zinc smelters to achieve optimal product mixes and on the basis of the results of the market investigation, the Commission finds that input or customer foreclosure concerns are not likely to arise.

103. Some of the competing traders surveyed in the market investigation raised concerns regarding access to zinc concentrate for their trading business. However, as explained by the Notifying Party in reply to the questions on Xstrata's commercial strategy, Xstrata […] and it […] zinc concentrate to other producers to enable them procuring different blends of zinc concentrate and thus guaranteeing an optimal mix of different concentrates for their smelters.[94] Accordingly, the Commission considers that there is a low probability that Xstrata would have sold material to traders other than Glencore in the future. Therefore, no input foreclosure concerns with respect to competing trader's access to zinc concentrates arise.

89 Q3 – Questions 64 – 66; Q4 – Questions 57 – 59.

90 Q3 – Question 70 ; Q4 – Question 62.

91 Q3 – Question 68.

92 Form CO §371.

93 Q3 – Questions 64 – 66 and 68 ; Q4 – Questions 57 – 59.

94 Notifying Party's reply to the Commission's 3rd Request for Information of 18 October 2012 (CMS 5871), question 5.

104. The Commission therefore concludes that the Proposed Transaction does not give rise to vertical competition concerns on the market for zinc concentrate, regardless of its geographic scope.

V.4.2.5. Conclusion

105. Therefore the Commission concludes that, with regard to the production and supply of zinc concentrate, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

V.4.3. Zinc metal

V.4.3.1. Relevant product market

V.4.3.1.1. Introduction

106. Zinc metal is used, among other things, for galvanising, die casting alloy, oxides and chemicals, and in the brass industry.

107. There are five commercially traded grades of zinc metal:

a. Special high grade ("SHG") zinc metal (99.995% pure), which is suitable for a wide range of end applications including galvanising, die casting and alloy production.

b. Continuous galvanising grade ("CGG") zinc metal, used for galvanising steel.

c. Die casting alloys ("DCA"), which are alloys of SHG zinc and other non-ferrous metals, such as aluminium and copper, used in the making of precision parts such as sprockets, gears and connector housings predominantly in the automotive and construction sector, but also in the manufacturing sector.

d. Good ordinary brand ("GOB") zinc metal (98.5% pure), suitable for production of alloys such as brass.

e. High grade ("HG") zinc metal (99.95% pure), suitable for a similar range of end applications to SHG zinc metal (save for the production of casting alloys, such as DCA).

108. Commodity grade zinc metal is characterised by the fact that it is a standardised product, i.e. a product which is suitable for numerous customers. It can therefore be traded. This contrasts with non-commodity grade zinc metal where an otherwise identical product is of a form which is of use only to a limited set of customers. According to the Notifying party, SHG and CGG can both be commodity and non-commodity grade zinc metal, DCA is always non-commodity grade zinc metal, and HG and GOB are both always commodity grade zinc metal.[95]

109. SHG, CGG and DCA are the most widely produced and heavily used grades of zinc metal throughout the world.

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95 Response to the Commission RFI dated 26 October and 6 November 2012.

V.4.3.1.2. Position of the Notifying Party

110. The Notifying Party considers that the market for zinc is a distinct product market from other metals due, in particular, to its different physical characteristics, its different usage and different price levels. It further claims that zinc concentrate and zinc metal constitute separate product markets.

111. The Notifying Party submits that the market should not be further segmented by grades of zinc metal because there is a high degree of supply-side substitutability. In particular, the Notifying Party claims that a producer of SHG can switch to producing DCA or CGG grades of zinc metal without incurring significant costs. No special technology or high capital investment are required to make the necessary adjustments/modifications to start producing. As regards HG metal, the Notifying Party submits that, although it has a slightly lower purity level than SHG zinc metal, it is to a large extent used in the same applications as SHG, with the sole exceptions of die casting alloys and rolled and extruded products. The Notifying Party considers that GOB is a by-product of the zinc concentrate smelting process that has minor merchant sales and that is subsequently further purified into SHG through the use of distillation columns. This is, according to the Notifying Party, a strong indication of GOB's substitutability with SHG.

112. On the demand-side, the Notifying Party argues that different grades of zinc metal have multiple uses (e.g. SHG can be used for galvanizing, die casting alloys, oxides and chemicals, brass semis & casting, and rolled & extruded products).

113. However, the Notifying Party considers that, in any case, the product market definition for GOB and HG can be left open since there are no overlaps between Glencore's and Xstrata's activities in these two grades of zinc metal.

V.4.3.1.3. Assessment of the Commission

114. In its previous decisional practice, the Commission has concluded that zinc is a distinct market, because of its special characteristics.[96] The Commission has treated zinc metal as a distinct market[97] and has stated that the market may be further segmented by grades. However, the Commission has ultimately left the exact market definition open.[98]

115. In their responses to the Commission's questionnaire, all the customers indicated that they would not be able to use all grades of zinc metal for their application.[99] As regards SHG, if the price of such grade were to increase by 5%, none of the customers responded that they would stop purchasing SHG and a small minority

96 Case IV/M.470 Gencor Shell, Decision of 29 August 1994; Case COMP/M.2062 Rio Tinto/North, Decision of 1 August 2000; Case COMP/M.2413 BHP/Billiton, Decision of 14 June 2001; Case COMP/M.4256 Xstrata/Falconbridge, Decision of 13 July 2006; Case COMP/M.4450 Umicore/Zinifix/Neptune, Decision of 26 February 2007.

97 Case COMP/M.2062 Rio Tinto/North, Decision of 01 August 2000; Case COMP/M.4450 Umicore/Zinifex/Neptune, Decision of 26 February 2004; Case COMP/M.4256 Xstrata/Falconbridge, Decision of 13 July 2006.

98 Case COMP/M.2348 Outokumpu/Norzink, Decision of 27 March 2001; Case COMP/M.4256, Xstrata/Falconbridge, Decision of 13 July 2006; Case COMP/M.4450 Umicore/Zinifex/Neptune, Decision of 26 February 2007.

99 Q1 and Q1 bis – Question 13.

said they would reduce their SHG purchases. However, in the past, none of the customers have actually switched to other zinc grades as a result of a 5% price increase of SHG.[100] As regards CGG, none of the customers said they would stop or reduce their CGG purchases as a result of a price increase. Only a very small minority indicated that they had actually switched to other zinc grades as a result of a 5% price increase of CGG in the past.[101] These responses suggest that demand-side substitutability between the different grades is low.

116. The replies of competitors to the questionnaire shows that a majority of zinc smelters can easily and relatively quickly switch between the production of different grades of zinc metal.[102] The majority of smelters can switch between SHG and CGG, and a few replied that they can also switch between SHG, CGG, zinc aluminium and GOB.[103] These responses indicate that supply-side substitutability between certain grades is relatively high (e.g. SHG and CGG). However, the market investigation was not conclusive with respect to supply-side substitutability between all grades.

117. In addition, there can be however contractual constraints on the ability of individual smelters to switch production and compete in different grades. This is particularly the case of the largest smelter in the EEA (Nyrstar, with production capacity of 705,000 MT), which under its exclusive long-term off-take with Glencore, […].[104]

118. The exact product market definition can nonetheless be left open since, even under the largest plausible market definition, i.e. in markets for all grades of zinc metal, the Proposed Transaction gives rise to serious risks of non-coordinated effects.

V.4.3.2. Relevant geographic market

V.4.3.2.1. Commission Precedents

119. In previous Commission decisions, the scope of the relevant geographic market for zinc metal was defined as either EEA-wide, or left open.

   a. In Case COMP/M.2348 - *Outokumpu/Norzink*, the Commission found that the market was EEA-wide due to the limited share of imports in EEA consumption (less than 15%), and the presence of non-negligible transport costs.

   b. In Case COMP/M.4256 - *Xstrata/Falconbridge*, the results of the market investigation were found to be in line with an EEA-wide definition of the market, due to the presence of transport costs, a 2.5% import tariff on zinc metal imports into the EU, and due to the fact that a number of customers purchased predominantly from EEA-based producers.

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100 Q1 and Q 1 bis – Questions 14 and 14.4.

101 Q1 and Q1 bis – Questions 15 and 15.4.

102 Q2 – Question 19.

103 Q2 – Question 19.1.

104 Response to the Request for Information dated 15 October 2012.

c. In Case COMP/M.4450 - *Umicore/Zinifex/Neptune JV*, the market investigation did not provide conclusive evidence in support of either a global or EEA-wide geographic definition of the market, and the Commission left the precise market definition open since the transaction did not give rise to concerns under the alternative definitions.

V.4.3.2.2. Position of the Notifying Party

120. The Notifying Party argues, contrary to the Commission precedents summarised above, that the scope of the geographic market for zinc metal is global. The Notifying Party puts forward a number of arguments in support of this geographic market definition, including the following :

a. The level of imports are significant, amounting to 15% of total EEA zinc metal consumption in 2011;

b. Long distance supplies from "swing countries" to different export regions (i.e. EEA, US, or Asia) are subject to similar transport costs, and similar import duties;

c. There are a number of countries that are exempt from the 2.5% import duty (including Namibia, Mexico, Algeria, South Korea, South Africa and Chile);

d. Imports into the EEA (in particular from swing countries) have reacted to changes in the relative level of zinc metal prices in the past;

e. Historically relative zinc metal prices across regions (i.e. EEA, US and Asia) have moved within a narrow band, normally within 2.5% - and only occasionally above 5% - of the sum of the LME price and the regional premia ("total zinc metal price");

f. Glencore's […] trading margins ([…]) indicate the presence of intense competition pre-merger, including competition from swing country producers.

121. The Notifying Party submitted a number of economic papers in support of some of these arguments as part of the Form CO.[105]

V.4.3.2.3. Results of the market investigation

122. Responses to the Commission's Phase I questionnaire from zinc metal customers in the EEA do not support the Notifying Party's contention on the existence of a global zinc metal market, and indicate at least a serious possibility that the market should be defined as EEA-wide.

123. A majority of these respondents did not import zinc metal in 2011 and 2012, and considered that total zinc metal prices and premia differed across regions. Moreover, a clear majority of customers purchased zinc metal at EEA or national level, from suppliers located close to their production facilities. A significant

105 Form CO, Annexes 6AB.3, 6AB.4, 6AB.6.

majority of respondents also consider that total transport costs (including import duties of 2.5% on the full zinc metal price where applicable) represent a significant portion of the total zinc metal price, and that they constitute a constraining factor for trade to and from the EEA. Most customers also indicated that shipment times and security of supply considerations negatively affect the ability of zinc metal importers to effectively compete with EEA suppliers. Additional factors mentioned by zinc metal customers as constraints on imports into the EEA include considerations on flexibility of supply, availability of product, quality standards, and the costs involved in adjusting the product to the specifications and quality required.[106]

124. Notwithstanding the answers summarised above, approximately half of the respondents considered the zinc metal market to be wider than the EEA. A similar proportion of respondents answered that they would reduce their purchases of zinc metal from EEA suppliers in the event of a small but permanent increase in price (in the order of 5% of either the total zinc metal price, and/or of the regional premium). However, the overwhelming majority of respondents stated that they actually had not responded to price increases of this magnitude by reducing their purchases from EEA suppliers in the past. Moreover, only a minority of customers considered that imports of zinc metal would be able to mitigate or eliminate a hypothetical 5-10% increase in the EEA total zinc metal price, or that competitors outside the EEA would be able to effectively constrain an attempt by the Merged Entity to increase price post-merger.

125. Overall, the Commission considers that the responses received from zinc metal customers do not provide sufficient support for the claim made by the Notifying Party that the market should be considered as global. On the contrary, these responses provide an indication (at least on a preliminary basis) that imports would not be able to constrain a small but significant and lasting price increase by a hypothetical monopolist in Europe, and therefore that the market should be defined as EEA-wide.

126. Responses received from competitors in the zinc metal market broadly confirm this preliminary conclusion on market definition. Half of the competitors consider that transport costs constitute a significant part of the final price of zinc metal and a majority see transport costs as a constraining factor for trade between the EEA and other geographic areas**.** Furthermore, a majority of competitors have not responded in the past to increases in EEA prices or premia by increasing their imports into the EEA, and none considers that imports would be able to mitigate or eliminate a hypothetical 5% increase in European prices. On the other hand, the majority of zinc metal competitors consider the zinc metal market to be global in scope.

127. In the Commission's assessment the evidence from the responses received from zinc metal competitors shows at least the serious possibility that the appropriate scope of the zinc metal market should be EEA-wide.

V.4.3.2.4. Evidence on imports, prices and margins

128. The available evidence on imports, prices and margins also does not confirm the Notifying Party's submission that the geographic scope of the zinc metal market is

106 Q1 – replies to questions 37 and 49.

global, and instead points to a serious possibility that the correct scope of the market is EEA-wide.

V.4.3.2.4.1. Evidence on imports and import duties

129. The volume of imports into the EEA has not been significant relative to the level of consumption over the recent past. On average during the period 2009-2011, imports have accounted for 15% of total EEA consumption. If one considers a longer period stretching back to 2003, the annual share of consumption accounted for by imports has averaged 14%, and only exceeded 20% in 2007.[107]

130. Moreover, Glencore itself accounts for a […] share of imports into the EEA (on average around [40-50]% of imports during the period 2006-2011). In 2011, Glencore imported […] MT of zinc metal into the EEA, accounting for […] of total imports ([…] from its zinc metal operations in […]).[108] The fact that Glencore accounts for a […] share of imports reinforces the conclusion that imports will not act as a significant competitive constraint post-merger.

131. The fact that some countries benefit from an exemption of import duty does not imply that aggregate imports into the EEA are not constrained by the presence of a 2.5% import duty. Countries that are exempted from the import duty have only accounted for 6% of total zinc metal consumption in the EEA in 2011, and for a similar average during the past three years.[109] The majority of imports into the EEA are, thus, still subject to the import duty.

132. This is a significant constraint on imports, in part because the import duty represents a significant share of the gross refining margin realised by zinc metal smelters (defined as the sum of treatment charges, the value of "free" zinc, premia and by-products[110]). Data submitted by the Notifying Party on the margins earned by their smelters in the EEA during 2011 shows that the gross refining margin realised by these smelters represents less than […]% of the overall zinc metal income (including revenues from zinc metal premia).[111] This reflects the fact that the raw material costs associated with purchases of zinc concentrates represent a

107 Import volumes are based on Eurostat data provided by the Notifying Party (computing aggregate imports into the EEA as the difference between total imports into EU-27 and imports into EU-27 from Norway - Response to the Request for Information dated 3 October 2012). Consumption data are provided by the Notifying Party on the basis of Brook Hunt reports (Form CO, Annex 6AB.6 and underlying data files).

108 Response to the Request for Information dated 3 October 2012.

109 This computation is based on the top 10 importing countries, which accounted for 98% of imports into the EEA during the 2009-2011 period. Response to the Request for Information dated 3 October 2012.

110 See paragraphs 50 and 51 above; see also Nyrstar Prospectus, October 12 2007, pages 68 and 147: This document also explains that "*Zinc smelters are essentially processing businesses that achieve a margin on the concentrates and other feedstock they process while in large part the price for the underlying material is effectively passed though from the miner supplying the concentrate or the other feedstock supplier to the smelter's customer*" (p. 68). The Notifying Party also identifies free metal, treatment charges, the sale of by-products and premia as the "typical revenues" of a smelter (Form CO, Annex 6AB.13).

111 Form CO, Annex 6.4 and Annex 6AB.10.

significant share of total income.[112] This evidence indicates that the 2.5% import duty tariff on the full zinc metal price represents a significantly higher share of the gross refining margins of zinc metal producers (likely to be in the order of 5% or more).

133. The importance of the 2.5% import duty on competitive conditions in the EEA is also reflected in the December 2008 long-term off-take agreement between the Notifying Party and Nyrstar.[113] The contract includes a provision ([…]) that is explicitly designed to […].

134. Moreover, the Commission considers that the close correlation that can be observed between European premia and the LME price also constitutes preliminary evidence that the import duty (which is computed on a full price basis, and therefore fluctuates with the level of the LME price) is an important determinant of the level of premia.

V.4.3.2.4.2. Evidence on regional premia

135. Evidence on the divergences of regional premia in the recent past also supports a definition of the relevant geographic market that is EEA-wide in scope. Regional premia provided by the Notifying Party on the basis of data collected by CRU shows that US, EEA and Asian premia have diverged significantly.[114]

136. During the 2002-2011 period, monthly divergences between EEA and US premia were on average in excess of 40% of the monthly EEA premium, and ranged between roughly -60% and 100%. During this period, there were prolonged episodes of significant divergences between premia (for example, the monthly EEA-US premia differential was above 40% of the monthly EEA premium continuously during the period between early 2007 and early 2011).[115]

137. Large discrepancies in regional premia can also be observed between the EEA and Asia, even though adjusting for differences in delivery terms is less straightforward in this case.[116] Comparing the unadjusted CRU premia for the EEA and Asia, one observes average monthly differences of around 20% during the 2002-2011 period, also with prolonged periods with larger discrepancies (for example, above 35% between mid-2006 and late 2007).

138. The evidence on premia is relevant to geographic market definition because regional premia are the element of price which directly reflects differences in

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112 This finding is broadly confirmed by the historical market data reported in the Nyrstar Prospectus of 2007, on the basis of Brook Hunt information (page 68). It is also in line with Nyrstar's financial results for its worldwide smelting activities in 2011, which show that Nyrstar's gross refining margins are equal to 40% of its overall zinc metal income (Response to the RFI of October 15, Annex 7B.2).

113 Response to the Request for Information of October 15 2012, Annex 7A.2.

114 Form CO, Annex 6AB.4 and underlying data.

115 These figures adjust for the difference in delivery terms between the US and the EEA, according to the adjustments estimated by the Notifying Party. See "Consolidated Response to the Commission's Information Request Regarding Contango Data, Geographic Market Definition, Trade Flows and Incentives", and underlying data, submitted on October 10 2012.

116 Form CO, Annex 6AB.4.

competitive conditions across regions, and more generally differences in regional demand-supply balances. As such, the regional premium appears to represent the main element of price of zinc metal that is subject to commercial bilateral negotiations between buyers and sellers of zinc metal. The rest of the price agreed between zinc metal buyers and sellers is indexed to the global LME cash price during the period of delivery, and is therefore not subject to commercial negotiations. These pricing practices are in line with the fundamental economics of zinc metal smelting, and with the fact that smelting margins do not depend on the level of the LME price (see section VI.3.1).

139. […].[117] […][118]; […][119]; […][120]).

140. Responses received from zinc metal customers in the EEA also confirm that a clear majority would be concerned about a 5-10% increase in zinc metal premia as a result of the merger, and would not only be concerned about increases in the total zinc metal price.

V.4.3.2.4.3. Evidence on the total zinc metal price and on price responsiveness of imports

141. The Notifying Party has argued that the appropriate scope of the geographic market for zinc metal should be assessed on the basis of the full price for zinc metal (inclusive of the LME price), and not by only considering regional premia.

142. The Commission has also assessed the evidence on geographic market definition by looking at alternative approaches that do not consider premia as the relevant benchmark for the purposes of geographic market definition. These alternative approaches do not provide compelling evidence that the geographic market should be defined as global, and confirm a serious possibility that an appropriate definition of the market is EEA-wide.

143. In particular, the evidence on the evolution of the total zinc metal prices across regions does not clearly point to a worldwide geographic market. Whilst the total zinc metal prices have moved closely across regions in the recent past, this correlation has been largely driven by the impact of the common element in these prices (i.e. the LME price). If this common element is accounted for, the correlation across regional prices becomes substantially lower.[121]

144. Moreover, whilst the percentage differences in the full prices of zinc metal across regions are significantly lower than the percentage differences in premia, there are still persistent differences in prices that are not arbitraged away by trading between regions. For example, the full price for zinc metal in the EEA remained consistently above the US price (controlling for differences in delivery terms) by 3.5% or more during the period between early 2007 and late 2009 (an almost 3-

117 Form CO, Annex 6AB.13, Annex 6AB.15 and Annex 6AB.16.

118 Response to the Request for Information of October 15 2012, Annex 7A.2.

119 Response to the Request for Information of October 15 2012, Annex 5.1.

120 Form CO, Annex 6AB.13.

121 "Consolidated Response to the Commission's Information Request Regarding Contango Data, Geographic Market Definition, Trade Flows and Incentives", submitted on October 10 2012.

year period).[122] Whilst a price difference of this level is below the 5-10% price threshold typically used for market definition purposes (as part of the hypothetical small lasting change in relative prices test[123]), it nonetheless represents a significantly higher share of the gross refining margin of a zinc metal smelter (i.e. the total zinc metal price net of the cost of zinc concentrate, as defined above).[124] When evaluated as a share of the element of the vertical value chain accounted for by smelters, the presence of persistent price differences across regions is therefore indicative of a relatively weak constraint between smelters located in different regions of the world, and not supportive of a global market definition for zinc metal.

145. Furthermore, the observation that price differences across regions have historically been below the 5% threshold typically considered for market definition purposes is not sufficient to infer that the scope of the geographic market is wider than EEA. A relevant factor that also needs to be considered is the actual responsiveness of absolute aggregate import and export flows to relative price changes across regions, since this indicates the competitive constraint that foreign producers impose on a hypothetical monopolist of zinc metal in any given region. In particular, if one is considering a hypothetical monopolist of zinc metal in the EEA, a key determinant of the market definition assessment is the responsiveness of total zinc metal imports into the EEA to price differences between the EEA and other regions.

146. The Notifying Party has provided two examples that seek to illustrate the response of the absolute level of imports into the EEA to relative price differences (measured in terms of differences in the full zinc metal price).[125] One of the examples illustrates the fact that a 3.1% increase in EEA-US price differentials between 2006 and 2007 was associated with an increase in imports into the EEA of approximately 106k MT from "swing" countries (equivalent to approximately 5% of current EEA zinc metal consumption). The second example shows that a 4.1% increase in EEA-Asian price differentials between 2005 and 2006 was associated with an increase in imports into the EEA of 36k MT (equivalent to less than 2% of current EEA zinc metal consumption).

147. The Commission considers that the responsiveness of imports to relative price changes suggested by these two examples (coupled with the evidence of low price elasticity of demand for zinc metal also submitted by the Notifying Party[126]) is not of sufficient magnitude to render unprofitable a hypothetical 5-10% price increase by suppliers of zinc metal in the EEA. In particular, the combined effect of the reduction in demand and loss of volumes to non-EEA suppliers that is likely to be

122 Form CO, Annex 6.30 and Annex 6AB.4 (including underlying data).

123 See paragraphs 15-19 of the Commission Notice on the definition of relevant market for the purposes of Community competition law.

124 Evaluating the economic significance of differences in prices with respect to the component of the vertical value chain (or value added) accounted for by smelters is in line with Commission precedents (e.g. COMP/M.4000 Inco/Falconbridge, Commission decision of 4 July 2006, point 379, and COMP/M.6166 Deutsche Borse/NYSE, Commission decision of 1 February 2012, points 501-502 and 1339).

125 Form CO, Annex 6AB.4.

126 Form CO, Annex 6AB.3

induced by such an increase in price does not appear to be sufficiently large to offset the increase in profits brought about by the assumed increase in prices. Therefore, in the Commission's assessment, these two examples provided by the Notifying Party on the reaction of imports to price changes do not provide sufficient evidence in favour of a global geographic market definition for zinc metal.

148. In order to further verify this preliminary conclusion, the Commission has carried out internally a more systematic assessment of the statistical relationship between total imports into the EEA and the absolute price differences between the US and the EEA (accounting for differences in delivery terms), during the 2002-2011 period (on a monthly basis). The purpose of this analysis was to further examine the responsiveness of total aggregate imports into the EEA to relative price changes (controlling for other factors such as changes in consumption). Whilst this preliminary analysis suggests that there is a statistically significant relationship between the level of imports and EEA-US price differentials, the analysis confirms the conclusion discussed above that imports do not appear to be sufficiently responsive to price changes so as to make a 5-10% price increase by EEA suppliers unprofitable. The analysis therefore indicates that the historical responsiveness of EEA imports to relative price changes does not appear to be of a sufficient magnitude to support a wider than EEA definition of the market.

V.4.3.2.4.4. Evidence on margins

149. The Commission also considers that the Notifying Party's arguments that its […] trading margins indicate the presence of intense competition for zinc metal (and are therefore indicative of a global market) cannot be accepted. In order to assess market power and competitive conditions in a zinc metal market that includes both smelters and traders, it is necessary to consider the aggregate gross margin earned by smelting and trading activities together. Margin data submitted by the Notifying Party indicates that their EEA smelting variable margin (defined as total smelter revenues minus variable costs) […].[127] The level of these margins (particularly bearing in mind the fact that they are expressed as a fraction of total smelter revenues, evaluated at the total zinc metal price) is not consistent with a global market definition for zinc metal, and with intense competition from smelters located outside the EEA.

V.4.3.2.5. Conclusion on relevant geographic market

150. Based on the evidence summarised above, including responses from market participants and an analysis of the evolution of zinc metal prices and import flows, the Commission considers that there is at least a serious possibility that the market is EEA-wide.

127 Form CO, Annex 6AB.10. The reason for the […] margins earned by Glencore relative to Xstrata appears to be due to […] ("Consolidated Response to the Commission's Information Request Regarding Contango Data, Geographic Market Definition, Trade Flows and Incentives", submitted on October 10 2012).

V.4.3.3. Assessment of effects on competition

151. The Notifying Party claims that, despite the merger resulting in high combined market shares, the Proposed Transaction will not give rise to any significant competition concerns, primarily because the market is worldwide in scope and because, due to Glencore's and Xstrata's complementary strategies and vertical integration, they currently do not exert any significant competitive constraint on each other.

V.4.3.3.1. Market Shares and Concentration Levels

152. Glencore and Xstrata's activities overlap both in the production and the supply of zinc metal. In this regard, the Proposed Transaction leads to a number of affected markets and, in particular, to high market shares in the supply of zinc metal in the EEA. The market power of the Merged Entity is even greater if the total quantities of zinc metal it would control are taken into account.

