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## China's Clearance of the Panasonic/Sanyo Transaction with Conditions

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China's Ministry of Commerce ("MOFCOM") on October 31, 2009 cleared the Panasonic/Sanyo transaction with conditions, concluding a nine-month review period. The Panasonic/Sanyo transaction is the most recent of the five transactions that MOFCOM has cleared with conditions since the Anti-Monopoly Law ("AML") took effect on August 1, 2008. The first four were InBev/Anheuser-Busch, Mitsubishi Rayon/Lucite, General Motors/Delphi and Pfizer/Wyeth.

### The Transaction

Both Panasonic and Sanyo are Japanese conglomerates with diversified businesses and operations worldwide. Both companies develop, manufacture and sell batteries. Panasonic and Sanyo entered into a binding agreement in December 2008 under which Panasonic would acquire a majority stake in Sanyo through a tender offer for approximately USD9 billion. Closing of the transaction is subject to certain conditions, including clearance by regulatory authorities in all relevant jurisdictions.

The parties submitted a notification in January 2009 to MOFCOM for merger review. On May 4, 2009, after several rounds of meetings and the submission of supplemental information, MOFCOM formally accepted the notification for investigation. Following expiration of the 30-day first phase investigation period, MOFCOM initiated a second phase investigation and set September 3, 2009 as the deadline for completion. In August, MOFCOM decided further to extend its investigation for an additional 60-day period expiring November 3, 2009. The number and duration of each period was in compliance with the AML. On October 30, 2009, four days before the final deadline, MOFCOM announced its decision to clear the transaction with conditions.

### The Decision

MOFCOM explained its decision in considerable detail, including the review process, investigation methods, analytical process, and impact on competition as well as the remedies sought for the transaction. MOFCOM found three key battery product market segments in which the merged entity

was likely to have a significant market share as a result of the concentration. These product areas were:

- rechargeable coin-shape lithium batteries (for mobile devices such as mobile phones and video cameras);
- nickel-metal hydride batteries for daily use (such as electric tools); and
- nickel-metal hydride batteries for automobile use.

After a time-consuming investigation (including consultations with relevant government authorities, industrial associations and chambers of commerce, telephone and questionnaire interviews with 39 competitors and downstream customers, as well as onsite visits to manufacturing bases in Shenzhen and other areas), MOFCOM concluded that the proposed concentration would result in combined-market shares of 61.6% for rechargeable coin-shape lithium batteries, 46.3% for nickel-metal hydride batteries for daily use and 77% for nickel-metal hydride batteries for automobile use through Panasonic EV Energy Co., Ltd. (PEVE), a joint venture between Panasonic and Toyota. MOFCOM deemed the countervailing buyer-side power and existing competition dynamics in the industry unlikely to countervail the anti-competitive impact of the transaction. MOFCOM thus ruled that the proposed concentration would adversely affect competition in these three product markets and conditioned its clearance of the transaction on certain post-transaction divestitures.

The conditions imposed generally included the following:

- rechargeable coin-shaped lithium batteries: transfer by Sanyo of its rechargeable coin-shaped lithium battery business to an independent third party buyer;
- nickel-metal hydride batteries for daily use: transfer by Sanyo of its nickel-metal hydride battery business in Japan to an independent third party buyer and conversion of Sanyo's factory in Suzhou to an OEM supplier to the above buyer with respect to Sub C and D batteries; or transfer by Panasonic of its corresponding business in China to an independent third party buyer; and
- nickel-metal hydride batteries for automotive use: transfer by Panasonic of its HEV nickel-metal hydride battery business to an independent third party buyer; and reduction of Panasonic's ownership interest in PEVE from 40% to 19.5%, waiver of its rights to appoint directors and vote in shareholders meetings, as well as excluding "Panasonic" from the PEVE name.

In addition, the decision required that the divestiture process, timeframe and selection of independent third party buyers and other key aspects of the divestitures be subject to MOFCOM's examination and approval. The assets to be divested had to be comprehensive enough to allow the buyer to operate the business independently. The parties are also subject to certain ring-fencing requirements, which bar the parties from exchanging business sensitive information during the divestiture process.

## **Analysis**

The Panasonic/Sanyo decision is a significant development and suggests that MOFCOM is becoming more aggressive in asserting its jurisdiction over offshore transactions.

Before Panasonic/Sanyo, MOFCOM had generally treated the relevant geographic market as China, but in this decision MOFCOM concluded that the geographic market for two of the three products was worldwide in nature.

Moreover, before Panasonic/Sanyo, MOFCOM's conditions for clearance of offshore transactions focused only on the parties' assets/interests in China. For instance, in Pfizer/Wyeth, the parties were required to divest a certain animal vaccine business in China; in Mitsubishi Rayon/Lucite, Lucite China was required to dispose of 50% of its manufacturing capacity in China; in InBev/Anheuser-Busch, both parties were restricted from increasing their stakes in Chinese domestic breweries. In Panasonic/Sanyo, however, MOFCOM for the first time expanded its conditions/remedies to cover the parties' overseas assets by requiring that the parties divest businesses located in Japan and that Panasonic reduce its ownership and waive board representation/voting rights in PEVE, an offshore entity located outside China.

Finally, the decision revealed MOFCOM's intent to actively participate in supervision of the divestiture of assets outside China. MOFCOM imposed a prescribed time period for the divestiture and asserted its authority to scrutinize key aspects of the divestiture. In doing so, MOFCOM was largely following the lead of the principal foreign enforcement authorities (the Japan Fair Trade Commission and European Commission), although the assertion of such extraterritorial authority is somewhat unusual in other jurisdictions.

Panasonic/Sanyo also demonstrates MOFCOM's increasing confidence and sophistication in handling offshore transactions with a China dimension. Compared to MOFCOM's earlier decisions, Panasonic/Sanyo contains much more detailed discussion on MOFCOM's investigation procedures and reasoning. MOFCOM conducted a comprehensive investigation on the likely competitive impact of the transaction by consulting with relevant government agencies, and seeking views and comments from industrial associations, competitors and consumers and other parties concerned. Some 39 competitors/customers were interviewed by questionnaire, telephone or onsite visits. MOFCOM also appears to have focused more on the negotiation of remedies/conditions with the parties and review of the adequacy of proposed remedies/conditions. In this transaction, it took nearly two months for the parties and MOFCOM to negotiate and settle on the final remedies/conditions and the discussion on remedies/conditions constituted a major part of the published decision.

## **Conclusion**

In the future, foreign companies contemplating offshore transactions with a potential China impact should anticipate more assertive review by MOFCOM and the possible imposition of remedies/conditions even on a global basis. MOFCOM will likely not confine its review and remedies/conditions on China, and foreign companies should plan any transactions subject to

notification in China with a careful eye to MOFCOM's implementation of the AML.

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