V.4.3.3.1.1. Production of Zinc Metal

153. Glencore produces zinc metal mainly through three subsidiaries: (i) the Portovesme smelter in Italy, with an annual production capacity of 120,000 MT […], (ii) the Kazzinc facility in Kazakhstan, with an annual production capacity of 300,000 MT, and (iii) the AR Zinc Group, with an annual production capacity of 44,000 MT. In addition, Glencore has […] tolling arrangements under which it obtained […] of zinc metal in 2011. Overall, the production capacity of Glencore's controlled zinc metal plants at 31 December 2011 was approximately […] MT. With 2011 production volumes of […] MT, Glencore produces […].[128]

154. Xstrata produces zinc metal mainly through two subsidiaries: (i) the Nordenham smelter in Germany, with an annual production capacity of 150,000 MT, and (ii) the San Juan de Nieva smelter in Spain, with an annual production capacity of 490,000 MT. Overall, the production capacity of Xstrata is of 640,000 MT of zinc metal, and production volumes in 2011 amounted to […] MT.[129]

155. The Notifying Party estimates Glencore's and Xstrata's combined market shares as follows:[130]

Production of Zinc Metal in 2011 – Worldwide						
Parties	**All Grades of Zinc**		**SHG**		**CGG**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[0-5]	[…]	[0-5]	[…]	[0-5]
Xstrata	[…]	[5-10]	[…]	[5-10]	[…]	[0-5]
Combined	**[…]**	**[5-10]**	**[…]**	**[5-10**	**[…]**	**[5-10]**

128 Form CO §§ 676 to 681.

129 Form CO §§ 695 to 698.

130 The Parties activities do no overlap in the production of HG zinc metal, GOB zinc metal, and in DCA zinc metal.

Production of Zinc Metal in 2011 – Worldwide Excluding China						
Parties	**All Grades of Zinc**		**SHG**		**CGG**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[5-10]	[…]	[0-5]	[…]	[0-5]
Xstrata	[…]	[5-10]	[…]	[5-10]	[…]	[5-10]
Combined	**[…]**	**[10-20]**	**[…]**	**[10-20]**	**[…]**	**[5-10]**

Production of Zinc Metal in 2011 – EEA						
Parties	**All Grades of Zinc**		**SHG**		**CGG**	
	Volume (in K MT)	Shares	Volume (in K MT)	Shares	Volume (in K MT)	Shares
Glencore	[…]	[5-10]	[…]	[5-10]	[…]	[0-5]
Xstrata	[…]	[20-30]	[…]	[30-40]	[…]	[20-30]
Combined	**[…]**	**[30-40]**	**[…]**	**[40-50]**	**[…]**	**[20-30**

156. On the basis of the Notifying Party's estimates, the Proposed Transaction would lead to three affected markets: a market for the production of all grades of zinc metal in the EEA, a market for the production of SHG in the EEA and a market for the production of CGG in the EEA. For CGG, the merger does not lead to competitive overlaps as Glencore did not produce CGG in its EEA plants in 2011.

157. As regards the market for the production of all grades of zinc metal in the EEA, the Merged Entity would become the largest player, with some important competitors remaining, namely Nyrstar ([30-40]%), and Boliden ([20-30]%),[131] as well as some smaller ones such as ZGH Boleslaw ([5-10]%), KCM AD ([0-5]%) and LZC AD ([0-5]%).[132] The Notifying Party has not provided the competitors' market shares for the production of SHG and of CGG in the EEA.

158. The Proposed Transaction would lead to an increase in concentration in the EEA production market (as measured by the HHI) of [300-400] points. Adjusting the concentration measure to take into account the minority stake that Glencore owns in Xstrata would reduce the increase in concentration due to the merger to between

131 However, approximately […] the production of Nyrstar in the EEA is sold to Glencore under an exclusive off-take agreement (see below).

132 Form CO, Annex 6AB.7.

approximately [100-200] and [200-300] points (depending on whether the stake is considered as silent, or as conferring some partial control).[133]

159. Given that, as mentioned above in paragraph 41, traders and producers are part of the same product market, and that the zinc metal sector is characterized by a number of off-take agreements, the assessment of the Proposed Transaction should be based on Glencore's and Xstrata's market shares on the market for the supply of zinc metal.

V.4.3.3.1.2. Supply of Zinc Metal

160. In 2011, Glencore made sales of approximately […] MT of zinc metal worldwide, of which […] MT within the EEA. In addition to the volumes it produces, Glencore markets zinc metal from Xstrata and from third party suppliers.

161. Over the period 2007-2011, Xstrata supplied on average approximately […] MT in the EEA to Glencore.[134]

162. The other major supplier of zinc metal to Glencore is Nyrstar, with whom Glencore has an exclusive long-term off-take agreement.[135] This agreement was entered into in December 2008, initially for the […]-year period running between […] and […]. In June 2011 the agreement was subsequently extended until December 2018 (i.e. for a […]-period relative to the initial term). Under the terms of the agreement, the supply of commodity grade zinc products from Nyrstar to Glencore is exclusive. The exclusivity clause means that Nyrstar cannot market independently of Glencore commodity grade zinc metal produced at its smelters in the EEA, US and Australia. The agreement provides for […] premia to be paid by Glencore to Nyrstar, in addition to the LME price. These premia are […]. The agreement also applies to lead metal products.

163. During 2011, Glencore purchased from Nyrstar around […] MT of zinc metal globally under the off-take agreement, out of which […] MT were supplied in the EEA.[136] In 2011 Nyrstar produced a total of 707,000 MT of zinc metal at its European smelters, and, according to the parties' estimates, it sold about […] MT of specialty zinc metal independently of Glencore.[137]

164. In 2011, Glencore also imported […] MT of zinc metal in the EEA, out of a total of imports into the EEA amounting to 317,000 MT.[138]

133 Form CO, Annex 6AB.7

134 Form CO § 888. On 30 September 2011, Xstrata and Glencore signed a written agreement on the supply of […] MT zinc metal delivered between January and December 2011. In practice, such an arrangement continues to be in place in 2012.

135 Response to the Request for Information dated 15 October 2012, Annex 7A.1.

136 Form CO § 468. During 2010, Glencore purchased from Nyrstar […] MT of zinc metal in the EEA (Response to the Request of Information dated 15 October 2012 (Annex 14A.1)).

137 Response to the Request for Information dated 18 October 2012; Response to the Request of Information dated 15 October 2012 (Annex 7B.2).

138 Form CO, paragraph 969 and Response to the RFI of October 18 2012.

165. The differences between Glencore's overall sources of zinc metal in the EEA and its sales is either exported outside the EEA, or stored (as is further discussed below).

166. Xstrata markets most of its production of zinc metal in EU countries and Canada. In 2011, it sold […] MT of zinc metal worldwide, of which […] MT in the EEA.

167. The Notifying Party estimates Glencore's and Xstrata's combined market shares as follows:[139]

Supply of Zinc Metal in 2011 – Worldwide						
Parties	**All Grades of Zinc**		**SHG**		**CGG**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[10-20]	[…]	[10-20]	[…]	[5-10]
Xstrata	[…]	[0-5]	[…]	[0-5]	[…]	[0-5]
Combined	**[…]**	**[10-20]**	**[…]**	**[10-20]**	**[…]**	**[10-20]**

Supply of Zinc Metal in 2011 – Worldwide Excluding China						
Parties	**All Grades of Zinc**		**SHG**		**CGG**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[20-30]	[…]	N/A[140]	[…]	N/A[141]
Xstrata	[…]	[5-10]	[…]	N/A	[…]	N/A
Combined	**[…]**	**[20-30]**	**[…]**	**N/A**	**[…]**	**N/A**

Supply of Zinc Metal in 2011 – EEA						
Parties	**All Grades of Zinc**		**SHG**		**CGG**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[20-30]	[…]	[20-30]	[…]	[20-30]
Xstrata	[…]	[10-20]	[…]	[20-30]	[…]	[10-20]
Combined	**[…]**	**[40-50]**	**[…]**	**[50-60]**	**[…]**	**[30-40]**

139 The Parties activities do no overlap in the supply of HG zinc metal, GOB zinc metal, and in DCA zinc metal.

140 The Parties are unable to estimate the total market size.

141 The Parties are unable to estimate the total market size.

168. In light of the above, the Proposed Transaction would lead to affected markets for the supply of all grades of zinc metal and of SHG regardless of the geographic scope of the market. The market for the supply of CGG in the EEA would also be affected.

169. In particular, the combined market shares of Glencore and Xstrata would be above 40% on the market for the supply of all grades of zinc metal and of SHG in the EEA, with increments over [10-20]%. Glencore and Xstrata would have a higher share in commodity-grade zinc, given the focus of Glencore in this market segment, and the fact that Nyrstar, one of the main competitors in the EEA, is contractually excluded from this market segment as a result of its long-term off-take agreement with Glencore.[142] On the basis of the Notifying Party's estimate of Nyrstar's sales of non-commodity grade zinc other than DCA, the size of the commodity grade zinc metal supply segment would be of at most […] MT, of which Glencore and Xstrata would account for […] MT post-merger, resulting in a market share in excess of 50%.[143]

170. The share of EEA supply of the merged entity drops to [40-50]% under the Notifying Party's market share methodology, where sales to traders are excluded from the market share computation, and only sales to end-customers are included.[144] This is largely due to the fact that of Glencore's […] MT of EEA sales, […] MT are made to follow-on traders. A further […] MT are sold by Xstrata to […], for follow-on trading.

171. Even under the Notifying Party's market share methodology, the position of the combined entity in the EEA supply market remains significant, and its share of total available volumes in the EEA (as defined below) is unaffected. Moreover, a significant share of the Parties´ combined sales to traders (roughly […] MT) are made to […], for follow-on trading purposes. The information provided by the Notifying Party indicates that […] uses […] zinc metal purchases for […], and therefore does not appear to have as its main focus its activities as […]. […] also appears to act as […] given its strong relationships with […].[145] As such, its trading activities appear to be largely complementary with those of the Parties, rather than in competition with them.

172. The rest of Glencore's contracts with other traders are […], as stated by the Notifying Party in the Form CO[146], and confirmed by the contractual terms for Glencore's top 10 trading customers in the EEA[147]. The zinc metal contracts with these trading partners appear to be […] in terms of […]. Moreover, the contracts between Glencore and these traders […]. It therefore appears that the traders supplied by Glencore within the EEA do not represent effective competitors to Glencore in the EEA supply market. As such, it is appropriate to attribute the

142 Commodity-grade zinc metal includes commodity SHG, commodity CGG, HG and GOB (Response to the RFI of 26 October and 6 November 2012).

143 Response to the RFI of 18 October 2012.

144 Form CO § 816.

145 Form CO §§ 783, 794, 813, 820 and 908.

146 Form CO § 821.

147 Form CO, Annex 6.AB16.

relevant volumes to Glencore’s share of the EEA supply market, as under the Commission’s preferred market share methodology.

173. The Notifying Party submits that the Merged Entity would be constrained by a number of competitors both at a worldwide and at an EEA-wide level. At an EEA-level, for the supply of all grades of zinc metal, there would only be a limited number of competitors, each having market shares […] as the market share of the Merged Entity: Nyrstar ([10-20]%), Boliden ([20-30]%), ZGH Boleslaw ([5-10]%), KCM AD ([0-5]%) and LZC AD ([0-5]%).[148] At a worldwide level, there would be significant competitors, such as Trafigura, Votorantim, Euromin and Marubeni Corporation.

174. In addition, contrary to the Notifying Party's allegations, Glencore's and Xstrata's activities on the market for the supply of zinc cannot be considered complementary from a geographic point of view,[149] since as a result of the off-take agreement with Nyrstar, they compete in Northern Europe (especially Germany, Austria, Netherlands and France).[150]

175. Based on the figures provided above, the Proposed Transaction would lead to a post-merger HHI above 2000 and an increase in concentration in the EEA supply market (HHI delta) of approximately [900-1000] points. Adjusting the concentration measure to take into account the minority stake that Glencore owns in Xstrata would reduce the increase in concentration due to the merger to between approximately [500-600] and [800-900] points (depending on whether the stake is considered as silent, or as conferring some partial control). Such increases in concentration are well above the HHI thresholds contained in the Horizontal Merger Guidelines, taking into account the concentrated nature of the market pre-merger.[151]

176. The Merged Entity's high market share on the supply market, regardless of whether the market is defined as comprising all grades of zinc metal or as being SHG only, is a strong indication of market power especially given the homogeneous nature of the product. [152]

V.4.3.3.1.3. Control over the Zinc Metal Quantities in Europe

177. The Merged Entity would control a higher share of total available volumes in the EEA than its share of supply to EEA customers reflects. In 2011, Glencore sourced a total […] MT of zinc metal in the EEA (excluding stocks removed from warehouses). Glencore's procurement sources were ([…]): the Nyrstar off-take

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148 Form CO, Annexes 6AB.7 and 6AB.22.

149 See in particular Form CO §§ 539 to 541.

150 See Glencore's paper entitled "The Proposed Remedy is an Efficient and Proportionate Solution for any Perceived Loss of Competition in Zinc Metal Resulting from the Glencore / Xstrata Transaction".

151 See paragraph 20 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

152 See paragraph 70 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

agreement ([…] MT); the Xstrata agreement ([…] MT); production from Portovesme ([…] MT); imports from Kazzinc ([…] MT); and other third-party sources from both within and outside the EEA ([…] MT).[153]

178. Of these total volumes, […] MT were sold to customers in the EEA, […] MT were exported (including […] MT to the LME), and […] MT were put in private warehouses (on a net inflows basis).[154]

179. The volumes that Glencore did not sell to customers in the EEA accounted for a substantial share of the total EEA volumes that were […].[155] This indicates that Glencore effectively acted as the "swing" supplier in the EEA market, […].[156]

180. Glencore's position as the swing supplier in the EEA is reinforced by its worldwide warehousing activities. During the past three years, Glencore has supplied […] MT of zinc metal to the LME on a net basis ([50-60]% of which was sourced from the EEA).[157] Over the same period, net stocks at the LME have grown by 567,000 MT (to a level of 820,000 MT at the end of 2011)[158], implying that on a net basis Glencore has accounted for […] of the increase in LME stocks.

181. Combined with Xstrata's supply volumes of […] MT, the Parties would account for a total of […] MT post-merger. This amounts to [50-60]% of total quantities available to the EEA market, given as the sum of EEA production volumes and imports. The Parties would have a similar share of total effective capacity in the EEA, defined as the sum of its own smelting capacity and the long-term exclusive off-take agreement that Glencore has with Nyrstar for commodity-grade zinc metal.

V.4.3.3.2. Market Investigation

182. The results of the market investigation confirm that the Merged Entity will have significant market power on the market for the supply of zinc metal in the EEA and will face only few competitors.

183. As regards the zinc metal market in the EEA as a whole, several EEA customers reported that the current market conditions for the supply of zinc metal in the EEA are not sufficiently competitive.[159] Some of these customers explain that the market is already very concentrated.[160]

153 Form CO § 800.

154 Form CO § 800.

155 This share is given by the ratio Glencore's total exports from the EEA (including to the LME) and net storage additions (amounting […] MT in total), and the equivalent measure for the EEA as a whole. The latter is given by summing EEA production (2,160,000 MT) and imports (317,000 MT), and subtracting EEA consumption (2,154,000 MT).

156 The Notifying Party's arguments on why […].

157 Response to the RFI of October 3 2012.

158 Brook Hunt, Metals Market Service, Long Term Outlook, Zinc, March 2012 (Table 2).

159 Q1 – Question 84.

160 Q1 – Question 84.

184. In particular, Glencore is considered, both by competitors and by customers, as already having a very strong position in the EEA.

185. Competitors' responses to the Commission's questionnaire indicate that Glencore is the largest supplier of zinc metal [161] and a majority of customers and competitors consider that Glencore already holds a significant degree of market power in the EEA regarding zinc metal.[162] One competitor described Glencore as already being dominant.[163]

186. Glencore is considered by a large majority of the customers and almost half of its competitors as having a special competitive advantage in the market for zinc metal in the EEA.[164]

187. One of the reasons of Glencore's strong position appears to be its off-take agreement with Nyrstar: a number of competitors emphasize that this off-take agreement enables Glencore to control a very large proportion of zinc metal in Europe.[165] Approximately half of the customers and a little over half of the competitors consider that this off-take agreement has significantly altered the competitive conditions in the EEA.[166] One competitor also mentions that Glencore controls a high proportion of the tradable zinc metal in the EEA.[167]

188. Furthermore, Glencore and Xstrata are considered by a majority of respondents as necessary or inevitable suppliers[168] and several customers consider that they are dependent on either Glencore or Xstrata as a purchaser of zinc metal. [169]

189. Whilst approximately half of the customers considered that the existing ownership link between Glencore and Xstrata affects competitive conditions, a similar proportion considered that the Parties compete with each other (albeit to a limited extent).[170]

190. These elements suggest that the Proposed Transaction would lead to a significant increase in market power on markets that are already very concentrated. In this regard, it is worth noting that a number of customers have complained about the Proposed Transaction, claiming that is a step towards an almost monopolistic market that will enable the Merged Entity to raise prices or that it will be dominant.[171] The risk of a price increase post-merger is emphasized by a majority of customers: half of them consider that the LME price will increase, whereas a

161 Q2 – Question 89.

162 Q1 and Q1 bis – Question 85; Q2 – Question 89.

163 Q2 – Question 88.

164 Q1 and Q1 bis – Question 90; Q2 – Question 94.

165 Q2 – Question 93.1.

166 Q1 and Q1 – Question 89; Q2 – Question 93.1.

167 Q2 – Question 87.

168 Q1 and Q1 bis – Question 83; Q2 – Question 87.

169 Q1 and Q1 bis – Question 82.

170 Q1 and Q1 bis – Question 87.

171 Q1 – Questions 102, 105 and 113.

majority believes that the premia and the overall price will increase as a result of the Proposed Transaction.[172]

191. The Notifying Party has submitted an economic analysis of pricing incentives in the EEA zinc metal market, allegedly showing that the Parties to the concentration would face very limited incentives to increase prices post-merger.[173] This conclusion is based on an "Upwards Pricing Pressure" (UPP) framework, and it relies on the combined effect of three main assumptions: […] diversion ratios between the parties in the event of a price increase; […] pre-merger margins for zinc metal sales in the EEA; and the existence of the 33.65% minority stake of Glencore in Xstrata pre-merger (which reduces pre-merger competition).

192. The Commission has assessed on a preliminary basis this economic analysis, and considers that its predictions on pricing incentives cannot be accepted. In particular, the assumptions on diversion ratios and on margins appear to under-estimate the potential for price effects post-merger.

193. In relation to the diversion ratios, the analysis assumes that in the event of a price increase each of the Parties would lose sales to other zinc metal suppliers, both in the EEA and outside the EEA, in proportion to the cost of transporting metal to different locations in the EEA. This assumption results in […] diversion ratios between the Parties (in the range of […]%, depending on […]), but […] diversion to suppliers located outside the EEA (in range of […]%), including to countries that currently export very limited amounts of zinc metal to Europe.[174] The assumed diversion ratios therefore effectively assume a global geographic definition of the zinc metal market. For reasons discussed above, the Commission considers that there is a serious possibility that the correct scope of the geographic market definition for zinc metal is EEA-wide. As such, the diversion ratios used in the pricing analysis submitted by the Notifying Party may significantly underestimate the diversion between the Parties.

194. In relation to pre-merger margins, the pricing analysis assumes that the margins to be taken into consideration are not the variable margins of the Parties' smelters, but should instead be based on the opportunity cost of selling metal into the EEA as opposed to delivering it to an LME approved warehouse (in return for the LME price and the incentives paid by warehouses to attract metal into storage). As a result of this approach, the economic margin is computed as equal to the difference between the EEA premia and warehouse incentives. The pricing analysis estimates this economic margin to be of roughly […]% based on 2011 data, […] the variable margin of smelters (computed as the difference between prices and variable costs). As reviewed above, variable margins for the Parties' European smelters are in the range of […]%.

172 Q1 and Q1 bis – Questions 105, 106 and 107.

173 Form CO, Annex 6AB.3

174 Under this analysis, diversion to countries that are at present minor importers of zinc metal into the EEA and that are subject to import duty (these countries include Australia, Canada, China, India, Iran, Japan and the USA) is consistently higher than the diversion between the parties, despite the fact that the Parties' combined share of EEA supply is several-fold larger than volumes from these countries.

195. The assumption on margins made by the Notifying Party effectively implies that the Parties could withdraw zinc metal from the EEA (potentially even in large volumes[175]), and place it at the LME without affecting the price paid for stored material. The Commission considers this assumption not to be realistic. If the Parties were to withdraw large volumes of metal from the physical market and placed them at the LME, it is likely that the LME cash price would need to adjust downwards (thus resulting in greater contango) in order to induce third parties to hold the metal in storage[176]. This would reduce the attractiveness of selling metal to the LME, resulting in lower average and marginal revenues for the zinc metal producer. Therefore, the difference between the price of selling zinc metal in the EEA and of selling it at the LME is likely to underestimate the additional profit from selling more zinc metal in the EEA in the event of a positive demand shift (e.g. due to a price rise by another producer)[177]. This is particularly the case given the […] variable margins earned by the Parties on their smelting operations in the EEA.

196. Because of the issues discussed above, the Commission considers that the […] margins and diversion ratios assumed in the pricing analysis submitted by the Notifying Party means that the results of the analysis are unlikely to reflect the true changes in pricing incentives brought by the Notified Transaction.

197. The risk that the Merged Entity raises prices in the EEA is also highlighted by internal documents of the Notifying Party on […]. A draft [internal document of the Notifying Party] dated 25 January 2012 describes synergies associated with […]. Two specific sets of synergies are discussed in relation to the EEA. The first is based on the fact that […]. The second synergy relates to […].[178]

175 The pricing incentives analysis relies on potential shifts in EEA volumes to LME warehouses that are in excess of the increase in net stocks at approved LME warehouses during 2011 (Form CO, Annex 6.12), and also in excess of Glencore's EEA exports to the LME in 2011 (Form CO, Annex 6AB.5).

176 A price adjustment of this type is in line with standard economic principles, and would be required to keep the market in equilibrium, avoiding the presence of excess incentives for the production and storage of metal. The Commission considers that the fact the in the past few years, LME stocks have increased whilst contango has not widened does not undermine the existence of this price adjustment mechanism, since during this period demand for stored metal has increased, as financial investors have had access to cheap liquidity (resulting in greater financialisation of the market). The Commission has conducted interviews with market participants (including Trafigura, JP Morgan and the LME) which have confirmed the nature of this mechanism. This is also in line with […] (see [internal document of the Notifying Party], dated December 12 2011, […] - Response to the Request for Information dated August 3 2012, Annex 3), and with industry reports (see "Metal Market Service – Monthly Update, Zinc, September 2012", p.2, Wood Mackenzie).

177 In particular, a zinc metal producer would optimally equalize the marginal revenues from selling metal in the EEA and selling to LME warehouses, setting both equal to the variable cost of production (adjusted for the presence of capacity constraints if these are binding). The economic margin in each market would be given by the difference between prices and the (adjusted) variable cost of production.

178 "Project Everest. Internal Documents regarding the preparation of the [internal document of the Notifying Party]", […], submitted by the Notifying Party on 6 June 2012.

V.4.3.3.3. Additional factors

198. In addition to the Merged Entity's high market share in the market for the supply of zinc metal, both for all grades of zinc and for SHG, there are a number of factors indicating that there is a risk that the Proposed Transaction will result in non-coordinated effects.

V.4.3.3.3.1. Vertical Integration of the Merged Entity

199. The Merged Entity would be vertically integrated, holding strong positions throughout the value chain: mining, production of zinc concentrates and zinc metal, storage and marketing. This vertical integration is likely to reinforce the market power of the Merged Entity as follows.

200. First, as pointed out by some customers, the Merged Entity's significant position on the markets for the production and supply of zinc concentrates (see paragraphs 8217 to 10522 above) would have an impact on the markets for zinc metal. [179] Access to the zinc concentrates is likely to give the Merged Entity a competitive advantage over other European smelters who may have limited access to zinc concentrates or whose mines may be close to being depleted.[180]

201. Second, the Merged Entity would own a number of LME approved warehouses around the world, such as the Pacorini warehouse business in New Orleans which is currently owned by Glencore. The Merged Entity would also own a number of private warehouses in Europe. The market investigation pointed to these storage capacities as likely playing an important role in the marketing strategy of the Merged Entity. Already today, some customers and competitors claim that Glencore is using its warehouse in New Orleans to reduce the volume of zinc metal available in Europe.[181] Stored at metal held at Pacorini's […].[182] As of May 2012, Pacorini accounted for […]% of all zinc metal held at LME warehouses.[183] […]% of the gross supplies to Pacorini between February 2008 and May 2012 have been accounted for by Glencore. [184]

202. The Notifying Party's internal documents on the due diligence performed in connection with the acquisition of Pacorini in June 2010 notes […] associated with ownership of a warehousing business. The document notes that […]. As a result of this consideration, Glencore identified […], whereby it could […].[185] The ownership of warehouses may therefore give a competitive advantage to Glencore in procuring zinc metal in the EEA.

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179 See Q1 – Question 112.

180 See Q1 – Question 108.3.

181 Q1 – Question 99; Q2 – Question 103.

182 Form CO, Annex 6.15.

183 Form CO, Annex 6.10.

184 Form CO, Annex 6.10 and 6.13.

185 See [internal document of the Notifying Party] dated 29 June 2010 and submitted in response to Question 99 of the Zinc Metal RFI of 31/05/2012 (CMS 943).

203. Third, the location of the EEA smelters owned by Glencore and Xstrata appears to be complementary and would enable the Merged Entity to cover the EEA almost in its entirety.[186] This would constitute a significant advantage as customers seem to have a preference for sourcing zinc metal close to their production plants.

204. Fourth, the Merged Entity, being wholly integrated across the value chain, will have knowledge of all the different aspects of the zinc metal production and supply.

205. For all the above-mentioned reasons, the Merged Entity is likely to have an even higher market power than the market shares suggest.

V.4.3.3.3.2. Position as the pre-eminent trader in the "Addressable Market"

206. Another element that strengthens the Merged Entity's market power in the zinc metal market is its position as the pre-eminent trader at a worldwide level.

207. In Glencore's announcement on its intention to float on the London Stock Exchange and the Hong Kong Stock Exchange of 2011,[187] Glencore explains that its success has been built upon "*a unique combination of competitive strengths, notably: Scale and leading market shares in commodity marketing globally: Glencore has significant market share positions in the addressable markets for its products – i.e. the volumes generally accessible to a third-party marketer*."[188] In particular, Glencore explained that, in 2010, its share of the global "addressable market" for zinc metal was approximately 60%.[189] Glencore's share of the "addressable market" in the EEA is likely to also be significant, given the size of its off-take agreements with Xstrata and Nyrstar.

208. Even if, according to this document the "addressable market" for zinc metal is six times smaller than the total market for the production of zinc metal,[190] Glencore´s large share of this part of the market is significant from a competition perspective, as it allows it to control flexible volumes which can be important in determining market outcomes. It also indicates that Glencore is able to secure significant off-takes of zinc metal from producers, which can strengthen its market power in the supply market (as shown by the Nyrstar agreement).

209. The IPO document of May 2011 also identifies "barriers to entry" which protect Glencore´s position in the commodity marketing industry. These are described as follows: "*The advantages provided by scale, global reach, and a solid track record*

186 Form CO § 592.

187 "Glencore announces Intention to Float", 14 April 2011, available at http://www.glencore.com/documents/Glencore_ITF_14_April_2011.pdf (retrieved on 19 November 2012).

188 Ibid, page 2.

189 Ibid, page 22. Glencore's share of the addressable markets for all the other products concerned by the Proposed Transaction is equal or inferior to 50%. The size of addressable market is computed as total consumption minus vertically integrated volumes, direct sales from producers to customers, and production within the Chinese market.

190 The addressable market for zinc metal is 2,700,000 MT whereas the size of the total marketis 12,700,000 MT, ibid. p.2,.

are also believed to present significant barriers to sustainable competitive entry into the global physical commodity marketing industry, which requires, amongst other attributes, substantial access to credit markets and a global network which supports the assembly of logistics and risk management capabilities and strong producer relationships" .[191] The document also identifies the fact that "*Glencore has few major marketing competitors for zinc, copper and lead, with Noble Group and Trafigura Group trading smaller zinc, copper and lead quantities are part of their core business, neither of which are significant production assets*".[192]

210. The importance of high market share levels in driving competitive outcomes and profitability in commodities markets is […].[193]

211. In light of these documents, the Merged Entity would be, by far, the most important trader in zinc metal, with access to significant zinc metal production assets, and a significant capacity to influence the competitive conditions for the zinc that is accessible to and sold by third-party marketers.

V.4.3.3.3.3. Reaction of Competitors

212. Competitors of the Merged Entity are unlikely to be able to counterbalance any attempt by Glencore Xstrata to increase prices post-merger.

213. This view is shared by some customers who stated that neither European competitors nor non-European competitors would be able to effectively constrain any attempt by Glencore Xstrata to increase prices after the Proposed Transaction.[194] A few respondents have also indicated that European competitors tend to limit themselves to their natural local markets.[195]

214. A key reason for EEA competitors' inability to constrain the Merged Entity is that they are capacity-constrained. Out of a total of 1,517,000 MT of production capacity not directly owned by the Parties (which includes the entire Nyrstar capacity), competitors produced 1,412,000 MT of zinc metal in 2011, implying a level of spare capacity of only 7% for competitors as a whole.[196]

215. Moreover, as confirmed by a large majority of respondents, the market for the production and supply of zinc metal in the EEA has high barriers to entry,[197] in particular, import duties and customs regulations, the transport costs for imported metal and high investments for setting up a production plant.[198]

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191 Glencore IPO prospectus of 4 May 2011, page 55, see fn. 27.

192 Ibid, p.65.

193 [internal document of the Notifying Party] dated December 12 2011, […], Response to the Request for Information dated August 3 2012, Annex 3.

194 Q1 replies to questions 110 and 111. The majority of customers do not know whether competitors inside or outside the EEA would be able to effectively constrain any attempts to increase prices after the Proposed Transaction.

195 See Q1 – Questions 87.1 and 108.3.

196 Form CO §§ 815 and 992.

197 Q1 and Q1 bis – Question 93; Q2 – Question 97.

198 Q1 and Q1 bis – Question 93.

216. Finally, it should be noted that, as mentioned in paragraphs 199 to 205 above, the competitors will not benefit from the same level of integration as the Merged Entity. As one customer summarized: the smaller players in the EEA could not counteract a high price strategy given their production volumes and production capacities, higher production costs, limited access or almost depleted access to zinc concentrates, lack of warehouses and focus on natural local markets.[199]

V.4.3.3.3.4. Reaction of Customers

217. In the same way as competitors are unlikely to act as a countervailing power to the Merged Entity, it is unlikely that customers may be able to react to a price increase because of lacking buying power that is further exacerbated by limited switching possibilities to alternative suppliers.

218. This is corroborated by the results of the market investigation in which a large majority of customers, regardless of their sizes, indicated that they do not have buyer power to introduce their terms in the contracts or spot purchases with suppliers of zinc metal.[200]

219. In addition, almost all customers who have replied to the questionnaires pointed out that they do not switch often between different suppliers and that is confirmed by a majority of competitors.[201] One of the reasons appears to be that it is difficult to find alternative suppliers to the ones they already have.[202]

V.4.3.4. Conclusion: Serious Risk of Non-Coordinated Effects

220. In light of the above, it can be concluded that there is a serious risk that the Merged Entity would hold a significant degree of market power and that it would be in a position to restrict output in the EEA (e.g. potentially by exporting material to other continents and/or to the LME) whereas reaction from competitors (including imports) and customers would not be sufficient to eliminate the serious risk of a significant price increase for zinc metal.

221. It can therefore be concluded that the Proposed Transaction gives rise to a serious risk of non-coordinated effects on the markets for supply of zinc metal in the EEA by creating or strengthening a dominant position. Therefore, the Commission considers that there are serious doubts as to the compatibility of the Proposed Transaction with the internal market on the markets in question.

V.5. Copper

V.5.1. Introduction

222. Copper mines generally produce one of two types of copper ore: copper oxide or copper sulphide. Copper oxide is processed into copper metal at the mine by first

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199 Q1 – Question 108.3.

200 Q1 and Q1 bis – Question 92. A majority of competitors consider the exact opposite see Q2 – Question 96.

201 Q1 and Q1 bis – Question 62; Q2 – Question 63.

202 Q1 and Q1 bis – Question 62.

leaching the ore and applying a process known as Solvent Extraction and Electro Winning ("SX-EW"). The production process from copper oxide to refined copper via the SX-EW process is vertically integrated and does normally not give rise to traded intermediate products. Copper sulphide, on the other hand, is first transformed into an intermediate product, copper concentrate.[203] Around 42% of concentrate production is processed at integrated smelters. The majority of copper concentrate producers however sell the copper concentrate to independent smelters located close to the end-customer markets.

223. Copper concentrate is typically converted to copper cathode through a refining process, involving the three following stages: (i) production of copper matte, (ii) production of copper blister, (iii) production of copper anode. Copper concentrate is transported to a smelter where the concentrate is melted and the copper is separated as a metallic sulphide, called matte, from the gangue material that contains iron and other materials. In a converter, copper matte is oxidised to produce 98% pure copper blister. The molten copper blister is then further processed in an anode furnace to produce 99.4% copper, which is cast into moulds to form copper anodes. Other sources of copper e.g. copper scrap and spent copper anodes can be fed into this production process as well. Finally, through an electrolytic refining process in a so called "tank house", copper anodes are converted to copper cathodes or refined copper metal.

224. Copper metal produced from copper sulphide and copper oxide is virtually indistinguishable. The final refined copper metal from the electrolytic process can be produced in various grades (A-grade copper and Standard /off-grade copper) and for various end-uses (copper rods, rolled copper products and copper alloys).[204]

225. The Notifying Party considers that, for the purpose of the Proposed Transaction, copper can be analysed in the following three main markets:

(a) copper concentrate

(b) secondary copper products

(c) copper metal

V.5.2. Copper concentrate

V.5.2.1. Relevant product market

226. The Notifying Party proposes, in accordance with previous Commission decisions,[205] to define a market for copper concentrate that is not further

203 Form CO § 1261.

204 Form CO §§ 1267 and following and §§ 1308 and following.

205 Case COMP/M.2413 BHP / Billiton, decision of 14 June 2001, point 40; Case COMP/M.3767 BHP / WMC, decision of 26 April 2005, point 8; Case COMP/M.4505 Freeport-McMoRan Copper & Gold / Phelps Dodge Corporation, decision of 20 February 2007, point 10.

segmented. A large majority of copper concentrate competitors and customers agree with this product market definition.[206]

227. In line with its precedents and on the basis of the replies to the questionnaires, the Commission concludes that the relevant product market is the market for copper concentrate.

V.5.2.2. Relevant geographic market

228. The Notifying Party considers that, in accordance with previous Commission decisions,[207] the market for copper concentrate is worldwide in geographical scope and includes China.

229. In the market investigation, a large majority of copper concentrate competitors and customers confirmed that the market for copper concentrate is worldwide in scope, including China.[208] With regard to China, even if few customers have purchased copper concentrate from China (as China is a large net-importer of copper concentrate itself),[209] obstacles to doing so do not appear to exist.[210] Sales into China of copper concentrate influence the price and conditions of concentrate sales in other geographic areas.[211] Demand and supply conditions for copper concentrate within China affect competitive conditions for the production and supply of copper concentrate outside China.[212]

230. However, even if the market investigation points to the existence of a world-wide market including China, it can ultimately be left open whether the geographical scope of the market includes China or not as, regardless of the position taken, the transaction does not raise serious doubts as to its compatibility with the internal market on the market for copper concentrate.

V.5.2.3. Assessment of effects on competition

231. On a worldwide market for copper concentrate, the combined market shares of the Merged Entity remain below [10-20]%. The same applies to a market for copper concentrate excluding China:

Production shares 2011	WW	Excl. Ch
Glencore	[0-5]	[0-5]
Xstrata	[5-10]	[5-10]
Combined	**[5-10]**	**[5-10]**

Supply shares 2011	WW	Excl. Ch
Glencore	[5-10]	[5-10]
Xstrata	[0-5]	[5-10]
Combined	**[5-10]**	**[10-20]**

206 Q7 – Question 10; Q8 – Question 11.

207 Case COMP/M.2413 BHP / Billiton, decision of 14 June 2001, point 42; Case COMP/M.3767 BHP / WMC, decision of 26 April 2005, point 13.

208 Q7 – Question 28; Q8 – Question 27.

209 Q7 – Question 19; Q8 – Question 20.

210 Q7 – Questions 19 and 20.

211 Q7 – Question 22; Q8 – Question 21.

212 Q7 – Question 23; Q8 – Question 22.

232. As regards copper concentrate production, the Merged Entity will, according to the Notifying Party's own estimates, become the world's […] largest producer of copper concentrate. Codelco and Freeport-McMoran Copper & Gold will […] than the Merged Entity with respectively [10-20]% and [5-10]% of worldwide copper concentrate production. BHP Billiton ([5-10]%), Grupo Mexico ([0-5]%) and Anglo American ([0-5]%) are other large competitors on an otherwise fragmented market on the supply side.[213]

233. As regards copper concentrate supply, the Merged Entity will, by the Notifying Party's own estimates, become […] supplier of copper concentrate with a market share of [5-10]%. Trafigura ([5-10]%), Freeport-McMoran Copper & Gold ([5-10]%), BHP Billiton ([5-10]%), Antofagasta and Anglo American (both [0-5]%) are other sizeable suppliers.[214]

234. In the Commission's market investigation, customers and competitors stated not to expect the merger to have an impact on competitive conditions for copper concentrate, even if a minority of respondents pointed to a possible impact in the longer run.[215]

235. Following up on these concerns regarding impacts in the longer run, the Commission assessed in greater detail the pipeline of mining projects/copper concentrate production of the Merged Entity and its impact on the market position of the Merged Entity on a forward looking basis.

236. Even if the data has to be interpreted with some degree of caution, under all plausible scenarios the market share of the Merged Entity on a worldwide market for the production of copper concentrate will not surpass [10-20]% in any of the years up to 2020. This assessment remains valid regardless as to whether only currently operating mines are considered or whether also projects for mining and concentrate production that are still in their development phases are considered, regardless of the likelihood that these projects will eventually be realised.[216]

237. It is also important to note that, even if Glencore and Xstrata have significant development projects, the total volume of concentrate production from projects under development by competitors of the Merged Entity is significantly larger, independent of the likelihood that these projects will be realised. Consequently, it is unlikely that the Merged Entity would have the ability and incentive to reduce capacity by deciding not to develop certain projects, thereby increasing prices for copper concentrate, as such capacity reduction would likely be countered through the development of projects by its competitors.

213 Form CO § 1386.

214 Form CO § 1396. Market shares of competitors reflect Notifying Party's' methodology.

215 Q8 – Question 68; Q7 – Question 73.

216 Commission calculations based on Brook Hunt Copper long-term outlook March 2012 data (pages 39, 40, 41 and 42), complemented by data on Glencore and Xstrata's own development projects provided in response to RFI 6 and supplements. The development projects by Glencore and Xstrata as reported in Brook Hunt are broadly classified by the likelihood that the projects are realised by 'highly probable', 'probable' or' possible'. In its assessment, the Commission takes account of these qualifications.

238. The market investigation did not point to other competition concerns. Indeed, the majority of copper concentrate customers did not consider that Glencore and/or Xstrata have a competitive advantage over other suppliers of copper concentrate.[217] A large majority of customers considered that a sufficient number of copper concentrate suppliers would remain active after the merger,[218] including suppliers that are comparable to a combination of Glencore and Xstrata in terms of their ability to offer similar volumes of copper concentrate.[219] None of the customers and competitors claimed that the merger would have a direct impact on their company.[220]

239. None of the customers considered that Glencore and/or Xstrata play a role in the price setting of copper concentrate that is different from that of other suppliers of copper concentrate.[221] None of the customers expected the merger to have an impact on copper concentrate prices.[222] None of the competitors considered that the merger would have an impact on copper LME prices, refinement and treatment charges or total copper concentrate prices charged in the short or long run.[223]

V.5.2.4. Conclusion

240. Based on the Parties' limited market shares and the outcome of the market investigation, the Commission therefore concludes that, with regard to the production and sale of copper concentrate, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

V.5.3. Secondary copper products

V.5.3.1. Relevant product market

241. The Notifying Party submits that there is a distinct product market for secondary copper products. This market would consist of copper blister, spent copper anodes[224] and copper scrap, but would exclude custom cast anodes.

242. Copper anodes can either be consumed internally or sold to third parties. Custom cast copper anodes are those anodes that are sold to third parties i.e. cast for and sold to specific third parties. In support of their view that custom cast anodes are

217 Q7 – Question 42.

218 Q7 – Question 76

219 Q7 – Question 47.

220 Q7 – Question 76; Q8 – Question 70.

221 Q7 – Question 43.

222 Q7 – Question 72.

223 Q8 – Questions 65, 66 and 67.

224 The term spent anodes refers to the thin "skeleton" of the anode which remains after copper units have been transferred from custom-cast anodes to cathode starter sheets during the process of electrolysis. In theory, it is possible to run the current through the electrolytic solution until the "skeleton" disappears. However it is not cost-effective to do so, hence the spent anode is removed from the tank-house and is either sold to third parties or re-smelted on site.

not part of a market for secondary copper products, the Notifying Party submits that: [225]

a. In a previous case,[226] even if the Commission left open the question of whether copper blister and copper anode are in the same product market, it noted that there was no perfect demand-side substitutability between copper blister and custom cast anodes, with which the Notifying Party agrees;

b. Custom cast anodes are purchased to go direct into a refinery's tank-house. Consequently, custom cast anodes must be produced in accordance with the specifications (i.e. shape) of the particular refinery at which they will be processed. There are practically no refineries which use the same shape of anodes. Hence, anodes cannot be readily traded as they cannot be used by other refineries without recasting, which is not economically viable;

c. In contrast, copper blister, spent anodes and copper scrap have to be re-melted to form the necessary shape of anodes. They are thus not only placed at an earlier stage in the production process than custom cast anodes but their usage is also not confined to a particular smelter/refinery;

d. As they are made according to the specifications of the refinery/smelter concerned, custom cast anodes are typically sold under long term and bespoke bilaterally negotiated contracts between individual smelters/refineries;

e. In contrast, copper blister and spent anodes can be readily traded and negotiated between multiple market participants both yearly and on a spot basis;

f. A considerable premium is charged for custom anodes relative to copper blister, spent anodes and copper scrap.

243. The Commission's market investigation showed that most competitors and customers of intermediate copper products consider that (i) copper blister, (ii) copper scrap, (iii) spent copper anodes and (iv) custom cast anodes are substitutable from a demand side perspective, in that they are all intermediate products for the production of copper metal.[227] Various respondents, however, qualified their answers referring, for instance, to the fact that custom cast anodes can be used directly in the tank house, whereas copper blisters, spent anodes and copper scrap need prior treatment (depending on impurities) and should be cast into anodes before they can be used. Similarly, qualifications were made as regards the physical shape of anodes. Significant price differences were considered to exist between these intermediate products, with custom cast anodes generally being priced higher.[228]

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225 Form CO § 1303.

226 Case COMP/M.4505 Freeport-McMoRan / Phelps Dodge Corporation, decision of 20 February 2007, point 15; Form CO § 1296.

227 Q23 – Questions 12 and 14; Q24 – Questions 11 and 13.

228 Q23 – Question 13; Q24 – Question 12.

244. Consequently, the market investigation largely confirmed the Notifying Party's views that copper blister, copper scrap and spent copper anodes are part of the same product market. The market investigation also provides some support for the Notifying party's view that custom cast copper anodes are not part of this market.

245. However, the Commission cannot conclude with sufficient certainty that a market for the supply of secondary products as proposed by the Notifying Party would also comprise custom cast copper. Consequently, the Commission will also consider the alternative product market whereby custom cast anodes are part of the same market as copper blister, copper scrap and spent copper anodes. However, a final view on the product market definition can be left open on this point as the Proposed Transaction does not raise competition concerns on the market for secondary copper products regardless of the position taken.

V.5.3.2. Relevant geographic market

246. The Notifying Party considers that the market for secondary copper products is worldwide in geographical scope.[229]

247. The Commission has previously found that a product market comprising copper blister and custom cast anode market is worldwide in scope.[230] The Commission has also previously found that a distinct product market for copper scrap was worldwide in scope.[231]

248. Market investigation respondents in general do not consider that barriers exist to redirecting sales of secondary copper products from <u>any</u> other geographical regions into the EAA in response to a 5% price increase in the EEA.[232] Respondents also confirmed that they consider markets for secondary products to be worldwide, including China.[233]

249. In view of the above and in particular the fact that no barriers exist to redirect sales of secondary products to the EEA from any region in response to price rises, the Commission concludes that, regardless of the precise product market definition, the geographical scope of the market is worldwide.

229 Form CO § 1321.

230 Case COMP/M.4505 Freeport-McMoRan/Phelps Dodge, Commission decision of 20 February 2007, point 15.

231 Case COMP/M.4781 Norddeutsche Affinerie/ Cumerio, decision of 23 January 2008, points 21 and 27.

232 Q23 – Question 30, Q23 – Question 31

233 Q24 – Question 34; Q23 – Question 32.

V.5.3.3. Assessment of effects on competition

V.5.3.3.1. Market for secondary copper products (Notifying Party's proposal)

250. Glencore and Xstrata's market shares in the production and supply of secondary copper products are as follows:[234]

Production shares 2011	WW
Glencore	[0-5]
Xstrata	[0-5]
Combined	**[5-10]**

Supply shares 2011	WW
Glencore	[0-5]
Xstrata	[0-5]
Combined	**[0-5]**

251. With regard to a world-wide market for the production of secondary copper products, even if the Merged Entity according to the Notifying Party[235] is likely to become […] producer of secondary copper products ([5-10]%), its market share will remain modest whereas several […] producers exist, including Codelco ([5-10]%), Jiangxi Copper Company ([5-10]%) and Aurubis ([0-5]%) on an otherwise fragmented market on the supply side.

252. With regard to a world-wide market for the supply of secondary copper products, according to the Notifying Party[236] the Merged Entity will with a market share of [0-5]% become […] supplier […] China Non-Ferrous Metal Mining ([5-10]%) and Trafigura ([0-5]%). However, there are no overlaps in the supply of secondary copper products as Xstrata is not active in the supply of secondary copper products.

253. Moreover, within the EEA, no overlaps exist between Glencore and Xstrata with regard to secondary copper product production as well as secondary copper product supply since Xstrata does not produce or supply such products in the EEA.[237]

254. The majority of respondents to the market investigation reported that the Proposed Transaction would not have an impact on secondary product prices[238] and competitive conditions for secondary copper products.[239]

V.5.3.3.2. Market for secondary copper products (Notifying Party's proposal) plus custom cast copper anodes[240].

255. Glencore and Xstrata's market shares in the production and supply of secondary copper products and custom cast anodes are as follows:[241]

234 Figures reflecting Notifying Party's' methodology.

235 Form CO § 1411.

236 Form CO § 1418.

237 Form CO § 1455.

238 Q23 – Question 59; Q24 – Question 58.

239 Q23 – Question 60; Q24 – Question 59.

240 It is noteworthy that no overlaps exist between Glencore and Xstrata in the production and supply of custom cast anodes as Glencore has no activities in this regard, Form CO § 1467. Consequently, no competition concerns can exist with regard to custom cast anodes if assessed separately.

Production shares 2011	WW
Glencore	[0-5]
Xstrata	[5-10]
Combined	**[5-10]**

Supply shares 2011	WW
Glencore	[0-5]
Xstrata	[5-10]
Combined	**[5-10]**

256. On a worldwide market for secondary copper products that includes also custom cast anodes, the market share of the Merged Entity will remain modest, both when production ([5-10]%) and supply are considered ([5-10]%).

257. Moreover, within the EEA, no overlaps exist between Glenore and Xstrata with regard to secondary copper product production as well as secondary copper product supply also if this market is considered to include custom cast anodes. This is because Xstrata produces or supplies neither secondary copper products nor custom cast anodes in the EEA.

V.5.3.4. Conclusion

258. Therefore the Commission concludes that, with regard to the production and sale of secondary copper products, regardless as to whether such a product market includes custom cast copper anodes or not, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

V.5.4. Refined copper

V.5.4.1. Relevant product market

259. The Notifying Party proposes to define a worldwide market for refined copper that is not segmented further between either (i) grades, i.e. A-grade copper (copper content of at least 99.9935% and defined maximum levels of various impurities) and standard/off-grade copper (copper content of 99.99% but impurities over 0.0065% or a copper content below 99.99%) or (ii) the end-use for which it is produced (copper rod, rolled products and copper alloys).

260. The Notifying Party takes the view that a segmentation by grade is not appropriate in view of the fact that a high degree of demand side and supply side substitutability exists between A grade and standard/off-grade.[242]

261. According to the Notifying Party, copper metal is used as an input in various production processes: the production of copper rods (wire and cables), rolled copper products (e.g. tubes and sheets) and copper alloys (e.g. brass and bronze).[243] The degree of demand side substitutability of copper grades differs depending on the intended end-use. For rolled copper products and copper alloys, A-grade and standard/off-grade copper metal are to a significant extent deemed substitutable. Copper rod production however requires a high degree of A-grade copper as impurities affect the integrity of the process of drawing cables and wires from

241 Figures reflecting Notifying Party's methodology; the market shares are based on Form CO §§ 1409, 1415 and 1466 and calculations of the Commission.

242 Form CO §§ 1311 and 1312.

243 Form CO §1311 and § 1312.

copper rod. Moreover, the Notifying Party claims that a degree of substitutability exists between copper scrap and refined copper.

262. In recent decisions, however, the Commission left open whether the copper metal market needs to be segmented by grade.[244]

263. Whilst the market confirmed to some extent the view of the Notifying Party, it also demonstrated that this view needs to be qualified. Whereas for the production of rolled copper products[245] and copper alloys[246], standard/off-grade copper and, maybe to a certain degree, copper scrap[247], can be deemed substitutable with A-grade copper, this is not the case for the production of copper rods.[248] Significant price differences also exist between A-grade, standard/off-grade and copper scrap.[249] The production of wires from copper rods (which constitutes the vast majority of copper rod consumption) only allows to a very limited extent the use of standard/off-grade copper and copper scrap in the production process.

264. A chain of substitution may exist, implying that copper metal for the production of copper rods is nonetheless in the same product market as that of other grades and end-uses. However, this would require that, in response to a price rise of A-grade copper, a sufficiently large amount of A-grade copper is substituted in end-uses for which this grade is more easily substituted than for standard/off grade copper and, possibly, copper scrap, to constitute a competitive constraint on the price of A-grade copper. It is not clear however whether this competitive constraint exists to a sufficient degree.

265. Copper rods represent about half of European and worldwide copper consumption and, more importantly, an even significantly higher part of refined copper consumption.[250] This means that a price increase in A-grade copper should give rise to a very significant shift in demand for A-grade copper in the production of other end-uses in order for a chain of substitution to exist. Moreover, even if the degree of substitution between A-grade copper on the one hand and standard/off-grade and, possibly, copper scrap on the other hand is high in end-uses for rolled copper products and copper alloys, that degree of substitution also has limits. Indeed, few customer respondents actually purchase standard/off-grade copper.[251] A significant proportion of customers would have to make substantial investments

244 In Cases COMP/M.4505 Freeport-McMoRan/Phelps Dodge Corporation, Commission decision of 20 February 2007, COMP/M.4781 Norddeutsche Affinerie/ Cumerio, Commission decision of 23 January 2008, Case COMP/M.6316 Aurubis/Luvata Rolled Products, Commission decision of 8 August 2011, the Commission considered whether the product market for refined copper should be segmented by A grade and off-grade. It finally left the product market definition open in all these decisions.

245 Q5 – Question 15.2.

246 Q5 – Question 15.3.

247 Q5 – Question 15.5 and 15.6.

248 Q5 – Questions 15.1 and 15.4; Q6 – Question 18.

249 Q5 – Question 16; Q6 – Question 17.

250 In Western Europe, 48.6% of consumption of all copper and 64.2% of refined copper are made for wire rod. On a worldwide level, these figures are 67.3% and 72.4%; Brook Hunt LTO Cooper 1 Q2012 (CMS 721). The difference is primarily explained by the use of copper scrap.

251 Q5 – Question 11.

in order to switch between A-grade, standard/off-grade copper and copper scrap.[252] Moreover, most respondents would not be ready to make such investments in response to a change in relative prices of 5 to 10%.[253] This casts doubts as to whether demand side substitutability is sufficient for standard/off-grade copper and copper scrap to exercise a competitive constraint on A-grade copper.

266. Moreover, even if on a world-wide basis the production of standard/off-grade copper is not insignificant and, in principle, most producers generally appear able to produce both grades, the respondent copper producers report a strong preference for the production of A-grade copper. Generally, standard grade/off-grade copper is produced only in case of production disturbances, unintentionally and in small quantities and there appears to exist little willingness to switch production between these grades in response to market developments.[254] This points to a limited degree of supply-side substitutability from standard/off-grade copper to A-grade copper in response to a price rise in A-grade copper as current production capacity, at least among respondents to the market inquiry, is primarily used for the production of A-grade copper already.

267. In view of these apparent constraints on demand and supply side substitutability, it cannot be excluded that a separate market for the production of refined copper for copper rod exists in which primarily A-grade copper is supplied. However, it is not necessary to conclude whether such separate market exists or not as, regardless of the position taken, the Proposed Transaction will not give rise to competition concerns also in the markets of different grades of refined copper.

V.5.4.2. Relevant geographic market

268. A significant majority of customers and all producers considers that, regardless of grade, the market for refined copper is worldwide including China.[255] With regard to China, a significant majority of customers consider that no obstacles exist in purchasing refined copper from China.[256] A large majority of refined copper producers confirm that China exports refined copper[257] even if they do not consider that refined copper originating from China, as a result of high logistics costs, exerts significant competitive pressure on their sales in geographical areas outside China.[258] The demand and supply conditions within China are moreover considered by a large majority of refined copper customers and producers to affect the production and supply of refined copper outside China. This shows that China should be included in the geographical scope of the market.[259]

252 Q5 – Question 17.

253 Q5 – Question 18.

254 Q6 – Questions 14.1, 14.2, 14.3, 15 and 16.

255 Q5 – Questions 42 and 43.

256 Q5 – Question 30.

257 Q6 – Question 30.

258 Q6 – Question 31. Explanations related to the low volume of Chinese exports and the fact that these exports, as a result of high logistics costs, are not competitive.

259 Q6 – Questions 32 and 33; Q5 – Question 31.

269. The Commission thus finds strong indications that domestic Chinese volumes should be included in the relevant geographic market. However, the question can ultimately be left open in this case as the Proposed Transaction does not give rise to any competition concerns on the market for refined copper under the alternative geographic market definitions.

V.5.4.3. Assessment of effects on competition

V.5.4.3.1. Market for copper metal, all copper grades

270. On a market as proposed by the Notifying Party, i.e. a worldwide market for copper metal that is not further segmented by end-use or grade, the Merged Entity's combined market shares remains below [10-20]% regardless both in production and supply of copper metal:

Production shares 2011	WW	Excl. Ch
Glencore	[0-5]	[0-5]
Xstrata	[0-5]	[0-5]
Combined	**[5-10]**	**[5-10]**

Supply shares 2011	WW	Excl. Ch
Glencore	[5-10]	[5-10]
Xstrata	[0-5]	[0-5]
Combined	**[5-10]**	**[10-20]**

V.5.4.3.2. Market for the supply of A-Grade copper

271. The Proposed Transaction only gives rise to a horizontally affected market if a separate market for the supply of A-grade copper exists that is worldwide but excludes domestic Chinese volumes. In view of the fact that the market inquiry points to a world-wide market that includes China, this is unlikely to be the case.

272. Glencore and Xstrata's market shares in the production and supply of copper metal in such a market are as follows:

Production shares 2011	WW	Excl. Ch
Glencore	[0-5]	[0-5]
Xstrata	[0-5]	[5-10]
Combined	**[5-10]**	**[10-20]**

Supply shares 2011	WW	Excl. Ch
Glencore	[5-10]	[10-20]
Xstrata	[0-5]	[0-5]
Combined	**[10-20]**	**[10-20]**

273. Although the Merged Entity would become the […] supplier of A-grade copper on a world-wide excluding China, the Proposed Transaction is not likely to give rise to competition concerns because (i) the Merged Entity would hold a modest market share of [10-20]% at the supply level and (ii) the Merged Entity would continue to face competition from a significant number of competitors such as Codelco ([10-20]%), Aurubus ([5-10]%), Freeport-McMoRan Copper & Gold ([5-10]%), BHP Biliton ([0-5]%) and Nippon Mining and Metals ([0-5]%).[260]

274. Within the EEA, the Merged Entity's market share as well as the overlap are smaller (Glencore [5-10]% and Xstrata [0-5]%, combined entity [5-10]%).[261]

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260 Form CO table 6C.40 and Form CO §1487. Competitors' supply shares based on Commission's methodology.

261 Form CO table 7C.3 page 408.

275. Finally, market participants surveyed in the market investigation did not consider that the Proposed Transaction would either affect copper LME prices, copper premia or total copper prices (regardless of copper grade) or competitive conditions for refined copper in the short and longer term or have an effect on their own company.[262] Moreover nearly all customers of copper metal took the view that there would be a sufficient number of refined copper suppliers for their company after the merger.[263]

V.5.5. Conclusion

276. Therefore, in light of the Parties' limited market shares and the outcome of the market investigation, the Commission concludes that, with regard to the production and sale of copper metal, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

V.5.6. Assessment of vertical effects

V.5.6.1. Copper metal (upstream) and copper rods (downstream)

277. Glencore is active in the production and supply of copper rods. In contrast, Xstrata neither produces nor supplies copper rods.[264]

278. In a previous Commission Decision, a separate product market for copper rods was defined that was considered EEA-wide in geographical scope.[265]

279. As was explained above, copper rods are primarily produced from A-grade copper. Therefore, both the market for copper metal (regardless of copper grade) and the sub-market for A-grade copper need to be considered as upstream markets. In these upstream markets, the merged entity will have market shares of not higher than [10-20]% regardless of the market definitions adopted. The post-merger HHI would remain well below 2000.[266]

280. On a downstream EEA-wide market for copper rod production and supply, Glencore's market share is [10-20]% and [10-20]% respectively.[267] The merger does not give rise to any overlaps in this market as Xstrata does neither produce nor supply copper rods.[268]

281. Since the abovementioned market shares of the Merged Entity would be […] below [30-40]% and the post-merger HHI would be well below 2 000, the Commission concludes that the Proposed Transaction does not raise vertical competition

262 Q5 – Questions 103, 104, 105, 106 and 108; Q6 – Questions 107, 107.2, 108 and 109.

263 Q5 – Question 107. A minority of copper metal customers raised issues related to warehousing, the LME and the combination of a trader and producer; issues that are however dealt with in the horizontal sections above, i.e., paragraph 71 and following.

264 Form CO §§ 1350-1352.

265 Case COMP/M.4781 Norddeutsche Affinerie / Cumerio, decision of 23 January 2008, points 37-50.

266 Form CO § 1429 and § 1489. HHI's on the basis of copper metal market shares only.

267 Form CO § 1352.

268 Form CO § 1350

concerns on the markets for copper metal (upstream) and copper rods (downstream).[269]

V.5.6.2. Copper concentrate (upstream) and copper metal (downstream)

282. On the upstream market for copper concentrate, regardless of the geographical scope of the market, the Merged Entity´s market shares remain lower than [10-20]%, also on a forward looking basis. The post-merger HHI would remain well below 2000.[270]

283. On the downstream market for copper metal, regardless of the geographical scope of the market and metal grade concerned, the Merged Entities market share remains lower than [10-20]%. The post-merger HHI would remain well below 2000.[271]

V.5.6.3. Secondary copper products (upstream) and copper metal (downstream)

284. On the upstream market for secondary copper products, regardless of the precise scope of the product market, the Merged Entity´s market shares remain lower than [10-20]%. The post-merger HHI would remain well below 2000.[272]

285. On the downstream market for copper metal, regardless of the geographical scope of the market and metal grade concerned, the Merged Entity's market share remains lower than [10-20]%. The post-merger HHI would remain well below 2000.[273]

V.5.6.4. Conclusion on vertical links between copper markets

286. In view of the market shares and overlaps of the Merged Entity in the upstream and downstream copper related markets identified above, post-merger HHI's and paragraph 25 of the guidelines on assessment of non-horizontal merger under the Council Regulation on the control of concentration between Undertakings, the Commission considers that the Proposed Transaction is unlikely to give rise of competition concerns. Respondents in the market investigation did not raise vertical concerns related to copper markets.

287. Therefore the Commission concludes that, with regard to the vertical links between copper markets as identified above, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

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269 According to paragraph 25 of the Non-Horizontal Merger Guidelines, *"[t]he Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % and the post-merger HHI is below 2 000"*.

270 Form CO § 1389

271 Form CO § 1429 and § 1489

272 Form CO § 1412

273 Form CO § 1429

V.6. Lead

V.6.1. Introduction

288. Lead is found naturally and mined as an ore, which typically contains other metals such as copper, zinc and silver. The ore is crushed and grinded before being floated and filtered to produce lead concentrate (roughly 40% to 70% lead). Lead concentrate is then sold to independent smelters to produce lead metal or, in the case of integrated producers, is smelted and/or refined in a facility close to the mine.

289. Under the smelting process, lead concentrate is first fed into a "sintering" machine along with other raw materials. The sintered powder is then fed, along with carbon, into a blast furnace for smelting. The carbon acts as a fuel and also purifies the lead-containing materials originating molten lead metal. Lead metal is then refined in cast-iron kettles to remove any remaining non-lead materials. The refined lead will have a purity of 99.97% or higher. It may be then mixed with other metals to form alloys, or it may be directly cast into shapes.

290. In addition to primary production of lead metal, more than half of total global lead metal production is attributable to secondary or recycled lead which is produced from the recycling of battery scrap.

V.6.2. Lead concentrate

V.6.2.1. Relevant product market

291. In line with previous Commission decisions, the Notifying Party submits that the market for lead concentrate forms a product market which is separate from other metal concentrates and from the market for lead metal.[274] No further sub-segmentations within a market for lead concentrate are considered relevant.

292. The results of the market investigation confirmed the Notifying Party's position as all respondents stated that the market for lead concentrates was distinct from the market for lead metal and the markets for other concentrates.[275]

293. As a consequence, the Commission considers that the relevant product market is the market for lead concentrate.

V.6.2.2. Relevant geographic market

294. The Notifying Party considers that the geographic scope of the market for lead concentrate is worldwide. Lead concentrate is shipped around the world from mines located in relatively few countries. In addition, according to the Notifying Party, lead concentrate continues to be actively traded as a commodity on a global basis under long-term contracts, with prices tied to those quoted on the LME.

295. The Commission has previously considered the market for lead concentrate to be worldwide in scope.[276]

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274 Case COMP/M.4256 Xstrata/Falconbridge, Commission decision of 13 July 2006.

275 Q11 – Question 8; Q12 – Question 10.

296. The majority of the respondents in the market investigation organise their sales/purchase department at a worldwide level and also regularly sell/purchase worldwide.[277] In addition, a little over half the suppliers of lead concentrates involved in the market investigation consider that there are no barriers to redirecting sales of lead concentrates from other geographical regions to the EEA in response to a 5% price increase in the EEA.[278] Transport costs were generally considered as a constraining factor on trade between regions[279] but, overall, a very large majority of the respondents considered that the market was worldwide in scope. None of the respondents considered that it was EEA-wide. [280]

297. In line with its precedents and based on the replies to the questionnaires, the Commission considers that an EEA-wide market for lead concentrates is not a plausible market definition.

298. As to the question whether a worldwide market definition should exclude China, replies by market participants demonstrate that, even though Chinese imports of lead concentrate account for a significant part of total worldwide production, there are no actual exports of lead concentrate from China.[281] However, the respondents replied almost unanimously that China should not be excluded as it represents a large part of the market for lead concentrate and therefore serves as a reference worldwide.[282]

299. The Commission considers that, the precise scope of the geographic market definition can ultimately be left open as the Proposed Transaction does not give rise to competition concerns on the market for lead concentrate regardless as to whether the market for lead concentrate is considered to be worldwide or worldwide excluding Chinese production and intra-Chinese sales.

V.6.2.3. Assessment of horizontal effects on competition

300. Glencore produces and supplies lead concentrate to smelters for further refining, using approximately […] of its production for internal smelting. Xstrata produces and supplies lead concentrate although it internally consumes approximately […]%[283] of the lead concentrate it produces. Therefore, the Parties' activities overlap both at the production and supply levels of lead concentrate.

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276 Case IV/M.470 Gencor/Shell, Commission decision of 9 August 1994; Case COMP/M.2413, BHP/Billiton, Commission decision of 14 June 2001.

277 Q11 – Questions 9 and 10; Q12 – Questions 11 and 12.

278 Q12 – Question 23.

279 Q11 – Question 15; Q12 – Question 16.

280 Q11 – Question 25; Q12 – Question 25.

281 Q11 – Question 18.

282 Q11 – Questions 19 and 25; Q12 – Questions 19 and 25.

283 Form CO, footnote 257 : Xstrata internally consumes approximately […]% (approximately […] MTU) of its total lead concentrate production of […] MTU. Sales to end-customers comprised approximately […]% ([…] MTU) and Glencore purchased […]([…] MTU approximately) of lead concentrate produced by Xstrata.

301. As can be deduced from the Notifying Party's estimates summarized in the tables below, the Merged Entity's market shares will remain relatively low both at a production level and at a supply level on a worldwide basis:

Production shares 2011	Worldwide	Worldwide excl. China
Glencore	[0-5]	[0-5]
Xstrata	[5-10]	[0-5]
Combined	**[5-10]**	**[5-10]**

Supply shares 2011	Worldwide	Worldwide excl. China
Glencore	[5-10]	[10-20]
Xstrata	[0-5]	[0-5]
Combined	**[5-10]**	**[20-30]**

302. The only affected market would be a market for the supply of lead concentrate on a worldwide level excluding Chinese production and intra-Chinese sales, where the market share of the Merged Entity would be [20-30]%. However, on such a market, the increment brought about by the Proposed Transaction is limited (i.e. only [0-5]%) as Xstrata uses […] of its lead concentrate production for in-house lead metal production.

303. Furthermore, the Merged Entity will be constrained by a number of other significant competitors many of whom are active in relation to both the production and supply of lead concentrate.

304. As regards the production of lead concentrates, the Merged Entity will face large competitors who have worldwide estimated market shares […]: BHP Billiton ([5-10]%), Doe Run ([0-5]%), Hindustan Zinc ([0-5]%), Zhongjin Lingnan Metals ([0-5]%), Teck ([0-5]%), JSC Gorevsky ([0-5]%), Sumitomo Group ([0-5]%) and Goldcorp ([0-5]%). The market shares of these competitors as estimated by the Notifying Party are more important on a worldwide-excluding-China market: BHP Billiton ([10-20]%), Doe Run ([5-10]%), Hindustan Zinc ([0-5]%), Teck Resources ([0-5]%), JSC Gorevsky ([0-5]%), Sumitomo Corporation ([0-5]%) and Goldcorp ([0-5]%).

305. Similarly, as regards the supply of lead concentrates, there are a number of competitors with significant market shares, according to the Notifying Party's estimates, both on a worldwide basis (i.e. BHP Billiton: [5-10]%, Trafigura: at least [5-10]%) and on a worldwide-excluding-China basis (i.e. BHP Billiton: [10-20]%, Trafigura: at least [10-20]%, Teck Resources: [5-10]%, Sumitomo Corporation: [0-5]%). In addition, a number of independent third party trading/marketing companies are active in the supply of lead concentrate including Ocean Partners, Transamine, Louis Dreyfus and MRI Trading, thereby imposing a significant competitive constraint on the Merged Entity.

306. The market participants did not raise any specific competition concerns about the effects of the Proposed Transaction on the markets for the supply or production of lead concentrate. The majority of market participants consider that there are alternatives to Glencore and Xstrata in the lead concentrate market and that neither of the Parties has a competitive advantage over its competitors.[284] Furthermore, the market participants do not consider that the Parties would be able to influence the

284 Q11 – Questions 42, 43 and 44; Q12 – Questions 34 and 35.

price of lead concentrate in the market[285] or to have an impact the competitive conditions of the market for lead concentrate, either in the short of in the long term.[286]

307. In light of the above, the Commission concludes that the Proposed Transaction does not give rise to horizontal competition concerns on the market for lead concentrate, neither on a worldwide basis nor on a worldwide excluding China basis.[287]

V.6.2.4. Vertical Assessment

308. The Proposed Transaction also leads to vertically affected markets with respect to Glencore and Xstrata's activities in lead concentrate (upstream) and lead metal (downstream)[288] but does not raise any concerns of input or customer foreclosure.

309. According to the Non-Horizontal merger guidelines, where a merged entity would have a market share just above 30% on one market but substantially below on another related market, competition concerns are less likely. [289]

310. The market shares of the Merged Entity on the lead concentrate (upstream market) and lead metal (downstream) markets is […] lower than [30-40]% for all hypothetical markets, but three namely:

   a. a hypothetical EEA wide market for the supply of 99.99% purity grade lead metal;

   b. a hypothetical market for the production of 99.99% grade lead metal and 99.985% grade lead metal in the EEA;

   c. a hypothetical market for the supply of 99.99% grade lead metal and 99.985% grade lead metal in the EEA;

311. However, in the case of an EEA wide market for the supply of 99.99% purity grade lead metal, the increment is very low, i.e. smaller than [0-5]%.[290] In the case of EEA-wide markets for the production and supply of 99.99% and 99.985% grades or lead metal, the Merged Entity would have market shares close to [30-40]% in the downstream markets but […] lower on the upstream markets and would still face a number of important competitors on these markets.[291]

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285 Q11 – Question 37; Q12 – Questions 32.

286 Q11 – Questions 64 and 65; Q12 – Questions 57 and 58.

287 For the sake of completeness, the Commission notes that neither Glencore nor Xstrata are active in the production of lead concentrates in the EEA and that they have a very limited supply activity in the EEA (according to the Notifying Party, and based on its methodology, the combined market share of Glencore and Xstrata on such a segment would be [10-20]% with a [0-5]% increment).

288 See paragraphs 328 and 329 below.

289 See footnote 3 of the Non-Horizontal Guidelines.

290 See paragraph 329 below.

291 See paragraph 330 below.

312. In light of the above, the market power of the Merged Entity in the upstream and downstream market is therefore limited.

313. Moreover, no substantiated foreclosure concerns were raised by any of the market participants which took part in the market investigation. The respondents to the market investigation explained that, in their view, a sufficient number of lead concentrate suppliers would remain for their company after the merger.[292] One customer even explained that there is high liquidity in the concentrates market and as a result a huge choice of suppliers.[293] In addition, as mentioned in paragraph 300 above, already now the vast majority of Xstrata's lead concentrates production is being used in-house and was therefore pre-merger unlikely to compete on the supply market.

314. Similarly, the Proposed Transaction does not raise customer foreclosure concerns as according to the Notifying Party's estimates, Glencore and Xstrata only account for [10-20]% of the worldwide excluding China production of primary lead metal.[294] There are several important lead metal producers in the world that source a large part of their concentrates need from third party suppliers such as Korea Zinc (Republic of Korea, smelter capacity of 150,000MT), Industrias Penoles (Mexico, smelter capacity of 180,000 MT)), Teck Metals (Canada, smelter capacity of 106,500 MT)), Hachinohe Smelting (Japan), Sumitomo Metal Mining (Japan, smelter capacity of 40,000 MT)), and Berzelius (Germany, smelter capacity of 160,000 MT).[295]

315. In light of the above, it can be concluded that the Proposed Transaction does not give rise to vertical competition concerns on the market for lead concentrate, irrespective of its geographic scope.

V.6.2.5. Conclusion

316. Therefore the Commission concludes that, with regard to the vertical link between (upstream) lead concentrate and (downstream) lead metal market(s), the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

V.6.3. Lead metal

V.6.3.1. Relevant product market

317. The Notifying Party submits that there is only one relevant market for lead metal, regardless of the grades and the feedstock used to produce the metal (i.e. concentrate or scrap). The Notifying Party also considers that lead metal alloys, i.e. lead metal to which another specific element has been combined (for instance, calcium or antimony), belong to that overall lead metal market. The Notifying

292 Q11 – Question 66.

293 Q11 – Question 69.

294 [20-30]% if Recylex's share is taken into account, see paragraph 326 below

295 See International Lead and Zinc Study Group, World Directory: Primary and Secondary Lead Plants. The primary lead metal producers mentioned are the ones who source between 10% and 50% (Teck), between 51% to 90% (Hachinohe, Industrias Penoles) or even over 90% (Korea Zinc, Berzelius, Sumitomo Metal Mining) of their need of lead concentrate from third party suppliers.

Party claims that all types and grades of lead metal are substitutable from the supply-side as well as from the demand-side.

318. In previous decisions, the Commission has identified a distinct product market for lead metal.[296] In one of its decisions, the Commission suggested that the relevant market may be further segmented according to the purity of the metal but ultimately left the exact definition open.[297]

319. In light of its precedents and the arguments of the Parties, the Commission has investigated whether lead metal could be further segmented by grades, whether there could be a segmentation depending on the feedstock used to produce the metal and whether lead alloys, being a specific combination of lead metal and another element, could still be considered to belong to the overall market of lead metal.

320. As regards the different grades of lead metal, the majority of respondents to the Commission's market investigation indicate that there are significant differences between the different grades of lead metal, in particular as regards the applications they are used for, the price and the quality.[298] The responses from customers show that for some specific niche applications (e.g. the glass industry), only 99.99% purity lead can be used.[299] For applications that require 99.97% or 99.985% lead metal, it is possible to use those grades and 99.99% lead. Typically, any higher ranking lead metal in terms of purity can replace the lower purity lead metal in end applications.[300] As a consequence, it appears appropriate to segment the overall lead metal market by grades or groups of lead metal grades, especially for the high purity grades.

321. As regards the different feedstock used, the results of the market investigation also show that there are differences between primary (i.e. lead made from concentrates) and secondary lead (i.e. recycled lead), in particular as regards price differences and quality.[301] However, approximately half of the competitors consider that primary and recycled lead are substitutable as regards the applications, in particular for the most commonly used batteries.[302] Other responses to the market investigation show that customers, when they refer to primary lead, effectively mean high purity grades of lead which can only be produced using primary lead.[303] One producer of lead has explained that, from a customer's point of view, the purity of lead is the determining factor and that, as long as the material falls within the customer's specification, the production process by which the lead is obtained is

296 Case COMP/M.4256 Xstrata/Falconbridge, Commission decision of 13 July 2006, Case IV/M.470 Gencor/Shell, Commission decision of 29 August 1994; Case COMP/M.2413 BHP/Billiton, Commission decision of 14 June 2001.

297 Case COMP/M.3134 Arcelor/Umicore/Duology JV, Commission decision of 4 July 2003.

298 Q9 – Questions 10 to 13; Q10 – Questions 10 to 13.

299 See e.g. reply to follow-up questions of 29 October 2012.

300 See e.g. reply to follow-up questions of 29 October 2012.

301 Q9 – Questions 17 and 18; Q10 – Questions 17 and 18.

302 Q10 – Question 19.

303 See e.g. replies to follow-up questions of 29 October 2012.

irrelevant.[304] The Notifying Party has also explained that some of Glencore's and Xstrata's smelters which are usually considered "primary smelters" actually use a mix of lead concentrates and recycled lead to produce lead metal without customers being able to distinguish lead produced from a mix of inputs from genuine primary lead.[305] As a consequence, a market delineation based on distinguishing primary and secondary lead is not plausible.

322. Finally, as regards the difference between lead metal and lead metal alloys, the responses to the market investigation show that there are significant differences between these products as regards applications, price differences and quality from the demand side.[306] In particular, competitors point out that lead metal alloys can be considered a different product altogether as they contain a deliberate addition of another element, which makes them significantly different in composition compared to pure lead. Lead metal alloys are used for different components of the same application (i.e. battery grids).[307] Lead metal alloys are not considered a commodity but depend on the customers' specifications.[308] However, a majority of competitors consider that switching between lead metal and lead metal alloys in their production process does not require significant investments and/or time.[309] Half of the competitors also point out that they would switch from lead metal to lead metal alloys and vice versa following a permanent 5-10% price increase in price in one product relative to the other.[310]

323. In light of the above, it cannot be excluded that it is pertinent to distinguish lead metal alloys from lead metal, and that the lead metal market should be further segmented according to grades of lead metal, in particular for applications that set higher requirements in terms of lead purity input. In any case, the exact market definition can ultimately be left open as the Proposed Transaction does not give rise to competition concerns on the market for lead metal regardless of whether it is segmented by grades and whether a distinct market for lead metal alloys is defined.

V.6.3.2. Relevant geographic market

324. The Notifying Party submits that the geographic scope of the market(s) for lead metal is worldwide.

325. In its previous decisions, the Commission defined the market for lead metal as being worldwide in scope.[311]

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304 Q10 – Question 19.1.

305 See Glencore's paper entitled Response to Commission Market Investigation Feedback Regarding Lead Metal.

306 Q9 – Questions 22 to 25; Q10 – Questions 22 to 25.

307 Q10 – Question 22.

308 See e.g; Q10 – Questions 23 and 25.

309 Q10 – Question 26.

310 Q10 – Question 27.

311 Case COMP/M.4256 Xstrata/Falconbridge, Commission decicion of 13 July 2006, Case IV/M.470 Gencor/Shell, Commission decicion of 29 August 1994; Case COMP/M.2413 BHP/Billiton, Commission decicion of 14 June 2001.

326. The results of the market investigation are not conclusive. Some of the market participants consider the market to be worldwide in scope, while others consider it to exclude China or even restrict the market as being EEA-wide in scope.[312] In particular, some customers have indicated that due to transport costs and lead times, it is not possible for them to import lead metal from regions outside the EEA.[313] A majority of respondents consider that the geographic market definition does not change depending on the type of lead.[314]

327. The Commission considers that, in any event, the geographic market definition can ultimately be left open as the Proposed Transaction does not give rise to competition concerns on any of the above lead metal markets even under the narrowest plausible definition.

V.6.3.3. Assessment of horizontal effects on competition

328. Glencore and Xstrata are both active in the production and supply of lead metal and lead alloys. In addition, Glencore owns a 32.1% share in Recylex, a company active in the recycling and production of lead metal. The Notifying Party claims that it does not have *de jure* or *de facto* control over Recylex. However, according to the information provided by Glencore, it has achieved a […] majority of voting rights at shareholders meetings […].[315] On this basis, Recylex could be considered as being *de facto* controlled by Glencore.[316] In any case, no final view on Glencore's control over Recylex is required as the Proposed Transaction does not give rise to competition concerns on the market for lead metal, even under the assumption that Recylex is controlled by Glencore.

329. As regards lead alloys, the Notifying Party submits that Glencore, without taking into account Recylex, does not produce or supply lead metal alloys either in Europe or worldwide. .[317] On a hypothetical EEA market for lead alloys, Xstrata's and Recylex's combined market share would be less than [10-20]%.[318] In addition, the Merged Entity would face some significant competitors such as smelters/recyclers Quexco/Ecobat, Campine, and Métal Blanc.[319] Some battery makers are also able to produce their own alloys such as Johnsons Controls, Hoppecke, and Enersys. The Merged Entity would therefore face significant competitive constraints on the market. In light of the above, the Proposed Transaction does not raise competition concerns on a market for lead metal alloys.

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312 Q9 – Question 44; Q10 – Question 44.

313 Q9 – Questions 36 and 42.

314 Q9 and Q10 – Question 45.

315 Reply to the RFI dated 22 and 23 October 2012 regarding lead metal, version of 24 October 2012, Annexes 6.2 to 6.4.

316 See paragraph 59 of the Jurisdictional Notice (fn 5).

317 See reply to the follow-up question on Lead Metal Alloys dated 19 November 2012 and

318 See the e-mail sent on 21 November 2012 by the Notifying Party at 17:11.

319 According to Recylex's estimates, Campine et Métal Blanc produce approximately […] of lead per year but the share of lead metal alloys in this production is higher than the share of alloys in Recylex's production.

330. As regards lead metal, the Notifying Party has provided the following estimates:

Production of Lead Metal in 2011 – Worldwide Excluding China						
Parties	**99.97% Lead metal**		**99.985% Lead metal**		**99.99% Lead metal**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[0-5]	[…]	N/A	[…]	N/A
Recylex	[…]	[0-5]	[…]	N/A	[…]	N/A
Xstrata	[…]	[0-5]	[…]	N/A	[…]	N/A
Combined	**[…]**	**[0-5]**	**[…]**	**N/A**[320]	**[…]**	**N/A**[321]

Production of Lead Metal in 2011 – EEA[322]						
Parties	**99.97% Lead metal**		**99.985% Lead metal**		**99.99% Lead metal**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[0-5]	[…]	[0-5]	[…]	[0-5]
Recylex	[…]	[5-10]	[…]	[10-20]	[…]	[0-5]
Xstrata	[…]	[0-5]	[…]	[0-5]	[…]	[50-60]
Combined	**[…]**	**[5-10]**	**[…]**	**[10-20]**	**[…]**	**[50-60]**

320 The Notifying Party has not been able to provide an estimate of the overall market. However, according to the Notifying Party, there are a number of competitors with important production volumes such as Quexco ([…]), KCM ([…]), Huta Cynku ([…]).

321 The Notifying Party has not been able to provide an estimate of the overall market. However, according to the Notifying Party, there are a number of competitors with important production volumes such as Korea Zinc ([…]), Industrias Penoles ([…]), and Quexco ([…]).

322 The Portovesme smelter (Italy) owned by Glencore is currently closed. It is expected to reopen in […] and will produce 99.97% and 99.985% lead metal with a production capacity of approximately […] MT per annum. This does not influence the fact that there is no overlap in the production of 99.97 % and 99.985% in the EEA. In addition, this is not expected to change the EEA supply shares as this production […].

Supply of Lead Metal in 2011 – Worldwide Excluding China						
Parties	**99.97% Lead metal**		**99.985% Lead metal**		**99.99% Lead metal**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[5-10]	[…]	N/A	[…]	N/A
Recylex	[…]	[0-5]	[…]	N/A	[…]	N/A
Xstrata	[…]	[0-5]	[…]	N/A	[…]	N/A
Combined	**[…]**	**[0-5]**	**[…]**	**N/A**[323]	**[…]**	**N/A**[324]

Supply of Lead Metal in 2011 – EEA						
Parties	**99.97% Lead metal**		**99.985% Lead metal**		**99.99% Lead metal**	
	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)	Volume (in K MT)	Shares (%)
Glencore	[…]	[0-5]	[…]	[10-20]	[…]	[0-5]
Recylex	[…]	[5-10]	[…]	[5-10]	[…]	[0-5]
Xstrata	[…]	[0-5]	[…]	[0-5]	[…]	[40-50]
Combined	**[…]**	**[5-10]**	**[…]**	**[20-30]**	**[…]**	**[40-50]**

331. On the basis of the above, it appears that the only affected market where there would be an overlap between Glencore/Recylex and Xstrata would be the market for the supply of 99.99% lead metal in the EEA, where the market share increment is very limited (i.e. less than [0-5]%).[325]

332. Given the possibility for customers to use higher purity lead for lower purity grade applications,[326] it also appears necessary to analyse the effects of the transaction on a hypothetical market combining 99.99% and 99.985% grade lead metal. In that situation, the combined market share of the parties on the markets for the production and for the supply of both grades of lead metal in the EEA would be

323 The Notifying Party has not been able to provide an estimate of the overall market. However, according to the Notifying Party, there are a number of competitors with important supply volumes such as Quexco ([…]) and Exide ([…]), KCM ([…]) and Huta Cynku ([…]).

324 The Notifying Party has not been able to provide an estimate of the overall market. However, according to the Notifying Party, there are a number of competitors with important supply volumes such as Korea Zinc ([…]), Industrias Penoles ([…]), Teck Cominco ([…]) and Quexco ([…]).

325 This overlap results from the supply of one customer in Europe under a spot contract. The […] MT were sources in part from […] and from Glencore's Kazzinc smelter. The reopening of the Portovesme facility will only concern […].

326 Responses to the market investigation show that the price of high purity grade is generally higher but the data submitted by the Notifying Party show that 99.985% premia are sometimes higher than the 99.99% ones.

respectively [30-40]% and [30-40]%, with increments of respectively [5-10]% and [10-20]%.

333. However, the Parties would still face a number of significant competitors including Ecobat (production and supply: [10-20]%), KCM (production and supply: [10-20]%) and Umicore (production and supply: [5-10]%) and traders such as Trafigura and Traxys. In addition, given that 99.985% lead metal can also be produced using secondary feedstock, the Merged Entity would be constrained by secondary smelters.

V.6.3.4. Conclusion

334. In light of the above, the Commission concludes that, with regard to the production and supply of lead metal, the Proposed Transaction does not raise any serious doubts as to its compatibility with the internal market.

V.7. Nickel

V.7.1. Introduction

335. Nickel is a silver-white malleable ductile metallic element with a high melting point. It is strongly resistant to corrosion and oxidation. Typically, nickel ores extracted from nickel mines are first milled and concentrated to obtain nickel concentrate. Nickel concentrate is then processed through a smelting or a leaching technique to produce other intermediate nickel products, such as nickel matte or nickel oxide. These products are further refined to obtain finished nickel products through the use of different refining technologies.[327]

336. Xstrata is not active in the supply of nickel concentrate or other intermediates as it consumes internally all of the intermediate nickel products it produces. The only overlap between Glencore and Xstrata's activities thus concerns the production and supply of refined nickel.

V.7.2. Refined Nickel

V.7.2.1. Relevant product market

337. According to the Notifying Party, there are six main types of refined nickel with different levels of purity: nickel pig iron (purity level of 1.7%-14%), ferronickel (17-40%), nickel oxides (typically 90%), grade 2 nickel (more than 97%), grade 1 nickel (more than 99.8%) and high purity nickel (more than 99.98%).

338. Refined nickel is used in a variety of end applications, which may be segmented into the following categories: (i) stainless steel, (ii) melting applications (other than stainless steel), (iii) plating and electroforming, and (iv) specialty applications, each with possible further sub-segments.

339. In line with previous Commission decisions,[328] the Notifying Party submits that the market for nickel is a distinct product market due, in particular, to its different

327 For further details of the production process, please see the description in Case COMP/M.4000 Inco/Falconbridge, Commission decision of 4 July 2006, points 15-26.

328 See only Case COMP/M.470 Gencor/Shell, decision of 29 August 1994, point 10.

physical characteristics, its different usage and price levels. Furthermore, in line with previous Commission decisions,[329] the supply of nickel intermediate products and the supply of refined nickel belong to different product markets in view of the lack of supply and demand-side substitutability.

340. These points were broadly confirmed by market participants surveyed in the market investigation.[330]

341. The Commission has previously concluded that the market for refined nickel can be further subdivided into several relevant product markets depending on the end applications because of the limited supply- and demand-side substitutability.[331]

342. It is however not necessary for the purpose of the present decision to decide on the precise delineation of the product market as the Proposed Transaction does not give rise to any competition concerns on the market for refined nickel under the alternative market definitions.

V.7.2.2. Relevant geographic market

343. The Notifying Party submits that the market for refined nickel should be defined as worldwide in scope for all the segments and sub-segments but that the geographic market definition can be left open in this case.

344. The Commission has previously found that for most end applications, the market for the supply of refined nickel is most likely global in scope, the only end application to be considered EEA-wide in scope being plating and electroforming.[332]

345. Market participants contacted in the market investigation broadly confirmed that the market can be considered global in scope.[333] Customers pointed to the possibility of purchasing sufficient nickel quantities from producers based outside the EEA if prices in the EEA increased.[334] Market participants maintained that transport costs did not constitute a significant portion of the final sales price for nickel[335] and that barriers to international trade were low.[336]

329 Case COMP/M.3767 BHP/WMC, decision of 26 April 2005, point 7; Case COMP/M.4000 Inco/Falconbridge, decision of 4 July 2006, point 53.

330 Q1 – Question 11; Q20 – Question 16.

331 Case COMP/M.4476 Norilsk Nickel/OMG Nickel, decision of 6 February 2007, points 14ff; Case COMP/M.4000 Inco/Falconbridge, decision of 4 July 2006, points 49ff.

332 Case COMP/M.4256 Xstrata/Falconbridge, decision of 13 July 2006, point 26; Case COMP/M.4000 Inco/Falconbridge, decision of 4 July 2006, points 98-200 and specifically points 202-226 where the Commission found that the market for the supply of nickel to the plating and electroforming industry was EEA-wide and that the the market for the supply of high purity cobalt for super alloys used in safety critical parts was worldwide in scope; the market was previously defined as global in Case No COMP/M.3767 BHP/WMC, decision of 26 April 2005, points 12 and Case COMP/M.470 – Gencor/Shell, decision of 29 August 1994, point 11.

333 Q19 – Question 22; Q20 – Question 27.

334 Q19 – Question 24.

335 Q19 – Question 25; Q20 – Question 29.

336 Q19 – Questions 34 and 35; Q20 – Questions 38 and 39.

346. However, there are export duties between 5% and 20% for the export of refined nickel from China. None of the customers surveyed in the market investigation indicated that they purchased nickel from China and the majority of competitors surveyed indicated that they did not export refined nickel from China.[337] The majority of market participants also considered that refined nickel produced in China did not constitute a competitive constraint for sales of nickel in other parts of the world.[338] Consequently, a sizeable minority of market participants considered that Chinese volumes should not be included in the relevant geographic market.[339]

347. However, the geographic market definition can ultimately be left open in this case as the Proposed Transaction does not give rise to any competition concerns on the market(s) for refined nickel under any of the alternative geographic market definitions.

V.7.2.3. Assessment of effects on competition

348. Following Xstrata's entry into nickel production through the acquisition of Falconbridge in 2006,[340] Glencore and Xstrata entered into five-year exclusive marketing agreements in 2007 covering all of Xstrata's production of (i) nickel and cobalt and (ii) ferronickel. In 2011, Glencore and Xstrata agreed to […].

349. The Merged Entity will become the […] producer of refined nickel worldwide with a combined production share by volume of [5-10]% in 2011 (Glencore: [0-5]%; Xstrata: [5-10]%). Important competitors include Norilsk (production share of [10-20]%), Vale ([10-20]%), Jinchuan ([5-10]%), BHP Billiton ([5-10]%), Sumitomo ([0-5]%), Anglo American ([0-5]%), Tsingshan ([0-5]%), and Eramet ([0-5]%). If Chinese production is subtracted from the market size, the Merged Entity's share in worldwide production of refined nickel is [10-20]%.

350. Moreover, Glenore and Xstrata are specialized in the production of different purity levels of nickel. While Xstrata exclusively produces high purity nickel and ferronickel, Glencore produces grade I nickel. There is thus no overlap between Xstrata's and Glencore's production activities in the different purity levels of nickel.

351. The Notifying Party estimates the combined market shares in the supply of refined nickel as follows (based on sales from Glencore's volumes and Xstrata's volumes):[341]

337 Q19 – Questions 28; Q20 – Question 32.

338 Q19 – Question 29; Q20 – Question 33.

339 Q19 – Question 22; Q20 – Question 27.

340 See Case COMP/M.4256 Xstrata/Falconbridge, decision of 13 July 2006.

341 The market shares are based on Glencore and Xstrata's company data and market size calculations of Brook Hunt, a research and consulting company.

	Worldwide			**Worldwide excluding intra-Chinese sales**		
	Glencore	**Xstrata**	**Combined**	**Glencore**	**Xstrata**	**Combined**
Refined nickel (Total)	[0-5]	[5-10]	**[10-20]**	[5-10]	[0-5]	**[10-20]**
Sub-segmentation by end use						
Stainless steel applications	[0-5]	[0-5]	**[5-10]**	[5-10]	[0-5]	**[5-10]**
Melting applications[342]	[0-5]	10-20]	**[10-20]**	[0-5]	[10-20]	**[20-30]**
Plating and electroforming	[0-5][343]	[20-30]	**[20-30]**	[5-10][344]	[30-40]	**[30-40]**
Specialty applications	[0-5]	[0-5]	**[0-5]**	[0-5]	[0-5]	**[0-5]**

352. As regards the EEA-wide supply of nickel for plating and electroforming end uses, there is no overlap between the activities of Glencore and Xstrata. All of the sales concern Xstrata material. Glencore does not sell nickel for electroforming and plating in the EEA, neither from its own production nor from third parties.

353. The Notifying Party has not been able to submit market share information for its competitors in the different sub-markets by end application.[345] However, it submits that the most important competitors for Glencore and Xstrata in nickel production are also active at the supply level. In particular, a number of effective competitors will remain active on the market for each end application. The Merged Entity's most important competitors Norilsk, Vale, Jinchuan, BHP Billiton and Sumitomo all supply to customers in stainless steel and melting applications while Norilsk, Vale, Jinchuan and Sumitomo also supply to customers in plating and electroforming as well as in specialty applications. Market participants surveyed in the market investigation generally confirmed that the competitors are equal to Glencore and Xstrata in their ability to supply similar quantities of nickel at similar prices.[346]

354. The market investigation did not raise any specific competition concerns regarding nickel supply. The vast majority of market participants found that Glencore and Xstrata are currently not in a position to act independently from their customers, e.g. by permanently raising prices by 5-10% in any of the refined nickel products.[347] Customers also generally maintained that they could switch their purchases to Glencore's and Xstrata's competitors[348] while some competitors

342 A further sub-segmentation into foundry, alloy steel, non-ferrous alloys and super alloys leads to roughly the same level of combined worldwide market shares, i.e. [10-20]-[20-30]%.

343 None of these sales were made in the EEA.

344 None of these sales were made in the EEA.

345 Form CO §§ 1671 and 1681.

346 Q19 – Questions 42 and 43; Q20 – Questions 43 and 44. An exception appears to be the high purity nickel segment. However, only Xstrata produces such high purity nickel while Glencore only trades third-party high purity nickel. In particular, in the relevant super alloy and plating and electroforming sub-segments, all of Glencore's sales in the EEA were from Xstrata's production.

347 Q19 – Question 44; Q20 – Question 45.

348 Q19 – Question 50; again, an exception seems to be the high purity nickel segment – however, there is no overlap in the EEA in this segment as described in footnote 346.

pointed to existing capacity constraints.[349] Moreover, the vast majority of market participants indicated that Glencore and Xstrata's exclusive distribution agreement of 2007 did not cause a change in the nickel markets.[350] Moreover, market participants generally do not expect the Proposed Transaction to have an impact on their business.[351]

355. In light of the Parties' market shares,[352] the Parties' existing close relationship and the results of the market investigation as outlined above, the Commission finds that a sufficient number of viable competitors will remain active in the market for refined nickel and its sub-segments.

V.7.2.4. Conclusion

356. Therefore the Commission concludes that, with regard to the production and sale of refined nickel, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

V.8. Cobalt

V.8.1. Introduction

357. Cobalt is a metal primarily obtained as a by-product of the refining of other metals, notably copper and nickel. It is extracted from ores, processed into cobalt intermediates and ultimately refined following similar processes as for nickel refining described in paragraph 335 above.[353]

358. Xstrata is not active in the supply of cobalt intermediates […]. The only overlap between the activities of Glencore and Xstrata thus concerns the production and supply of refined cobalt.

V.8.2. Relevant product market

359. Depending on the processing and refining technique, refined cobalt may be sold as metallic cobalt or as cobalt chemicals. Metallic cobalt is typically sold as a metal or powder and is used among others in the production of hard-facing steel, high speed steel, magnets, super alloys, carbides and diamond tools. Chemical cobalt is typically sold as a chemical solution and is used among others in the production of batteries, catalysts, pigments and ceramics. Metallic cobalt finished products vary in terms of purity levels. Prices on 99.3% "low purity" and 99.8% "high purity" cobalt are quoted by London Metal Bulletin and are widely used for pricing in the market together with the quotations of Platt's Metals Week.

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349 Q20 – Question 51.

350 Q19 – Question 36; Q20 – Question 40.

351 Q19 – Question 64; Q20 – Question 69.

352 See in this context paragraphs 17 and 18 of the Horizontal Merger Guidelines. In the only potential sub-market where market shares exceed [20-30]% (plating and electroforming) there is no overlap in the EEA.

353 For further details of the production process, please see the description in case COMP/M.4000 Inco/Falconbridge, decision of 4 July 2006, point 39.

360. In line with the Commission's overall approach to the base metal markets, the Notifying Party submits that the market for cobalt is a distinct product market. Furthermore, in line with previous Commission decisions,[354] the supply of cobalt intermediate products and the supply of refined cobalt belong to different product markets in view of the lack of supply and demand-side substitutability. These points were broadly confirmed by market participants surveyed in the market investigation.

361. The Commission has previously found that it appeared appropriate to subdivide the product market by end applications due to differences in the structure of demand and in technical and delivery requirements resulting in limited supply- and demand-side substitutability. However, the precise delineation of the product market was ultimately left open but for the high purity cobalt segment for the production of super alloys and batteries.[355]

362. It is however not necessary for the purpose of the present decision to decide on the precise delineation of the product market as the Proposed Transaction does not give rise to any competition concerns on the market for refined cobalt under the alternative market definitions.

V.8.3. Relevant geographic market

363. The Notifying Party submits that the market for refined cobalt should be defined as worldwide in scope, including for all the segments and sub-segments.

364. The Commission has previously found that for most end applications, the market for the supply of refined cobalt is most likely global in scope.[356] This conclusion was broadly confirmed in the market investigation. Customers pointed to the possibility of purchasing sufficient nickel quantities from producers based outside the EEA if prices in the EEA increased.[357] Market participants maintained that transport costs did not constitute a significant portion of the final sales price for cobalt[358] and that barriers to international trade were low.[359]

365. Moreover, according to the Notifying Party, there are no export duties on the export of refined cobalt from China. Nevertheless, a number of market participants do not consider Chinese volumes to constitute a competitive constraint for sales of cobalt in other parts of the world.[360] In sum, however, the vast majority of market

354 Case COMP/M.4476 Norilsk Nickel/OMG Nickel, Commission decision of 6 February 2007, point 9.

355 Case COMP/M.4000 Inco/Falconbridge, Commission decision of 4 July 2006, see in particular points 167 and 168. The product market definition was previously left open in Case No COMP/M.3767 BHP/WMC, Commission decision of 26 April 2005, point 9.

356 Case COMP/M.4256 Xstrata/Falconbridge, Commission decision of 13 July 2006, point 23; Case COMP/M.4000 Inco/Falconbridge, Commission decision of 4 July 2006, points 223 – 226; the geographic market definition was previously left open in Case No COMP/M.3767 BHP/WMC, Commission decision of 26 April 2005, point 14.

357 Q17 – Question 23.

358 Q17 – Question 24; Q18 – Question 29.

359 Q17 – Questions 33 and 34; Q18 – Questions 38 and 39.

360 Q17 – Question 28; Q18 – Question 33.

participants consider that Chinese volumes should be included in the relevant geographic market.[361]

366. However, the geographic market definition can ultimately be left open in this case as the Proposed Transaction does not give rise to any competition concerns on the market for refined cobalt under the alternative geographic market definitions.

V.8.4. Assessment of effects on competition

367. Following Xstrata's entry into cobalt production through the acquisition of Falconbridge in 2006,[362] Glencore and Xstrata entered into a five-year exclusive marketing agreement in 2007 covering all of Xstrata's production of nickel and cobalt. This agreement was […].[363]

368. The Merged Entity will become […] largest producer of refined cobalt worldwide with a combined production share by volume of [10-20]% (Glencore: [5-10]%; Xstrata: [0-5]%). Important competitors include OM Group (production share of [10-20]%), ENRC ([10-20]%), Jinchuan ([5-10]%), Zheijang Huayou ([5-10]%), Zhangjiagang Huayou ([0-5]%), ICCI ([0-5]%) and QNI ([0-5]%). If Chinese production is subtracted from the market size, the Merged Entity's share in the worldwide production of refined cobalt is [10-20]% (Glencore: [10-20]%; Xstrata: [5-10]%).

369. Moreover, Glencore and Xstrata are specialized in the production of different purity levels of cobalt. While Xstrata exclusively produces high purity cobalt, Glencore exclusively produces low purity cobalt. Thus, there is no overlap between Glencore and Xstrata's production activities in the different purity levels of cobalt.

370. The Notifying Party estimates the market shares of the Merged Entity by volume in the supply of refined nickel to be as follows (based on sales from Glencore's volumes and Xstrata's volumes):[364]

	Worldwide			**Worldwide excluding intra-Chinese sales**		
	Glencore	**Xstrata**	**Combined**	**Glencore**	**Xstrata**	**Combined**
Refined cobalt (Total)	[10-20]	[0-5]	**[10-20]**	[10-20]	[5-10]	**[20-30]**
Sub-segmentation						
Metallic cobalt[365]	[10-20]	[5-10]	**[20-30]**	[10-20]	[5-10]	**[20-30]**
Chemical cobalt	[5-10]	[0-5]	**[10-20]**	[20-30]	[0-5]	**[20-30]**

361 Q17 – Question 21; Q18 – Question 27.

362 See Case COMP/M.4256 Xstrata/Falconbridge, Commission decision of 13 July 2006

363 [internal document of the Notifying Party] of 15 November 2011 (CMS 2808).

364 The market shares are based on Glencore and Xstrata's company data and market size calculations of CRU.

365 If the metallic cobalt segment is further sub-segmented by specific end uses, combined market shares at the worldwide level reach a maximum of [20-30]% for hard-facing steel (increment of [5-10]%) and [20-30]% for super alloys (increment of [0-5]%). The Notifying Party has not been able to provide market shares for these sub-segments excluding Chinese volumes.

371. The Notifying Party submits that their competitors' market shares at the supply level are the same as at the production level as presented in paragraph 368 above.

372. The market investigation did not raise any specific competition concerns regarding cobalt supply. Customers also generally maintained that they could switch their purchases to Glencore's and Xstrata's competitors.[366] Moreover, the vast majority of market participants indicated that the Glencore and Xstrata' exclusive distribution agreement of 2007 did not cause a change in the cobalt markets.[367] Moreover, market participants generally did not expect the Proposed Transaction to have an impact on their business,[368] or on prices and product availability of cobalt.[369]

373. In light of the Parties' market shares,[370] the Parties' existing close relationship and the results of the market investigation as outlined above, the Commission finds that a sufficient number of viable competitors will remain active in the market for refined cobalt and its sub-segments.

V.8.5. Conclusion

374. Therefore the Commission concludes that, with regard to the production and sale of refined cobalt, the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market.

V.9. Ferrochrome

V.9.1. Introduction

375. Ferrochrome is an alloy of chromium and iron generally containing between 47% and 70% chrome. It is primarily used in steel production. According to the Notifying Party, stainless steel accounts for 80% of ferrochrome use while special and alloy steel accounts for 20%. Stainless steel producers can also use stainless steel scrap as a source of ferrochrome, which according to the Notifying Party accounts for 28.3% of chrome content consumed in global stainless steel production and 61% in EEA production.

376. Ferrochrome is often classified by the amount of carbon and chrome it contains as (i) low, (ii) medium or (iii) high carbon ferrochrome and as (iv) charge ferrochrome.

377. The activities of Glencore and Xstrata overlap only regarding the supply of charge ferrochrome, given that Glencore has no production of ferrochrome and Xstrata only supplies charge ferrochrome, which is marketed by Glencore. There is also a vertical relationship between the activities of Glencore and Xstrata in chrome ore (upstream) and ferrochrome (downstream), without this resulting in vertically affected markets.

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366 Q17 – Question 52.

367 Q17 – Question 35; Q18 – Question 40.

368 Q17 – Question 66; Q18 – Question 70.

369 Q17 – Question 70; Q18 – Question 73.

370 See in this context paragraphs 17 and 18 of the Horizontal Merger Guidelines.

V.9.2. Relevant product market

378. The Commission has not previously reached a definitive position on the relevant product market for ferrochrome. In Outokumpu/Avesta Sheffield,[371] the Commission noted that there are no substitutes for chromium in the production of stainless steel but did not reach a conclusion on whether new ferrochrome and stainless steel scrap belong to the same product market.

379. The Commission has investigated whether new ferrochrome and stainless steel scrap belong to the same product market as well as whether the different grades of ferrochrome (charge, low, medium and high) should be seen as separate markets. The market investigation showed that both sub-segmentations may be relevant, considering that some of the respondents note that there are different end uses and production processes as well as different chemical compositions (regarding ferrochrome grades).[372]

380. However, as the transaction does not raise any serious doubts as to its compatibility with the internal market regarding the supply of ferrochrome under any plausible market definition, the question whether the market for ferrochrome should be further segmented can be left open.

V.9.3. Relevant geographic market

381. The Notifying Party submits that the geographic scope of the market for ferrochrome is worldwide as the supply of and demand for ferrochrome is global in nature. The Commission has not previously reached a definitive position on the relevant geographic market for ferrochrome, even though it was analysed at EEA level on a previous case.[373]

382. Nonetheless, the market investigation has given clear indication that the market for ferrochrome, as well as any of the possible sub-segmentations, is not EEA wide, but either world-wide or world-wide excluding China, given that China has a 20% export tax on ferrochrome and, therefore, low actual exports.[374]

383. However, as the transaction does not raise any serious doubts as to its compatibility with the internal market regarding the supply of ferrochrome under any plausible market definition, the question whether the market for ferrochrome should be further segmented can be left open.

V.9.4. Assessment of effects on competition

384. Xstrata entered into a ferrochrome marketing agreement with Glencore on 21 April 1995, appointing Glencore as its exclusive worldwide marketing agent for the sale of ferrochrome produced by Xstrata, other than ferrochrome sold in the United

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371 Case COMP/M.2180 Outokumpu/Avesta Sheffield, Commission decision of 4 December 2000, point 20.

372 Q21 – Question 11-18.

373 Case COMP/M.2180 Outokumpu/Avesta Sheffield, Commission decision of 4 December 2000, points 24 and 27.

374 Q21 – Question 18-20.

States, Canada and certain Asian countries.[375] The Notifying Party submits that the agreement continues for as long as Xstrata produces ferrochrome.

385. The Merged Entity will become […] in the supply of ferrochrome worldwide (excluding stainless steel scrap) with a combined market share of [10-20]% (Glencore: [0-5]%; Xstrata: [10-20]%). Important competitors include ENRC ([10-20]%), Samancor ([10-20]%), Ehuj Metallurgical ([0-5]%), Sichuan Tianghi ([0-5]%) and Hernic ([0-5]%). In a hypothetical world-wide market excluding China, the Merged Entity's share in the worldwide supply of ferrochrome is [10-20]% (Glencore: [0-5]%; Xstrata: [10-20]%).

386. The Notifying Party estimate their combined market shares in the supply of ferrochrome as follows (based on sales from Glencore's volumes and Xstrata's volumes):[376]

Product	**Supply shares**								
	Glencore			**Xstrata**			**Combined**		
	WW	**Ex Ch**	**EEA**	**WW**	**Ex Ch**	**EEA**	**WW**	**Ex Ch**	**EEA**
Ferrochrome (Total)	[0-5]	[0-5]	[0-5]	[10-20]	[10-20]	[20-30]	[10-20]	[10-20]	[20-30]
Sub-segmentation by grade									
Charge ferrochrome	[0-5]	N/A	[0-5]	[30-40]	N/A	[50-60]	[30-40]	N/A	[50-60]
High carbon ferrochrome	[0-5]	N/A	[0-5]	[0-5]	N/A	[0-5]	[0-5]	N/A	[0-5]
Medium carbon ferrochrome	[0-5]	N/A	[0-5]	[0-5]	N/A	[0-5]	[0-5]	N/A	[0-5]
Low carbon ferrochrome	[0-5]	N/A	[0-5]	[0-5]	N/A	[0-5]	[0-5]	N/A	[0-5]

387. The market investigation has confirmed the Notifying Party' submission that the exclusive marketing agreement ensures that from the customer's perspective, the transaction will not result in any differences for the supply of ferrochrome in general and the supply of charge ferrochrome in particular.[377] As noted, Glencore already supplies approximately […]% of Xstrata's total ferrochrome sales globally under this continuing exclusive marketing agreement. Moreover, the increments in market shares are […] [0-5]% in any of the market segments due to Glencore's reliance on Xstrata volumes prior to the Proposed Transaction.

388. Moreover, the majority of respondents to the market investigation found that Glencore and Xstrata are currently not in a position to act independently from their customers. Customers also generally maintained that they could switch their purchases to the Glenore and Xstrata's competitors.[378] Moreover, the vast majority

375 Xstrata's ferrochrome sold to the United States and Canada is distributed by Glencore under separate distribution agreements. In relation to certain Asian countries, Xstrata has entered into a ferrochrome distribution agreement with Mitsui.

376 The market shares are based on Glencore and Xstrata's company data and market size calculations of CRU, a research and consulting company.

377 Q21 - Question 52.

378 Q17 - Question 40.

of respondents do not expect the transaction to have an impact on their business,[379] or on prices and product availability of ferrochrome in general and the supply of charge ferrochrome in particular.[380]

389. In light of the Parties' individual market shares,[381] and in particular the limited market share increments as well as the Parties' existing close relationship and the results of the market investigation as outlined above, the Commission finds that a sufficient number of viable competitors will remain active in the market for ferrochrome and its potential sub-segments.

V.9.5. Conclusion

390. Therefore, the Commission concludes that, with regard to the supply of ferrochrome and charge ferrochrome in particular, the transaction does not raise serious doubts as to its compatibility with the internal market.

V.10. Thermal coal and coking coal

V.10.1. Introduction

391. Coal continues to be one of the world's most extensive, affordable and geographically diverse natural sources of energy. There are two main types of coal that are mined: black coal and brown coal.[382]

392. Brown coal is not traded internationally as it is not economically feasible to do so, compared to regular black coal. Neither Glencore nor Xstrata is active in the supply of brown coal.

393. Black coal is processed by crushing, sizing, washing,[383] blending and grading to meet customer needs. The activities of Glencore and Xstrata overlap in the production and sale of black (or bituminous) coal. Glencore and Xstrata have no production facilities in the EEA, but sell to EEA customers from their respective mines, and in the case of Glencore, also via its trading activities. Glencore's mines are located in Colombia and South Africa. Xstrata's mines are located in Australia and South Africa and it also has an interest in a mine in Colombia. Moreover, Xstrata has exploration permits in Canada.

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379 Q21 - Question 52.

380 Q21 - Question 54.

381 See in this context paragraphs 17 and 18 of the Horizontal Merger Guidelines.

382 Brown coal is used to heat steam generating boilers in power stations and may also be made into briquettes, which are used for industrial or domestic heating. Brown coal can also be described as lignite. Lignite plays a significant role in the generation of electricity in certain Member States, such as Germany, the Czech Republic, Poland and Greece.

383 "Washing" is a process that relies on the relative densities between various minerals in coal, whereby the coal is crushed and washed to liberate unwanted minerals thereby reducing its impurity level. Ash and sulphur levels are reduced in particular.

394. The Notifying Party considers that the supply of black coal can be sub-divided into: (i) thermal (or steam) coal; and (ii) coking (or metallurgical) coal. This view is consistent with the Commission's decisional practice.[384]

395. The Proposed Transaction gives rise to horizontal overlaps in the production and supply of thermal coal, and in the supply of coking coal.

396. In view of the above, the present Decision analyses, first, the market definition and competitive effects of the Proposed Transaction with respect to thermal coal and, second, the market definition and competitive effects of the Proposed Transaction with respect to coking coal.

V.10.2. Thermal coal

397. Thermal coal is used in combustion processes to produce steam and heat by electricity producers and heavy industrial users such as cement producers.

398. The majority of the world's production of black coal is in thermal coal, which, according to the World Coal Association, accounted for 5,294 million MT out of a total black coal production of 6,185 million MT in 2010.[385]

V.10.2.1. Relevant product market

399. Thermal coal is a natural, non-standardized product, whose main parameters are moisture, volatile content, calorific value (CV), and the content of ash and sulphur. While the industry does not typically segment coal according to any individual property, it can nevertheless be said that the lower the moisture, ash and sulphur content and the higher the calorific value, the better the coal.

400. The Notifying Party states that there are two distinct product markets with respect to black coal, without further segmentation: (i) thermal coal; and (ii) coking coal.

401. This view is consistent with the Commission's decisional practice,[386] which generally distinguishes between thermal coal and coking coal, although it has ultimately left the exact market definition open.

402. During the market investigation, twenty-two out of twenty-three (22/23) customers replied that they cannot substitute thermal coal with coking coal.[387] Although only

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384 Case COMP/M.2413 BHP/Billiton, Decision of 14 June 2001; Case COMP/ECSC.1344 RAG/Sidarfin/BBCT, Commission decision of 22 December 2000; Case COMP/ECSC.1316 RAG/Burton, Commission decision of 17 November 1999; Case IV/ECSC.1252 RAG/Saarbergwerke/Preussag Anthrazit, Commission decision of 29 July 1998; Case COMP/M.3376 Dillinger Hüttenwerke/Saarstahl/Cokerie de Carling, Commission decision of 17 March 2004.

385 World Coal Association, http://www.worldcoal.org/resources/coal-statistics/.

386 Case COMP/M.2413 BHP/Billiton, Decision of 14 June 2001; Case COMP/ECSC.1344 RAG/Sidarfin/BBCT, Commission decision of 22 December 2000; Case COMP/ECSC.1316 RAG/Burton, Commission decision of 17 November 1999; Case IV/ECSC.1252 RAG/Saarbergwerke/Preussag Anthrazit, Commission decision of 29 July 1998; Case COMP/M.3376 Dillinger Hüttenwerke/Saarstahl/Cokerie de Carling, Commission decision of 17 March 2004.

387 Q13 – Question 17.

six out of twelve (6/12) competitors considered that thermal coal and coking coal are not substitutable from a supplier's perspective,[388] ten out of twelve (10/12) competitors considered that thermal coal and coking coal are not substitutable from a customer's perspective.[389] Overall, eleven out of twelve (11/12) responsive competitors and all (23/23) responsive customers agreed that the relevant product market should be the supply of thermal coal, as opposed to the supply of coking coal.[390]

403. With respect to further possible segmentations of thermal coal by geological properties into anthracite, bituminous coal and sub-bituminous coal, the majority of customers considered that the three different segments are not interchangeable,[391] whereas half of competitors considered that customers can substitute one segment with another, if required to.[392]

404. Furthermore, market conditions in spot sales of thermal coal are not substantially different from market conditions in sales under longer-term contracts, according to seventeen out of twenty-three (17/23) customers and eleven out of twelve (11/12) competitors. Twenty out of twenty-three (20/23) customers and eleven out of twelve (11/12) competitors consider than there are no barriers that preclude a supplier from selling thermal coal on the spot. Therefore, the market investigation does not show that there is a distinct product market for spot sales of thermal coal.

405. In view of the above, the market investigation suggests that the relevant product market comprises the supply of thermal coal, without further distinction between spot sales and sales under longer-term contracts. The Commission, thus, concludes that the relevant product market should not be defined on the basis of spot sales and longer-term sales of thermal coal.

406. With respect to possible segmentations of thermal coal by geological properties into anthracite, bituminous coal and sub-bituminous coal, the Commission does not have to take a definitive decision on the relevant product market, since the proposed transaction does not raise competition concerns in thermal coal under any plausible product market definition.

V.10.2.2. Relevant geographic market

407. A key feature of the geographic market for thermal coal is that it is transported from diverse regions around the world by seaborne means and is supplied locally by landborne means.

408. Thermal coal is often shipped over large distances because ocean freight costs are relatively low. Shipping costs typically account for less than 20% of the price of

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388 Q14 – Question 15.

389 Q14 – Question 16.

390 Q14 – Question 14; Q13 - Question 14. A few respondents preferred to distinguish terminologically between the product market for thermal coal, as opposed to "metallurgical" coal (comprising coking coal and PCI, i.e. pulverized coal injection). However, this does not influence the product market definition for thermal coal.

391 Q13 – Questions 10 to 13.

392 Q14 – Questions 10 to 13.

thermal coal supplied. More importantly, the incremental costs of shipping thermal coal over longer distances compared with shorter distances are small when using seaborne routes. Of the current global trade for thermal coal, Glencore estimates that […]% is shipped by sea.

409. The table[393] below shows the pattern of origin and destination of coal supplies from an Atlantic and from a Pacific perspective between 2007 (actual) and 2013 (expected). These numbers show that the seaborne market is in constant movement.

[…]

410. The Notifying Party claims that the relevant geographic market for thermal coal from the EEA perspective should comprise global seaborne supplies and also indigenous production in the EEA.

411. During the market investigation, the majority of customers[394] and ten out of twelve (10/12) competitors replied that there is no thermal coal from a given origin that customers cannot substitute to thermal coal from another origin in the world[395] because of its characteristics[396] or because of its price.[397]

412. Furthermore, most customers and competitors indicated that they can easily respond to small but significant non-transitory price increases in thermal coal originating from a specific region of the world.[398] In particular, customers can easily switch their purchases between Colombia, the USA, Russia and South Africa, and competitors can easily shift their sales between Colombia, the USA, Russia and South Africa.

413. Overall, nineteen out of twenty-one (19/21) responsive customers and all (11/11) responsive competitors consider that the relevant geographic market is the worldwide market for the seaborne supply of thermal coal.[399]

414. In view of the above, the market investigation suggests that the relevant geographic market is the worldwide market for the seaborne supply of thermal coal, without further distinction between different origins of seaborne thermal coal.

415. With respect to the question whether from an EEA perspective such a worldwide seaborne market should also include indigenous production in the EEA, the Commission does not have to take a definitive decision on the relevant geographic market, since the proposed transaction does not raise competition concerns in thermal coal even under the narrowest plausible market definition, i.e. the worldwide market for the seaborne supply of thermal coal.

393 […]

394 Twelve out of twenty-one (12/21) responsive customers.

395 For example, Colombia, USA, South Africa, Russia, Australia or Indonesia.

396 For example, sulphur content, volatile matter, moisture content, ash content or calorific value.

397 Q14 – Question 29; Q13 – Question 29.

398 Q14 – Questions 30-36; Q13 – Questions 30-40.

399 Q14 – Question 38; Q13 – Question 42.

416. Therefore, as the transaction does not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition on the market for thermal coal, the exact scope of the worldwide market for the seaborne supply of thermal coal (i.e. whether it includes indigenous production in the EEA) can be left open.

V.10.2.3. Assessment of effects on competition

417. The Notifying Party claims that the Proposed Transaction will not create any competition concerns in relation to the supply of thermal coal, mainly because of the Merged Entity's low market share, the large number of significant competitors and the existence of buyer power and low barriers to entry.

V.10.2.3.1. Market shares of Glencore and Xstrata in the worldwide market for the seaborne supply of thermal coal

418. In view of the fact that Glencore stated in the context of its IPO in 2011 that it marketed 196 million tonnes of the seaborne thermal coal market in 2010,[400] the question arises as to the types of sales of thermal coal that should be included in the calculation of the market shares of Glenore and Xstrata from a merger control perspective. This question concerns mainly the following types of sales: (i) sales of significant quantities by Glencore as agent of certain producers; (ii) sales by the large Colombian producer Cerrejón/CMC, of which Xstrata owns 33.3%; and (iii) sales financially settled by Glencore without physical delivery taking place.

V.10.2.3.2. Calculation of the possible market shares of Glencore and Xstrata

419. The Commission has examined the different shares of all types of sales in the worldwide market for the seaborne supply of thermal coal which could possibly be controlled or influenced by Glencore and Xstrata.

420. First, the tables below illustrate for 2011 (actual) and for 2012 (estimates) the possible market share of Glencore and Xstrata by including only sales[401] by Glencore and Xstrata as principals.

400 See page 22 of document entitled as "Announcement of intention to float on the London Stock Exchange and the Hong Kong Stock Exchange" available at Glencore's website: http://www.glencore.com/documents/Glencore_ITF_14_April_2011.pdf

401 These sales include both sales to end-customers and sales to traders, although the latter are […], e.g. […] MT by Glencore and […] MT by Xstrata in 2011.

2011:

	Glencore	Xstrata	Combined	Worldwide supply of seaborne thermal coal[402]
Sales in volume (in million tonnes)	[…]	[…]	[…]	752.3
Sales in percentage	[5-10]%	[5-10]%	[10-20]%	100%

2012:

	Glencore	Xstrata[403]	Combined	Worldwide supply of seaborne thermal coal[404]
Sales in volume (in million tonnes)	[…]	[…]	[…]	797.1
Sales in percentage	[5-10]%	[5-10]%	[10-20]%	100%

421. Second, the tables below illustrate for 2011 (actual) and for 2012 (estimates) the possible market share of Glencore and Xstrata by including (i) sales[405] by Glencore and Xstrata as principals; and also (ii) the hypothetical attribution of the sales of Cerrejón to Xstrata.

2011:

	Glencore	Xstrata	Combined	Worldwide supply of seaborne thermal coal[406]
Sales in volume (in million tonnes)	[…]	[…]	[…]	752.3
Sales in percentage	[5-10]%	[10-20]%	[10-20]%	100%

402 McCloskey Steam Coal Forecaster, Vol. 4/2011.

403 The significant increase in Xstrata's sales from 2011 to 2012 is due to two main factors. First, the 2011 figure does not include sales to Glencore ([…] million tonnes), since this would amount to double-counting, whereas the 2012 figure includes as well volumes possibly sold to Glencore. Second, there are increases in Xstrata's exports of thermal coal […].

404 McCloskey Steam Coal Forecaster, Vol. 4/2011.

405 These sales include both sales to end-customers and sales to traders, although the latter are […], e.g. […] MT by Glencore and […] MT by Xstrata in 2011.

406 McCloskey Steam Coal Forecaster, Vol. 4/2011.

2012:

	Glencore	Xstrata	Combined	Worldwide supply of seaborne thermal coal[407]
Sales in volume (in million tonnes)	[…]	[…]	[…]	797.1
Sales in percentage	[5-10]%	[10-20]%	[20-30]%	100%

422. Third, the tables below illustrate for 2011 (actual) and for 2012 (estimates) the possible market share of Glencore and Xstrata by including (i) sales[408] by Glencore and Xstrata as principals; (ii) the hypothetical attribution of the sales of Cerrejón to Xstrata; and (iii) the hypothetical attribution of the sales of Cerrejón to Xstrata.

2011:

	Glencore	Xstrata	Combined	Worldwide supply of seaborne thermal coal[409]
Sales in volume (in million tonnes)	[…]	[…]	[…]	752.3
Sales in percentage	[10-20]%	[10-20]%	[20-30]%	100%

2012:

	Glencore	Xstrata	Combined	Worldwide supply of seaborne thermal coal[410]
Sales in volume (in million tonnes)	[…]	[…]	[…]	797.1
Sales in percentage	[10-20]%	[10-20]%	[20-30]%	100%

423. Fourth, the tables below illustrate for 2011 (actual) and for 2012 (estimates) the possible market share of Glencore and Xstrata by including (i) sales[411] by Glencore

407 McCloskey Steam Coal Forecaster, Vol. 4/2011.

408 These sales include both sales to end-customers and sales to traders, although the latter are […], e.g. […] MT by Glencore and […] MT by Xstrata in 2011.

409 McCloskey Steam Coal Forecaster, Vol. 4/2011.

410 McCloskey Steam Coal Forecaster, Vol. 4/2011.

and Xstrata as principals; (ii) the hypothetical attribution of the sales of Cerrejón to Xstrata; (iii) the hypothetical attribution of the sales of Cerrejón to Xstrata; and (iv) the hypothetical attribution of financial settlements as physical sales to Glencore.

2011:

	Glencore	**Xstrata**	**Combined**	**Worldwide supply of seaborne thermal coal**[412]
Sales in volume (in million tonnes)	[…]	[…]	[…]	752.3
Sales in percentage	[10-20]%	[10-20]%	[20-30]%	100%

2012:

	Glencore	**Xstrata**	**Combined**	**Worldwide supply of seaborne thermal coal**[413]
Sales in volume (in million tonnes)	[…]	[…]	[…]	797.1
Sales in percentage	[10-20]%	[10-20]%	[30-40]%	100%

424. Therefore, even if all sales that can possibly be controlled by Glencore and Xstrata were attributed to their market shares, their combined market share would only reach [30-40]% in 2012. Nevertheless, the investigation shows that the market share of the Merged Entity is in fact lower as analysed below in sub-sections V.10.2.3.3 to V.10.2.3.6.

V.10.2.3.3. Control over Cerrejón/CMC by Xstrata

425. The Cerrejón mining operation in Colombia has a thermal coal production capacity of 32 million tonnes and in 2011 exported approximately 32.05 million tonnes of seaborne thermal coal. If Xstrata were to be considered as controlling Cerrejón, the combined market share of the Parties in the market for the worldwide supply of seaborne thermal coal would increase by approximately [0-5]%.

426. Xstrata has a 33.3% non-controlling interest in Cerrejón, which is co-owned equally with BHP Billiton ("BHP") and Anglo American ("Anglo"). Cerrejón's coal is marketed and sold exclusively by Coal Marketing Company Limited ("CMC"), which is also owned in equal parts by Anglo, BHP and Xstrata, on a fixed agency fee of […]% of the payments actually received by Cerrejón.

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411 These sales include both sales to end-customers and sales to traders, although the latter are […], e.g. […] MT by Glencore and […] MT by Xstrata in 2011.

412 McCloskey Steam Coal Forecaster, Vol. 4/2011.

413 McCloskey Steam Coal Forecaster, Vol. 4/2011.

427. Cerrejón mining is managed by a […] where each shareholder is represented [description of management],[414] where [description of management].

428. Cerrejón mining also has a board of directors with […]. Each of the Cerrejón shareholders has the right to appoint […] to its board. [description of voting rules and decisions of the board].

429. CMC is a marketing entity with a nominal capital and no significant assets. It is owned in equal parts by Anglo, BHP and Xstrata. CMC's primary purpose is the marketing and coordination of the delivery of Cerrejón coal. To this end, it also enters into supply agreements to sell the Cerrejón coal. CMC's business and affairs are managed by […].

430. The CMC board consists of a maximum of […], with each of the current shareholders having the right to appoint […]. [description of voting rules].[415]

431. Each of the three shareholders is represented by [description of decisions and voting rules].[416]

432. In view of the above, Xstrata does not have control over Cerrejón/CMC and the latter's sales should not be attributed to Xstrata's market share. Nevertheless, the reduced incentives of Cerrejón/CMC to compete against Xstrata are taken into account in the present Decision.

V.10.2.3.4. Control over KPC and Arutmin agency sales by Glencore

433. Glencore has long-term exclusive agency agreements in place with PT Kaltim Prima Coal ("KPC") and PT Arutmin Indonesia ("Arutmin"), both Indonesian producers controlled by BUMI Resources PLC.[417] […][418] […].[419]

434. Under these agreements, Glencore as a market advisor conveys market intelligence and information about business opportunities to the Principals. If a Principal is interested in a potential opportunity, Glencore [description of Glencore's role]. The Principal may then [description of Principal's role].

435. Under […], Glencore [description of the agency agreement].

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414 [List of exceptions].

415 [description of voting rules].

416 [description of some decisions and the majority required to adopt them].

417 For ease of reference, KPC and Arutmin are each referred to also as "Principal" or collectively as "Principals". The KPC agency agreement is valid until […] and the Arutmin agency agreement is valid until […]. Furthermore, in 2012 Glencore is expected to sell […] tonnes as KPC's agent and […] tonnes as Arutmin's agent. Apart from these two agreements, in July 2011, Glencore entered into a two-year market advisory agency agreement with Store Norske Spitsbergen Grubekompani AS ("SNSG") in Norway. However, since volumes sold under this agency agreement will not exceed […] tonnes per year, it is not examined separately in the present Decision why it should not be included in Glencore's market share.

418 […]

419 In fact, from the KPC agency volumes […]% in 2011 and […]% in 2012 was sold in the EEA. From the Arutmin agency volumes […]% in 2011 and […]% in 2012 was sold in the EEA.

436. [description of the agency agreement].[420] [description of the agency agreement][421] [description of the agency agreement].

437. In view of the above, Glencore does not have control over the volumes it sells as KPC's and Arutmin's agent to an extent that would lead to the attribution of these sales to Glencore's market share. Nevertheless, the reduced incentives of KPC and Arutmin to compete against Xstrata are taken into account in the present Decision.

V.10.2.3.5. Financial settlements

438. Glencore claimed that […] tonnes were financially settled in 2010 without physical delivery taking place. Financial settlement occurs where Glencore and a third party mutually agree to settle their obligations in respect of part or all of the quantity in a given delivery period by financial means instead of proceeding with the physical delivery of the traded volumes. Financially settled sales do not involve any physical movement of coal and are simply a means to settle cash flows.

439. Since physical delivery does not take place such "sales" do not concern the market for the supply of seaborne thermal coal. The market investigation shows that in 2011 five out of twenty-two (5/22) customers had part of their purchases financially settled and ten out of eleven (10/11) competitors had part of their sales financially settled in the end.[422] Several respondents settled financially an important part of their sales/purchases. If such sales were to be counted in the market share of each supplier in the market for the worldwide supply of seaborne thermal coal, the denominator as the addition of all these market shares would exceed the currently used denominator that represents the worldwide consumption of seaborne thermal coal.

440. Therefore, financial settlements should not be included in Glencore's market share as this would not correspond to its share in the market for the worldwide supply of seaborne thermal coal.

V.10.2.3.6. Market shares of Glencore and Xstrata

441. In view of the above, the market shares of Glencore and Xstrata should include the volumes they have sold as principals, which leads to [5-10]% for Glencore and [5-10]% for Xstrata ([10-20]% combined market share) in 2011 and [5-10]% for Glencore and [5-10]% for Xstrata ([10-20]% combined market share) in 2012.

442. However, the reduced incentives for KPC/Arutmin and Cerrejón/CMC to compete against Glencore and Xstrata respectively are taken into account in the present Decision.[423]

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420 Form CO § 2261.

421 See Glencore's reply to Question 20 (in particular the internal documents attached as Appendix 20.A) of the RFI dated 28 June 2012.

422 Q14 – Question 46; Q13 – Question 51.

423 See section V.10.2.3.8.

V.10.2.3.7. Position of Glencore and Xstrata with respect to thermal coal of different geological properties and different origins

443. Since coal is a non-standardised product, the Commission has examined the positions of Glencore and Xstrata in several segments of thermal coal differentiated by geological properties or by origin.

444. With respect to segments of different geological properties, Glencore and Xstrata overlap only in the supply of seaborne *bituminous* thermal coal reaching a combined market share of [10-20]%, as the table below demonstrates.[424]

2011	Glencore (in million tonnes)	Glencore %	Xstrata (in million tonnes)	Xstrata %	Combined %	Segment size (in million tonnes)[425]
Anthracite	[…]	[0-5]%	[…]	[0-5]%	[0-5]%	0
Bituminous	[…]	[5-10]%	[…]	[5-10]%	[10-20]%	607.7
Sub-bituminous (including 42.7 million tonnes of Indonesian lignite)	[…]	[5-10]%	[…]	[0-5]%	[5-10]%	182.9
Total	[…]	[5-10]%	[…]	[5-10]%	[10-20]%	790.5

445. th respect to segments of different origins, the Glencore and Xstrata overlap in the supply of seaborne South African and Australian thermal coal reaching combined market shares of [20-30]% and [20-30]%, as the table below demonstrates.[426]

2011	Glencore (in million tonnes)	Glencore %	Xstrata (in million tonnes)	Xstrata %	Combined %	Segment size (in million tonnes)[427]
Colombia	[…]	[20-30]%	[…]	[0-5]%	[20-30]%	76.1
South Africa	[…]	[10-20]%	[…]	[5-10]%	[20-30]%	67.5
North America (Canada + USA)	[…]	[10-20]%	[…]	[0-5]%	[10-20]%	32.8
Russia	[…]	[10-20]%	[…]	[0-5]%	[10-20]%	84.7
Australia	[…]	[0-5]%	[…]	[20-30]%	[30-40]%	145.3
Indonesia	[…]	[5-10]%	[…]	[0-5]%	[5-10]%	320.9
Others	[…]	[0-5]%	[…]	[0-5]%	[0-5]%	16.4
Total	[…]	[5-10]%	[…]	[5-10]%	[10-20]%	743.7

424 Form CO § 2432.

425 Source: Wood MacKenzie Reports.

426 Form CO § 2429.

427 McCloskey Steam Coal Forecaster, Volume 4/2011, page 8.

446. Even if the Atlantic region were to be examined separately as a segment, the Merged Entity would reach a combined market share of [10-20]% with an increment of only [0-5]%, as the table below demonstrates.[428]

2011	Glencore (in million tonnes)	Glencore %	Xstrata (in million tonnes)	Xstrata %	Combined %	Segment size (in million tonnes)[429]
Atlantic	[…]	[10-20]%	[…]	[0-5]%	[10-20]%	188.5
Pacific	[…]	[5-10]%	[…]	[5-10]%	[10-20]%	549.1
Total	[…]	[5-10]%	[…]	[5-10]%	[10-20]%	737.6

V.10.2.3.8. Competing suppliers of seaborne thermal coal

447. Although the Merged Entity will create the largest producer of seaborne thermal coal in the world, the market remains fragmented and there are still several important suppliers who can effectively compete with the Merged Entity.

448. The table[430] below shows the most important producers of seaborne thermal coal and their produced volumes in 2011.[431]

Competitor	**Volumes (million tonnes)**	**Estimated share (%)**
• Adaro (Indonesia)	• […]	• [5-10]
• Anglo American (Australia/SA)	• […]	• [0-5]
• Arutmin (Indonesia)	• […]	• [0-5]
• Banpu (Thailand/Indonesia/China)	• […]	• [0-5]
• Berau (Indonesia)	• […]	• [0-5]
• BHP Billiton (Australia/SA/USA)	• […]	• [0-5]
• Cerrejón (Colombia)	• […]	• [0-5]
• Drummond Coal (Colombia)	• […]	• [0-5]
• GBP (PT Gunung Bayan Pratama Coal) (Indonesia)	• […]	• [0-5]

428 Form CO § 2425.

429 McCloskey Steam Coal Forecaster, Volume 3/2011, page 75.

430 Source: Glencore's estimates based on a combination of public information and internal statistics, and Wood Mackenzie Thermal Coal Monthly Update January 2012.

431 Form CO § 2304.

Competitor	Volumes (million tonnes)	Estimated share (%)
• Glencore (Colombia/SA)	• […]	• [0-5]
• Kideco (Indonesia)	• […]	• [0-5]
• KPC (Indonesia)	• […]	• [5-10]
• Peabody (Australia/USA)	• […]	• [0-5]
• Rio Tinto (Australia/USA)	• […]	• [0-5]
• SUEK (Russia)	• […]	• [0-5]
• Tanito (PT Tanito Harum) (Indonesia)	• […]	• [0-5]
• Xstrata (Australia/SA)	• […]	• [5-10]
• Others	• […]	• [40-50]
• **TOTAL**	• **790.5**	• **100**

449. During the market investigation, most customers listed numerous (often more than ten) actual and potential suppliers of seaborne thermal coal.[432] Most competitors also listed numerous competing suppliers of seaborne thermal coal.[433] The lists usually included important players such as BHP, Anglo, Rio Tinto, Peabody, Drummond, Morgan Stanley and Goldman Sachs.

450. Furthermore, nine out of eleven (9/11) competitors and nineteen out of twenty-two (19/22) customers have predominantly non-exclusive contracts.[434] In addition, ten out of twelve (10/12) competitors and twenty-two out of twenty-three (22/23) customers do not have any supply contracts which are automatically renewed (evergreen).[435]

451. Therefore, even if Cerrejón/CMC and KPC/Arutmin have reduced incentives to compete with Xstrata and Glencore respectively, there are numerous other suppliers with the ability and incentive to effectively compete with the Merged Entity.

V.10.2.3.9. Port and rail Infrastructure

452. With respect to competitors' access to infrastructure that is necessary to export seaborne thermal coal, mainly port and rail facilities, the market investigation

432 Q13 – Question 46.

433 Q14 – Question 43.

434 Q14 – Question 58; Q13 – Question 63.

435 Q14 – Question 64; Q13 – Question 68.

showed that Glencore and Xstrata do not control any bottleneck facility that could allow them to restrict exports of seaborne thermal coal.

453. In Colombia, there are several accessible ports that allow suppliers to export their desired quantities of thermal coal. In South Africa, the rail operator Transnet is State-owned and independent from the Glencore and Xstrata, whereas the Richard's Bay Coal Terminal ("RBCT") operates independently and has several important shareholders apart from Glencore and Xstrata, such as Anglo, BHP, Exxaro Coal and Sasol. In Australia, despite Xstrata's significant minority shareholdings in three ports, all these ports are common user facilities that are obliged by government regulations to give equal and non-discriminatory access to all users which meet the access requirements. In the rest of the world, Glencore and/or Xstrata do not have interests in port or rail facilities.[436]

V.10.2.3.10. The role of indexes

454. The Commission also examined whether the Merged Entity could post-merger cause anti-competitive effects by exerting their influence on a specific price index.

455. The use of indexed pricing in contracts is not as common in coal as in certain metals and many customers in the market investigation replied that they do not index a significant part of their purchases.[437]

456. The index most commonly used by EEA customers is the Argus API2, which is based on transactions on coal destined to ARA (Amsterdam-Rotterdam-Antwerp). In the market investigation, customers often replied that they use the API2 for approximately 60-80% of their purchases.[438] Follow-up phone calls with traders and customers[439] as well as the high number of transactions taking place every day in API2[440] indicate that it is a liquid and robust index that cannot be manipulated.

457. EEA customers use to a limited extent the index Argus API4, which is based on transactions on coal originating from RBCT. The globalCOAL NEWC index based on coal originating from Newcastle (Australia) is used only exceptionally and for minimal quantities by EEA customers.[441]

458. Therefore, the Merged Entity cannot influence more than any other player the index mostly used in the EEA, the Argus API2.

V.10.2.3.11. Possibility of entry of new suppliers

459. During the market investigation, several customers and competitors gave specific examples of entrants in the market for the seaborne supply of thermal coal in the

436 Reply to Question 12 of the 3rd RFI in Phase I. See also the minutes of the phone calls with […] on 22/10/2012 and with […] on 18/10/2012

437 Q13 – Question 72.

438 Q13 – Question 72.

439 For example, see the minutes of the phone calls with […] on 19/10/2012, with […] on 22/10/2012 and with […] on 18/10/2012.

440 Reply to Question 11 of the 3rd RFI in Phase I.

441 Q13 – Question 72.

past five years.[442] Also, the market investigation pointed to USA thermal coal being increasingly exported to the EEA due to the development of shale gas as a cheap energy source for US customers.[443]

V.10.2.3.12. Buyer power

460. During the market investigation, eleven out of twenty-three (12/23) customers claimed that they do not have enough buyer power to introduce their terms in negotiations.[444] However, all (12/12) competitors considered that customers have enough buyer power to introduce their terms in negotiations.[445]

461. Therefore, the market investigation suggests that there is at least some degree of buyer power in the worldwide market for the seaborne supply of thermal coal.

V.10.2.4. Conclusion

462. Therefore, in particular in view of the abovementioned market shares of the Merged Entity and the existence of significant competitors, the Commission concludes that, with regard to the supply of thermal coal, the transaction does not raise serious doubts as to its compatibility with the internal market.

V.10.3. Coking coal

V.10.3.1. Relevant product market

463. Coking coal is predominantly used to produce coke, which is then used as a reductant in ovens and in blast furnaces for the production of pig iron, an intermediate process in the production of steel.

464. The World Coal Association estimates that in 2010, approximately 14.4% of the world's black coal production was composed of coking coal, i.e. 891 million MT out of a total production of 6,185 million MT of black coal.[446]

465. Coals suitable for coking exhibit specific physical and chemical characteristics. They are generally not sold for power generation.

466. As stated in paragraph 394 above, the Notifying Party claims that there are two distinct product markets with respect to black coal, without further segmentation: (i) thermal coal; and (ii) coking coal.[447] The Notifying Party claims that there should be no further segmentation within coking coal in respect to hard coal and soft coal.[448]

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442 Q13 – Question 81; Q14 – Question 78.

443 For example, see the minutes of the phone calls with […] on 19/10/2012 and with […] on 18/10/2012.

444 Q13 – Question 78.

445 Q14 – Question 75.

446 World Coal Association, http://www.worldcoal.org/resources/coal-statistics/.

447 Form CO p. 603, § 2198.

448 Form CO p. 603, § 2195.

467. The Commission has in previous decisions found that there is a market for coal for electricity generation (steam coal/thermal coal) and coal for the steel industry (metallurgical coal/coking coal), although the exact market definition has been left open.[449]

468. During the market investigation, eight out of ten customers (8/10) and ten out of ten (10/10) competitors replied that black coal should be divided into two distinct product markets, one for thermal coal and one for coking coal, and that they are not substitutable.[450] [451]

469. In respect to whether there is a distinct product market for spot sales of coking coal, as opposed to sales under longer-term contracts, ten out of ten (10/10) customers and seven out of nine (7/9) competitors consider that competitive conditions are the same and that both types of sales should be regarded as one product market.[452] [453]

470. It is suggested by three out of 10 (3/10) competitors and one out of ten (1/10) customer that coking coal should be further segmented into hard coal and soft coal.[454]

471. In view of the above, the market investigation strongly suggests that the relevant product market comprises the supply of coking coal, without distinction between spot sales and sales under longer-term contracts. With respect to possible segmentations of coking coal by hard coal and soft coal, the Commission does not have to take a definitive decision on the relevant product market, since the Proposed Transaction does not raise competition concerns in coking coal under any plausible product market definition.

472. Therefore, as the Proposed Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition on the market for coking coal, the question whether the market for coking coal should be further segmented can be left open.

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449 Case COMP/M.2413 BHP/Billiton, Commission decision of 14 June 2001; Case COMP/ECSC.1344 RAG/Sidarfin/BBCT, Decision of 22 December 2000; Case COMP/ECSC.1316 RAG/Burton, Commission decision of 17 November 1999; Case IV/ECSC.1252 RAG/Saarbergwerke/Preussag Anthrazit, Commission decision of 29 July 1998.

450 Q15 - Question 14; Q16 – Question 14. A few respondents suggested that PCI (pulverised coal injection) should also be included as a distinct product market. However, since there is no overlap between Glencore and Xstrata's activities in PCI, the present Decision does not address separately PCI as a potential product market. In fact, only Glencore is active in the supply of PCI, but does not produce any PCI.

451 Further, the market investigation has confirmed that all (10/10) customers do not consider thermal coal and coking coal to be substitutable. Also, seven out of ten (7/10) replies from competitors states that coking coal and thermal coal are not substitutable from a supplier's perspective and nine out of ten (9/10) do not consider coking coal and thermal coal to be substitutable from a customer's perspective.

452 Q15 – Question 25; Q16 – Question 25

453 Moreover, the market investigation also shows that cocking coal sold on a spot basis or under a long-term contract interact and influence each other, according to nine out of ten (9/10) customers and nine out of nine (9/9) competitors.

454 Q16 – Question 10; Q15 – Question 10.

V.10.3.2. Relevant geographic market

473. The Notifying Party claims that the relevant geographic market for coking coal should comprise indigenous production in the EEA and global seaborne supplies.[455]

474. The market investigation shows that all (9/9) competitors and all (10/10) customers consider the geographic market for seaborne supply of coking coal to be worldwide in scope.[456]

475. With respect to the possibility of including also EEA indigenous production, as the transaction does not raise serious doubts as to its compatibility with the internal market even under the narrowest plausible market definition on the market for coking coal, the exact geographic scope of the market for the seaborne trade of coking coal can be left open.

V.10.3.3. Assessment of effects on competition

476. Glencore and Xstrata's combined market share in the worldwide seaborne supply of coking coal is [5-10]%, with an increment of [0-5]%.[457]

477. If the product market were to be segmented into a distinct market for hard coking coal and a distinct market for soft coking coal, Glencore and Xstrata have a combined market share of [5-10] % for hard coking coal (HCC) with an increment of [0-5] % and a combined market share of [10-20] % with an increment of [0-5] % for soft coking coal (SCC).[458]

478. Glencore and Xstrata's small market shares and the minimal increment mean that the Proposed Transaction will have little effect as to the effective competition.

V.10.3.4. Conclusion

479. Therefore, the Commission concludes that, with regard to the supply of coking coal, the transaction does not raise serious doubts as to its compatibility with the internal market.

V.11. Non-core products

480. Glencore and Xstrata's activities also overlap in the production or supply of chrome ore, vanadium, gold, silver, platinum, palladium, sulphuric acid, and molybdenum. However, the Merged Entity's market share does not exceed [10-20]% where overlaps occur at the production or supply level.

481. Therefore, the Commission concludes that, with regard to the production and supply of chrome ore, vanadium, gold, silver, platinum, palladium, sulphuric acid, and molybdenum, the transaction does not raise serious doubts as to its compatibility with the internal market.

455 Form CO p. 612, § 2216.

456 Q16 – Question 36; Q15 – Question 40.

457 Form CO p. 654, table 6F.40.

458 Form CO p. 655, table 6F.42

VI. REMEDIES

482. On 30 October, 13 November and 19 November 2012, the parties proposed remedies in order to address the competition concerns raised with respect to the EEA zinc metal market. The sequence of proposals is analysed below.

VI.1. The remedy proposal of 30 October 2012

483. A first set of formal commitments was submitted by Glencore on 30 October 2012, which was followed by revisions formally submitted on 2 November 2012 (referred to as "The initial Proposed Commitments").

484. The initial Proposed Commitments consisted of the following commitments:

a. A commitment to terminate, with effect as of 31 December 2013, the part of the exclusive EEA Off-Take Agreement relating to commodity grade zinc products, concluded between Nyrstar and Glencore on 22 December 2008, under which Nyrstar supplies zinc metal from its European production sites to Glencore.

b. A commitment to terminate an agency agreement ("the Representative Agreement") concluded between Nyrstar and Glencore on 23 January 2009, under which Nyrstar acts as a non-exclusive sales agent for Glencore in Austria, Benelux, France, Germany, Central and Eastern Europe excluding Poland and the Baltic States.

c. A commitment for Glencore to (re-)introduce Nyrstar to zinc metal Customers and to transfer to Nyrstar the associated Commercial Data to that effect.

d. A commitment not to re-enter a long-term agreement with Nyrstar for commodity grade zinc metal (including a commitment not to engage in practices that have the same effect of a long-term agreement). For the purposes of this commitment, a long-term agreement is defined as any agreement with a duration of more than one year.

e. A commitment to cease the exclusivity clause contained in the off-take agreement with Nyrstar as of […], in relation to products not already committed to Glencore by that date. During the transitional period between […] and […], Nyrstar will have the right but not the obligation to sell available commodity grade zinc metal products to Glencore under the off-take agreement.

f. A commitment to divest Glencore's 7.79% minority stake in Nyrstar.

485. The initial Proposed Commitments were market tested by the Commission on 5 November 2012.

VI.1.1. Commission assessment of the initial Proposed Commitments on commodity grade zinc

VI.1.2. Objective of the initial Proposed Commitments

486. The termination of the EEA off-take and Representation Agreements concluded with Nyrstar should, according to Glencore, have ensured that post-merger the Merged Entity does not directly or indirectly control or influence the supply of commodity grade zinc metal in the EEA by Nyrstar. Still according to Glencore, these commitments would also have ensured that Nyrstar would be re-introduced to the market as a zinc supplier that is independent of the Merged Entity.

487. Where a concentration would likely raise serious doubts as to its compatibility with the internal market, the parties may seek to modify the proposed concentration in order to resolve the competition concerns.

488. Under the Merger Regulation, it is the Commission's responsibility to show that a concentration would be likely to raise serious doubts as to its compatibility with the internal market. By contrast, it is for the parties to the concentration to put forward appropriate commitments. The Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market so that they will prevent any significant impediment to effective competition in all relevant markets where competition concerns were identified. To this aim, the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view.[459] Furthermore, commitments entered into during a Phase I merger procedure must constitute a direct and sufficient response capable of clearly excluding the serious doubts within the meaning of Article 6(1)(c) of the Merger Regulation.[460]

489. According to the Remedies Notice, commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.[461]

490. Furthermore, the Remedies Notice specifies that commitments in phase I can only be accepted where the competition problem is readily identifiable and can easily be remedied. The competition problem therefore needs to so straightforward and the remedies so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out 'serious doubts' raised by the transaction.[462]

491. The Remedies Notice provides that, whilst being preferred remedy, divestitures or the removal of links with competitors are not the only remedy possible to eliminate

459 Paragraph 9 of the Remedies Notice.

460 See judgment of the EU General Court in Case T-119/02 Royal Philips Electronics NV v Commission [2003] ECR II-1433, paragraph 80.

461 Paragraph 9 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267/2, (referred to as the "Remedies Notice").

462 Paragraph 81 of the Remedies Notice.

certain competition concerns. The Commission may accept other types of commitments, but only in circumstances where the other remedy proposed is at least equivalent to a divestiture with respect to its effects.[463] The Remedies Notice also sets out that a suitable remedy may consist of the termination of distribution agreements with competitors.[464]

VI.1.3. The volumes addressed

492. The quantities covered by the terminated part of the off-take agreement amounted in 2010 to […] MT and in 2011 to […] MT. These volumes are important and in principle could neutralise to a large extent the overlap created by the merger.

493. A majority of respondents[465] to the market test considered the roughly 350 000 MT of zinc metal covered by the agreement in 2011 to be in principle sufficiently large to remedy the competition concerns, provided that the links between Glencore and Nyrstar would be terminated to enable Nyrstar's quantities effectively to compete against Glencore. The overwhelming majority of respondents also expressed an interest in purchasing commodity grade zinc metal from Nyrstar.

494. The market test however clearly indicated that the quantities effectively sold to third parties by Nyrstar as a result of the Proposed Commitments would likely be too small in terms of quantities, since (i) the remedies would not eliminate the possibility for Glencore to continue buying volumes of zinc metal from Nyrstar in the EEA under short-term agreements (defined as agreements with durations of less than 1 year); (ii) Glencore would continue to have incentives to purchase significant quantities from Nyrstar; and (iii) Nyrstar would continue to have incentives to sell significant quantities to Glencore.

495. On the basis of these responses, the Commission thus found a serious risk that Glencore would have both the incentives and the ability to buy a significant part of the Nyrstar quantities which would render the initial Proposed Commitments insufficient.

VI.1.4. Independence of Nyrstar, incentives to compete on a lasting basis with Glencore, and effectiveness of the initial Proposed Commitments

496. The market test primarily focussed on whether Nyrstar depended on the merged entity for the supply of zinc concentrate with the result that Nyrstar's independence from Glencore for zinc in the EEA would be limited. Most of the market test respondents dispelled these concerns as Nyrstar has its own supply of zinc concentrate, in part as a result of a successful vertical integration strategy. Information obtained by the Commission as part of the investigation shows that Nyrstar sources […] zinc concentrate needs from Glencore and Xstrata.

497. However, a majority of market test participants pointed to a serious risk of a continuation of the current off take situation on a de facto basis. Approximately

463 Paragraph 61 of the Remedies Notice.

464 Paragraph 60 of the Remedies Notice.

465 Throughout this section, "respondents" or "participants" refers to those respondents who did not answer "*Don't know*" to the relevant question in the market test.

half of the respondents considered in particular that the continued right of Glencore to buy commodity grade zinc metal from Nyrstar on a one year basis would entail significant risks for the overall effectiveness of the initial Proposed Commitments.

498. Some market test participants stated that, due to the high working capital requirements and marketing costs that the setting up of its own trading operation entails, Nyrstar would have incentives rather to sell to a trader such as Glencore and to obtain upfront payments. One respondent also noted that Nyrstar's incentive to market commodity zinc in competition with Glencore would be further diminished by the fact that the long term exclusive contract for zinc metal outside the EEA and for lead remained in place. In addition, some respondents to the market test indicated that the commitments lacked comprehensive anti-circumvention clauses ensuring that Glencore could in any way (for example through financing deals) influence Nyrstar's incentives to act as an independent competitor in the EEA zinc metal market.

499. Some market participants also questioned the fact that Glencore’s commitment not to re-enter long-term agreements with Nyrstar only related to commodity grade zinc metal, and not to all zinc metal products (including zinc alloys). This could have further limited the effectiveness of the commitment not to re-enter long-term exclusive off-takes with Nyrstar.

500. As to the merged entity's incentives to buy significant volumes from Nyrstar, the Commission considers that post-merger Glencore would have controlled even more volumes in Europe than before and would have had an even higher incentive to prevent its main rivals from obtaining access to the Nyrstar volumes. In addition, for Glencore there would have been an incentive to limit the damages that it would have to pay to Nyrstar for early termination of the off-take agreement, resulting in particular from the latter obtaining lower prices for the quantities than those promised previously by Glencore under the long term agreement.

501. Therefore, the Commission considered the initial Proposed Commitments as being insufficient to guarantee the independence of Nyrstar and its incentives to compete on a lasting basis with Glencore.

502. A clear-cut remedy also requires that there should not be the need for on-going monitoring of compliance with the commitment, in particular because non-compliance may be difficult to monitor from the outset.[466] Also this condition was not met by the initial Proposed Commitments.

VI.1.5. Transition periods

503. Respondents to the market test largely confirmed that transition arrangements are necessary to ensure that Nyrstar can compete with the Merged Entity, in particular given that Nyrstar may require time to re-establish a functioning marketing department. However, some respondents to the market test stated that the transition period should be shorter, in the sense that Nyrstar should be free to market its commodity grade zinc metal earlier than […] in order to be in a position to compete as soon as possible for contracts being finalised in […]. Some respondents

466 See paragraph 14 of the Remedies Notice.

to the market test therefore stressed that […] should end as of closing of the merger.

504. The Commission inferred from these responses that the proposed transitional period would have created the risk of Glencore continuing the *de facto* exclusivity for […]. This prolonged exclusivity period would have been without justification. It would have implied that the initial Proposed Commitments would have become effective only a significant time after the merger was implemented and its negative effects could materialise.

VI.1.6. Divestiture of minority stake in Nyrstar

505. The divestment of Glencore's 7.79% minority stake in Nyrstar contributes to eliminate the serious doubts identified in the commodity grade zinc market, as it allows Nyrstar to be fully independent from the Merged Entity. The divestment of the minority stake removes the structural link between Nyrstar and Glencore, thereby taking away the ability of Glencore to appoint an observer to the board of Nyrstar and removes the potential for Glencore to obtain any access to competitively-sensitive information.

506. In order to maintain the structural effect of Glencore's commitment to divest its minority stake in Nyrstar, Glencore shall not, for a period of ten years after the Effective Date, either acquire any stake in Nyrstar or acquire direct or indirect influence over Nyrstar. Glencore commits not to exercise its voting rights in respect of the Divestment Assets from the Effective Date until its minority stake is divested. During that period, the Monitoring Trustee shall exercise Glencore’s voting rights as an independent financial investor.

507. As confirmed by the market test, the Commission considers that this commitment ensures that there are no structural links and no flow of competitively-sensitive information between the Merged Entity and Nyrstar. In itself, it removes a limitation on Nyrstar's incentives to compete with the merged entity in the EEA.

VI.1.7. Conclusion on the initial Proposed Commitments

508. Overall, the majority of respondents (including some major zinc metal customers) considered that the initial Proposed Commitments did not eliminate the concerns arising from the transaction in the EEA zinc metal market in their entirety.

509. On the basis of this overall assessment, and of the specific responses from the market test discussed above, the Commission concluded that the Initial Proposed Commitments taken as a whole were not sufficient to remove the serious doubts identified on the EEA zinc metal market.

510. The Notifying Party was informed about the Commission's conclusions on the Initial Proposed Commitments on 9 November 2012.

VI.2. The remedy proposal of 13 November 2012

511. On 13 November 2012 Glencore submitted a second remedy proposal consisting of (a) a slightly amended version of the Nyrstar remedy included in the initial remedy proposal (with the main difference being that the commitment not to enter long-term agreements with Nyrstar applied to all types of zinc metal); […].

512. The market test of the second Proposed Commitments was launched on 14 November 2012.

VI.2.1. Evaluation of the second Proposed Commitments

VI.2.1.1. […]

513. […]

514. Approximately half of the respondents to the market test considered that […].

515. About half of the respondents questioned the effectiveness […].

VI.2.1.2. Partial termination of the Nyrstar agreement

516. A majority of respondents to the market test raised again the concern that the fact that the merged entity could continue to purchase zinc products from Nyrstar under short-term agreements (1 year or less) would be detrimental to the effectiveness of the second Proposed Commitments.

VI.2.1.3. Effectiveness of the second Proposed Commitments

517. A significant majority of respondents considered that the second Proposed Commitments taken as a whole failed the requirements in terms of effectiveness in view of the merged entity's possibility to acquire zinc metal from Nyrstar under contracts with durations of less than one year, […], and that the overall remedy package include in the second Proposed Commitments did not remove in their entirety the competition concerns associated with the proposed transaction.

VI.2.1.4. Conclusion on the second Proposed Commitments

518. The Commission considers that the second Proposed Commitments would have continued to enable the merged entity to buy significant quantities under (possibly revolving) one year agreements from Nyrstar […]. As a result, there may not have been any meaningful quantities freed up by the second Proposed Commitments.

519. The second Proposed Commitments also did not resolve the other key shortcomings of the Nyrstar remedy as proposed under the initial Proposed Commitments (as identified above in paragraphs 496 to 502). […].

VI.3. The remedy proposal of 19 November 2012

520. The remedy proposal of 19 November, as refined on 21 November 2012, (referred to as "The final Proposed Commitments") consists of the following commitments:

    a. A commitment to terminate the EEA Off-Take Agreement and the Representative Agreement as described under the initial Proposed Commitments.

    b. A commitment for Glencore to (re-)introduce Nyrstar to all zinc Customers and to transfer to Nyrstar the associated Commercial Data to that effect as described under the initial Proposed Commitments.

c. A commitment to divest Glencore's 7.79% minority stake in Nyrstar, as described under the initial Proposed Commitments.

d. A commitment to cease the exclusivity clause contained in the off-take agreement with Nyrstar as of the date of closing of the proposed transaction. During the Transitional Period between the date of closing and […], Nyrstar will have the right but not the obligation to sell commodity grade zinc metal products to Glencore under the off-take agreement, provided that those products have not been produced after […]. This last provision[467] essentially clarifies and ensures together with other clauses of the final Proposed Commitments that Nyrstar cannot sell to Glencore, and Glencore cannot purchase, directly or indirectly Nyrstar Zinc Products which are produced by Nyrstar after the Termination Date subject to the exceptions in clause 12 the final Proposed Commitments.[468]

e. An obligation not to purchase directly or indirectly any zinc metal products from Nyrstar in the EEA, for a period of ten years from the date of closing. This obligation does not include purchases of Nyrstar commodity grade zinc metal products during the Transitional Period.

f. As part of the obligation not to purchase zinc products from Nyrstar for 10 years, and in order to maintain the structural effect of termination of the EEA Off-Take and representative Agreements, Glencore undertakes not to "*enter into any arrangements with, or engage in any practices with respect to, Nyrstar, including, but not limited to, those relating to the production, supply, trading, warehousing, hedging or financing, which are aimed at or have the effect of materially restricting Nyrstar's ability or incentives to compete effectively with the Parties in the zinc metal market in the EEA*" (clause 11).

521. The final Proposed Commitments were verified in the market with market players that have an in-depth knowledge of how the market functions, in particular on issues that could give rise to circumvention of the remedies, if not properly addressed, including Nyrstar.

VI.3.1. Assessment of the final Proposed Commitments

VI.3.1.1. Objective

522. The objective of the final Proposed Commitments is comparable to the initial Proposed Commitment, namely to ensure that post-merger Nyrstar is re-introduced

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467 Clause 5 of the final Proposed Commitments, as refined on 21 November 2012.

468 The exceptions in clause 12 of the final Proposed Commitments, as refined on 21 November 2012, include *inter alia* the possibility of purchases of Nyrstar Zinc Products by the Parties through an LME warrant. This exception, however, shall not apply in circumstances where Nyrstar Zinc Products are put on LME warrants by Nyrstar or its agents pursuant to an arrangement or understanding between Nyrstar and Glencore according to which Glencore will purchase, directly or indirectly, those LME warrants. This delineation of the scope of the exceptions under clause 12 essentially clarifies and ensures, together with other clauses of the final Proposed Commitments, that Glencore and Nyrstar cannot through the use of purchases of LME warrants engage in practices which would effectively circumvent the objective of the discontinued business commitments as well as clause 11 (described at paragraph 520.f of the present Decision).

to the market as a supplier of commodity grade zinc metal products independent of the Parties and that the Parties do not directly or indirectly control or influence the supply of Nyrstar's zinc metal. The principal difference with the initial Proposed Commitments is that the final Proposed Commitments include as part of the objective that the Parties do not influence the supply of Nyrstar products through any arrangements or practices which are aimed at or have the effect of materially restricting Nyrstar's ability or incentive to compete effectively with the Parties in the zinc metal market in the EEA.

VI.3.1.2. Zinc metal volumes

523. The affected volumes (close […] MT in 2011) addressed by the final Proposed Commitments are identical to those of the initial Proposed Commitments. Given the undertaking contained in the final Proposed Commitments that the merged entity will not have access to these volumes for a 10-year period, the remedy effectively removes the increment in the share of the EEA supply market brought about by the transaction. The final Proposed Commitments also remove or strongly mitigate the increase in market concentration brought about by the transaction. This is particularly the case under the assumption that pre-merger Glencore was exercising some partial influence on Xstrata's commercial strategy through its minority stake.

524. The final Proposed Commitments are considered particularly effective in reducing the degree of concentration in the sales of commodity-grade zinc, since pre-merger scenario Nyrstar was so far contractually prevented from competing in this segment, so that the remedy effectively introduces a new player to the market.

525. The final Proposed Commitments are also effective in reducing Glencore's control over the volumes of zinc metal available in the EEA which, absent the remedy, would have been significantly increased ([50-60]%). The volumes released by the final Proposed Commitments eliminate or strongly mitigate this projected increase in concentration.

VI.3.1.3. Structural nature of the remedy

526. The introduction of a 10-year ban on trading between Glencore and Nyrstar, which had been suggested by some market test participants, meets the concerns of the market tests and removes in a clear-cut way the possibility for Glencore to continue the current off-take agreement with Nyrstar on a *de facto* basis. Under this commitment, Nyrstar will be incentivised to develop its own marketing capacity, or to rely on different distribution arrangements, and will no longer be dependent on Glencore for selling its output volumes. As explained above, Nyrstar has its own supply of zinc concentrate and has the relevant expertise, ability and capacity to market itself the commodity grade zinc currently sold to Glencore under the off-take agreement.

527. In order to address the Commission's concerns raised with regard to the previous proposed commitments, according to which the Merged Entity and Nyrstar would still have the legal possibilities to achieve outcomes similar to the off-take agreement, the final Proposed Commitments contain the following clause: *"Glencore shall also not enter into any arrangements with, or engage in any practices with respect to, Nyrstar, including, but not limited to, those relating to the production, supply, trading, warehousing, hedging or financing, which are aimed*

at or have the effect of materially restricting Nyrstar’s ability or incentives to compete effectively with the Parties in the zinc metal market in the EEA”. This clause, formulated in an objective and clear-cut manner, ensures that the effectiveness of the final Proposed Commitments is not jeopardised.

528. The 10-year prohibition on Glencore purchasing zinc metal volumes from Nyrstar, as formulated under the final Proposed Commitments, implies that the termination of the current long-term exclusive agreement between the two parties has a impact on the market that is comparable in nature to that of a divestiture. The remedy will therefore reduce the market power of the merged entity in a structural manner, with a beneficial impact on competition, and as such contributing to eliminating the competition concerns arising from the transaction in a comprehensive and effective manner.

529. Given the strong interest in Nyrstar’s zinc metal output expressed in the market test of the initial Proposed Remedies, the restriction on Glencore purchasing its supplies from Nyrstar does not unduly restrict Nyrstar’s competitive position in the market. This conclusion is reinforced by that the fact post-merger Glencore and Nyrstar would be the […] suppliers of zinc metal in the EEA (with a market share in excess of [60-70]% between them). A restriction to trade between horizontal competitors of this significance does not represent an undue restriction of the two undertakings' economic activity.

530. The final Proposed Commitments also do not require active on-going monitoring of compliance with the commitment, in the sense that violations are easily and immediately detectable by market participants.

531. Already the outcome of the market test of the initial Proposed Commitments prompted the Commission to conclude that the divestiture of Glencore's minority stake in Nyrstar was already cleared by the market test of the initial Proposed Commitments as an adequate structural remedy.

VI.3.1.4. Transitional period

532. Glencore commits not to implement the concentration with Xstrata unless and until it has agreed with Nyrstar the termination of the EEA off-take agreement and the Representative Agreement with effect as of the end of the Transitional Period. As of closing, Nyrstar will have the right (but not the obligation) to market and sell, directly or indirectly, to any person, including Glencore. At the same time, the exclusivity provisions to the benefit of Glencore as contained in the off-take agreement will cease to have effect as of date of closing of the transaction.

533. As such, the final Proposed Commitments aim at solving the competition problem as quickly as possible by removing the off-take exclusivity that Glencore enjoys whilst at the same time providing for the necessary transitional arrangements.

534. The transition arrangements in the commitments are considered sufficient to ensure that Nyrstar can compete timely with the parties, in particular given that Nyrstar may require time to re-establish a functioning marketing department. The final proposed commitments also meet the concerns expressed by some market test participants that Nyrstar should be free to market its zinc as of the completion date in order to enable it to compete as soon as possible.

VI.3.1.5. Conclusion on the final Proposed Commitments

535. As the final Proposed Commitments have solved in a clear-cut manner the deficiencies raised by the Commission following the responses to the market tests, the Commission considers the commitments suitable for remedying the serious doubts on the compatibility of the concentration with the common market, which have been established in the previous sections of this Decision.

VI.4. Overall conclusion on the final Proposed Commitments

536. For the reasons outlined above, the final Proposed Commitments entered into by the undertakings concerned are adequate and sufficient to eliminate the serious doubts as to the compatibility of the transaction with the internal market.

537. Sections B, C and D of the Commitments submitted by the Notifying Party on 19 November 2012 (and refined on 21 November 2012) constitute conditions attached to this decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out in the sections E and F of the same Commitments constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market.

VII. CONCLUSION

538. For the above reasons, the Commission has decided not to oppose the Proposed Transaction as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in sections B, C and D of the Commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.

For the Commission

(signed)
Joaquín ALMUNIA
Vice-President

By hand and by fax: 00 32 2 296 4301
European Commission – Merger Task Force
DG Competition
Rue Joseph II 70 Jozef-II Straat
B-1000 BRUSSELS

CASE COMP/M.6541 – Glencore International plc / Xstrata plc

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EEC) No. 139/2004 (the "**Merger Regulation**"), Glencore hereby provides the following commitments (hereinafter the "**Commitments**") in order to enable the European Commission (hereinafter the "**Commission**") to declare the acquisition by Glencore of the outstanding share capital in Xstrata which it does not already own (the "**Proposed Concentration**") compatible with the internal market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (hereinafter the "**Decision**").

These Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that these Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

These Commitments are given by Glencore without prejudice to Glencore's position that the Proposed Concentration is not capable of significantly impeding effective competition within the internal market or a substantial part thereof and is therefore compatible with the internal market and the functioning of the EEA agreement. Furthermore, nothing in these Commitments shall be construed as implying that Glencore agrees with the presentation of the facts set out in the Decision.

These Commitments replace in full all previous commitments, whether signed or unsigned, submitted by Glencore to the Commission in relation to the Proposed Concentration.

SECTION A. DEFINITIONS

For the purpose of these Commitments, the following terms shall have the following meaning:

Affiliated Undertakings: Undertakings controlled by the Parties and/or by the ultimate parents of the Parties whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

Available Relevant Products: Nyrstar Relevant Products under the EEA Off-Take Agreement which have not been designated by Glencore as having been committed as of Closing.

Closing: Date of closing of the Proposed Concentration.

Discontinued Business: The business consisting of the marketing of Nyrstar Relevant Products.

Divestment Assets: All shares (International Securities Identification Number BE0003876936) that Glencore holds in Nyrstar at the Effective Date. Glencore notes that on the day of submitting these Commitments, it holds 13,245,757 shares in Nyrstar, amounting to approximately 7.79% of Nyrstar's outstanding share capital.

Divestiture Trustee: One or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Glencore and who has received from Glencore the exclusive Trustee mandate to sell the Divestment Assets to a purchaser **[…]** in the event that the Divestment Assets are not sold otherwise to a Third Party in compliance with the Commitments below.

EEA: The European Economic Area.

EEA Off-Take Agreement: The Off-Take Agreement insofar as it relates to Nyrstar Relevant Products.

Effective Date: The date of adoption of the Decision.

First Divestiture Period: A period of **[…].**

Glencore: Glencore International plc, with its registered office at Queensway House, Hilgrove Street, St. Helier, JE1 1ES, Jersey and its headquarters at Baarermattstrasse 3, 6341 Baar, Switzerland, and its Affiliated Undertakings.

Monitoring Trustee: One or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Glencore, and who has the duty to monitor Glencore's compliance with the conditions and obligations attached to the Decision.

Nyrstar: Nyrstar NV, with its registered office at Zinkstraat 1, 2490 Balen, Belgium, and its corporate office at Tessinerplatz 7, 8002 Zurich, Switzerland, and undertakings controlled by Nyrstar whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

Nyrstar Commercial Data: Information relating to the Nyrstar Relevant Products sold since **[…]**, including up-to-date details of the Nyrstar Customers and their contact details, the terms and conditions of supply by Glencore including pricing, the quantity and quality of Nyrstar Relevant Products sold to each Nyrstar Customer under the EEA Off-Take Agreement, and details of any specific quality requirements of each Nyrstar Customer and any quality complaints made by any Nyrstar Customer.

Nyrstar Customers: All customers which have been or will be supplied by Glencore with Nyrstar Relevant Products **[…]**.

Nyrstar Relevant Products: Commodity grade zinc metal (as defined in the Off-Take Agreement as Zinc Products) from (i) the zinc smelting operations owned and/or operated by Nyrstar located at Rue Jean-Jacques Rousseau, F-59950 Auby, France, (ii) the zinc smelting operations owned and/or operated by Nyrstar at Zinkstraat 1, 2490 Balen, Belgium, (iii) the zinc smelting operations owned and/or operated by Nyrstar at Hoofdstraat 1, 6024 AA Budel-Dorplein, The Netherlands, and (iv) the zinc alloying operations owned and/or operated by Nyrstar at Fabriekstraat 144 bus. 2, B3 900 Overpelt, Belgium.

Nyrstar Zinc Products: Commodity grade zinc products, non-commodity grade zinc products and speciality zinc products from (i) the zinc smelting operations owned and/or operated by Nyrstar located at Rue Jean-Jacques Rousseau, F-59950 Auby, France, (ii) the zinc smelting operations owned and/or operated by Nyrstar at Zinkstraat 1, 2490 Balen, Belgium, (iii) the zinc smelting operations owned and/or operated by Nyrstar at Hoofdstraat 1, 6024 AA Budel-Dorplein, The Netherlands, and (iv) the zinc alloying operations owned and/or operated by Nyrstar at Fabriekstraat 144 bus. 2, B3 900 Overpelt, Belgium.

Off-Take Agreement: The off-take agreement (including subsequent addendums and amendments) concluded between Nyrstar and Glencore on 22 December 2008 under which Nyrstar supplies commodity grade zinc **[…]** to Glencore.

Parties: Glencore and Xstrata.

Placing: A sale by way placing of the Divestment Assets by one or more bank(s) appointed by Glencore for the purposes of giving effect to such a placing; provided that the placing is given effect by such bank(s) conducting this via a general placement into the market at the best price obtainable by such bank(s) in accordance with the rules of the relevant exchange or a sale by the bank(s) using any anonymous order system available by the relevant exchange or any combination thereof or otherwise in some customary manner provided that in any case Glencore shall not be aware of the identity of the buyers of the Divestment Assets.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Assets in accordance with the criteria set out in Section D.

Representative Agreement: The representative agreement (including subsequent amendment) concluded between Nyrstar and Glencore on 23 January 2009 pursuant to which Nyrstar acts as Glencore’s non-exclusive agent to promote and solicit orders for Nyrstar Relevant Products in Austria, Benelux, France, Germany, Central and Eastern Europe excluding Poland and the Baltic States.

Termination Date: **[…]**.

Third Party: Any natural person or legal entity independent from the Parties.

Transitional Period: period between Closing and Termination Date.

Trustee(s): The Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: The period of **[…]** from the end of the First Divestiture Period

Xstrata: Xstrata plc, with its registered office at Bahnhofstrasse 2, 6301 Zug, Switzerland, and its Affiliated Undertakings.

SECTION B. THE DISCONTINUED BUSINESS COMMITMENT

1 In order to restore effective competition, Glencore commits (a) to terminate the EEA Off-Take Agreement as well as the Representative Agreement and (b) for a period of ten years from Closing, not to purchase directly or indirectly Nyrstar Zinc Products and thereby to relinquish and to transfer control over the marketing of all Nyrstar Relevant Products. In addition, Glencore commits to divest its minority stake in Nyrstar.

2 The object of these Commitments is to ensure that post-Proposed Concentration Nyrstar is re-introduced to the market as a supplier of the Nyrstar Relevant Products independent of the Parties and that the Parties do not directly or indirectly control or influence the supply of Nyrstar Zinc Products through any arrangements with, or any practices with respect to, Nyrstar which are aimed at or have the effect of materially restricting Nyrstar's ability or incentive to compete effectively with the Parties in the zinc metal market in the EEA. This is to improve the overall structure of supply of zinc metal in the EEA.

3 Glencore commits not to implement the Proposed Concentration unless and until it has agreed with Nyrstar the termination of the EEA Off-Take Agreement with effect as of the end of the Transitional Period.

4 As of Closing, Nyrstar will have the right (but not the obligation) to market and sell, directly or indirectly, Available Relevant Products to any person.

5 The exclusivity provisions contained in Section 5(a) of the Off-Take Agreement shall cease to have effect as of Closing in respect of the Nyrstar Relevant Products. During the Transitional Period, Nyrstar will have the right (but not the obligation) to sell Available Relevant Products to Glencore under the Off-Take Agreement provided that those Available Relevant Products have not been produced after the Termination Date.

6 Glencore shall not enforce any provision(s) of the Off-Take Agreement, to the extent that such provision(s) would contravene compliance with these Commitments.

7 Glencore commits to agree with Nyrstar the termination of the Representative Agreement simultaneously with the termination of the EEA Off-Take Agreement; such termination shall take effect during the Transitional Period, as of a date determined by Nyrstar.

8 In order to enable Nyrstar to act independently of Glencore, Glencore undertakes to introduce or re-introduce Nyrstar to all Nyrstar Customers within **[…]** following Closing. To the extent that Glencore sells Nyrstar Relevant Products to new customers during the Transitional Period, Glencore also undertakes to introduce Nyrstar to those new customers within **[…]** from the end of the Transitional Period.

9 Glencore undertakes to transfer to Nyrstar the Nyrstar Commercial Data, within **[…]** following Closing and to transfer an updated set of the Nyrstar Commercial Data within **[…]** from the end of the Transitional Period.

10 From the Effective Date until Closing, Glencore shall preserve the economic viability, marketability and competitiveness of the Discontinued Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Discontinued Business. In particular Glencore undertakes:

(a) not to carry out any act upon its own authority that might have a significant adverse impact on the Discontinued Business;

(b) to make available sufficient resources for the development of the Discontinued Business and fulfilment of the terms of the Off-Take Agreement.

11 Subject to paragraph 12, in order to maintain the structural effect of these Commitments, Glencore shall not, for a period of ten years from Closing, purchase, directly or indirectly, Nyrstar Zinc Products. Glencore shall also not enter into any arrangements with, or engage in any practices with respect to, Nyrstar, including, but not limited to, those relating to production, supply, trading, warehousing, hedging or financing, which are aimed at or have the effect of materially restricting Nyrstar's ability or incentive to compete effectively with the Parties in the zinc metal market in the EEA.

12 For the avoidance of doubt, the obligation in paragraph 11 shall not include:

(i) purchases of Nyrstar Relevant Products during the Transitional Period in accordance with paragraph 5;

(ii) purchases of Nyrstar Zinc Products by the Parties through an LME warrant;

(iii) purchases of Nyrstar Zinc Products from third parties where Glencore can show that it was not aware and in accordance with established market practice in the zinc metal industry would not have been expected to be aware, at the time of purchase, that those products were Nyrstar Zinc Products.

The exemption of Clause 12(ii) shall not apply in circumstances where Nyrstar Zinc Products are put on LME warrants by Nyrstar or its agents pursuant to an arrangement or understanding between Nyrstar and Glencore according to which Glencore will purchase, directly or indirectly, those LME warrants.

13 The obligation in paragraph 11 shall apply unless the Commission has, subsequent to the Effective Date, found that the structure of the market has changed to such an extent that adhering to these Commitments is no longer necessary to render the Proposed Concentration compatible with the internal market.

14 For the avoidance of doubt, these Commitments shall not prevent the Parties from purchasing products (including zinc metal products) from Nyrstar other than Nyrstar Zinc Products or to market such other products.

SECTION C. THE DIVESTMENT ASSETS COMMITMENT

15 Glencore commits to divest the Divestment Assets within the First Divestiture Period on the basis set out in this Section C.

16 This divestment shall take place through one or both of the following alternatives according to Glencore's discretion:

(a) a transfer of the Divestment Assets by way of sales via a Placing on the NYSE Euronext Exchange or any other exchange on which the Divestment Assets are listed; or

(b) a transfer of the Divestment Assets to a Purchaser in compliance with the conditions as set out below in paragraph 17.

17 In the case of a divestment contemplated in paragraph 16 (b), Glencore further commits to the following:

(a) to divest, or procure the divestiture of the Divestment Assets, to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 22 (b);

(b) to find a Purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Assets (or remaining Divestment Assets, as applicable) within the First Divestiture Period.

18 To the extent Glencore has not transferred the Divestment Assets pursuant to paragraph 16 (a) or (b) at the end of the First Divestment Period, Glencore shall grant the

Divestiture Trustee an exclusive mandate to sell the Divestment Assets in accordance with the procedure described in paragraph 32 in the Trustee Divestiture Period.

19 In order to maintain the structural effect of these Commitments, Glencore shall not, for a period of ten years after Closing, acquire:

(a) any stake in Nyrstar; or

(b) direct or indirect influence over Nyrstar,

unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of such stake or influence is no longer necessary to render the Proposed Concentration compatible with the internal market.

20 Glencore commits not to exercise its voting rights in respect of the Divestment Assets from the Effective Date until the end of the First Divestiture Period or the Trustee Divestiture Period. The Monitoring Trustee shall exercise Glencore's voting rights in respect of the Divestment Assets as an independent financial investor, and with a view to fulfilling the Parties' obligations under these Commitments and to preserve the value of the Divestment Assets.

21 Glencore shall be deemed to have complied with the Commitments in paragraphs 15 to 20 if, by the end of the Trustee Divestiture Period,

(a) the transfer of the Divestment Assets has been completed; or

(b) Glencore has entered into a final binding sale and purchase agreement, if the Commission approves the purchaser and the terms in accordance with the procedure described in paragraph 22 (b) and if closing takes place within a period not exceeding 3 months after the approval of the Purchaser and the terms of sale by the Commission.

SECTION D. THE PURCHASER

22 In the case of a divestment contemplated in paragraph 16 (b):

(a) In order to ensure the maintenance of effective competition, the purchaser, in order to be approved by the Commission, must be independent of and unconnected to the Parties and not be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns (the before-mentioned criteria for the Purchaser hereafter the "**Purchaser Requirements**"); and

(b) the final binding sale and purchase agreement shall be conditional on the Commission's approval. When the Parties have reached an agreement with a purchaser, they shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. The Parties must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Assets are being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that the Divestment Assets are being sold in a manner consistent with the Commitments.

Section E. TRUSTEE

I. Appointment Procedure

23 From a date set by the Commission, Glencore shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If

(a) Glencore has neither transferred the Divestment Assets pursuant to paragraph 16 (a) nor entered into a binding sales and purchase agreement relating to the Divestment Assets one month before the end of the First Divestiture Period; or

(b) in the case of a divestment contemplated in paragraph 16 (b), if the Commission has rejected a purchaser proposed by Glencore at that time or thereafter,

Glencore shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.

24 The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by Glencore in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Assets, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by Glencore

25 No later than one week after the Effective Date, Glencore shall submit a list of one or more persons whom Glencore proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, Glencore shall submit a list of one or more persons whom Glencore proposes to appoint as Divestiture Trustee to the Commission for approval.

26 The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee(s) fulfils the requirements set out in paragraph 24 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee(s) to fulfil its duties under these Commitments;

(b) the outline of a work plan which describes how the Trustee(s) intends to carry out its assigned tasks;

(c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

27 The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, Glencore shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Glencore shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by Glencore

28 If all the proposed Trustees are rejected, Glencore shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 25 and 26.

Trustee nominated by the Commission

29 If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Glencore shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

30 The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of Glencore, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

31 The Monitoring Trustee shall:

(a) monitor and ensure compliance with the Commitments, and in particular the commitment to terminate the EEA Off-Take Agreement and the commitment, for a period of ten years from Closing, not to purchase directly or indirectly Nyrstar Zinc Products as well as Glencore's obligation not to enter into any arrangements with, or engage in any practices with respect to, Nyrstar which are aimed at or have the effect of materially restricting Nyrstar's ability or incentive to compete effectively with the Parties in the zinc metal market in the EEA;

(b) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;

(c) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(d) propose to Glencore such measures as the Monitoring Trustee considers necessary to ensure Glencore's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Discontinued Business;

(e) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, potential purchasers receive sufficient information relating to the Divestment Assets in particular by reviewing, if available, the information memorandum;

(f) provide to the Commission, sending Glencore a non-confidential copy at the same time, a written report within 15 days after the end of every month until the Termination Date. The report shall cover the progress of the divestiture process as well as potential purchasers. From the Termination Date, reports shall be submitted every six months until the all obligations in these Commitments are satisfied. The report shall cover the compliance with Glencore's outstanding obligations under the Commitments. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending Glencore a non-confidential copy at the same time, if it concludes on reasonable grounds that Glencore is failing to comply with these Commitments;

(g) within one week after receipt of the documented proposal referred to in paragraph 22 (b), submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and as to whether the Divestment Assets are sold in a manner consistent with the conditions and obligations attached to the Decision.

Duties and obligations of the Divestiture Trustee with regard to the Divestment Assets

32 Within the Trustee Divestiture Period, the Divestiture Trustee shall, **[…]**, either sell the Divestment Assets by means of the mechanism set out in paragraph 16 (a) or sell the Divestment Assets to a Purchaser by means of the mechanism set out in paragraph 16 (b), provided that in the latter case, the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 22 (b). The Divestiture Trustee shall carry out the sale of the Divestment Assets on such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. The Divestiture Trustee shall protect the legitimate financial interests of Glencore, subject to the Parties' unconditional obligation to divest **[…]** in the Trustee Divestiture Period.

33 In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

34 The Parties shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Parties' books, records and documents insofar as they relate to the Discontinued Business, necessary for fulfilling its duties under the Commitments and the Parties shall provide the Trustee upon request with copies of any document. The Parties shall make available to the Trustee one or more offices on its premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

35 The Parties shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request. This shall include all administrative support functions relating to the Discontinued Business and the divestment of the Divestment Assets which are currently carried out at headquarters level. The Parties shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers. Glencore shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.

36 Glencore shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing of the Divestment Assets, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, Glencore shall cause the documents required for effecting the sale and the Closing to be duly executed.

37 The Parties shall indemnify the Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

38 At the expense of the Parties, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Glencore's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should Glencore refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Glencore. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 37 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served Glencore during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

39 If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:

(a) the Commission may, after hearing the Trustee, require Glencore to replace the Trustee; or

(b) Glencore, with the prior approval of the Commission, may replace the Trustee.

40 If the Trustee is removed according to paragraph 39, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 23 to 29.

41 Beside the removal according to paragraph 39, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

SECTION F. REPORTING

42 Glencore shall submit written reports in English on how the implementation of these Commitments is proceeding no later than 10 days after the end of every month following the Effective Date until the Termination Date (or otherwise at the Commission's request). From the Termination Date, reports shall be submitted every six months.

SECTION G. THE REVIEW CLAUSE

43 The Commission may, where appropriate, in response to a request from Glencore showing good cause and accompanied by a report from the Monitoring Trustee

(a) grant an extension of the time periods foreseen in the Commitments, or

(b) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

44 Where Glencore seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall Glencore be entitled to request an extension within the last month of any period.

21 November 2012

(signed)

duly authorised for and on behalf of

Glencore