Not Quite Easy to Win MOFCOM's Nod - On MOFCOM Conditionally Clearing Proposed Acquisition of Sanyo by Panasonic

Tao Liang, Sidley Austin LLP
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By Liang Tao

On October 30, 2009, Ministry of Commerce of the PRC ("MOFCOM"), a ministry directly under the State Council of China in charge of merger control, issued an announcement to clear the acquisition of Sanyo by Panasonic subject to conditions. This is the sixth merger case which was subjected to MOFCOM’s intervening since the new Chinese Anti-monopoly law ("AML") came into effect. Among the six intervened cases, one of these cases was prohibited to proceed with the acquisition of Huiyuan Juice, the largest privately-owned juice producer in China, by Coca Cola; the rest of the five cases were approved conditionally. According to the data published by MOFCOM, by the end of June 2009, MOFCOM had received 58 filing cases, and review of 46 cases had been finished, among the 46 closing cases, 43 cases had been cleared unconditionally, and two cases had been cleared on-condition, and one case had been prohibited. Based on the foregoing data, 6.52 per cent of the cases had been intervened by the end of June 2009. It is worthy to note that at present all of the 5 cases which were cleared on condition are mergers between foreign investors, and the only prohibited cases is the merger between foreign investor and Chinese domestic enterprise. MOFCOM appears to have a good appetite to impose interference on mergers related to foreign investor.

Introduction to the acquisition
Panasonic, the largest Japanese electronics producer, is mainly engaged in electronics manufacturing and produces products under a variety of brand names including Panasonic and Technics. Sanyo, member of the Fortune 500 and a major electronics company whose headquarters is also located in Japan, mainly produces solar modules and electric vehicle batteries. On November 2, 2008, Sanyo and Panasonic announced that they have agreed on the main points of a proposed buyout that would make Sanyo a subsidiary of Panasonic. Both Panasonic and Sanyo have commercial presences around the world especially in China, Europe, U.S. and Japan. Therefore, due to their great amount of revenues worldwide and combined market shares in certain segment markets, the merger between them has to be reviewed by the anti-monopoly authorities in various jurisdictions including the foregoing four major jurisdictions.

On September 10, 2009, Japanese Fair Trade Commission approved Panasonic takeover of Sanyo which would create one of the world’s biggest electronics makers. After the Fair Trade Commission gave the green light to the acquisition, the merger between Panasonic and Sanyo had obtained their first approval from the anti-monopoly regulators of the four major jurisdictions and paved the way for the closing of the acquisition.

On September 29, 2009, the European Commission ("EC") had cleared under the EU Merger Regulation the proposed acquisition of Sanyo by Panasonic. EC’s decision is conditional upon the divestment of certain battery production facilities in market where the EC identified competition concerns. EC’s competition concerns arose from three battery markets, including markets for primary cylindrical lithium batteries, portable rechargeable nickel-metal hydride batteries and rechargeable coin-shaped batteries based on lithium, where the merged entity would have a significant market share. To remedy the concerns raised by the EC relating the foregoing batteries, EC decided to divest certain production plants that currently produce some of the foregoing batteries and certain business regarding
the foregoing batteries to eliminate any increase in market share in these product markets.

In accordance with Nikkei's news report on October 31, 2009, the acquisition of Sanyo by Panasonic had won informal consent from U.S. Federal Trade Commission, the anti-monopoly regulator of U.S., marking that it had almost cleared all regulatory hurdles. After receiving approval from Japan, Europe and China, and the informal approval from U.S., Panasonic had announced commencement of tender offer for Sanyo shares on November 4, 2009.

Notification procedures with MOFCOM

The acquisition of Sanyo by Panasonic has reached the threshold for notification with MOFCOM according to Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings issued by State Council which is one of the most important implementing rules of the AML. Hence, the parties to the acquisition shall be obligated to file notification with MOFCOM and provide detailed information regarding the acquisition. MOFCOM acknowledged in its decision that MOFCOM received the filing documents from Panasonic on January 21, 2009, and after the supplement of the documents on April 30, 2009 by Panasonic, MOFCOM decided that the documents submitted by Panasonic met the requirements stipulated in Article 23 of the AML and initiated the preliminary review.

The AML requires MOFCOM to finish the preliminary review within 30 days. If MOFCOM decides to initiate the in-depth investigation, the in-depth investigation shall be completed within 90 days, provided that, under certain circumstances, MOFCOM has the right to extend the duration of the in-depth investigation. However, the extension period shall be less than 60 days. In short, maximum merger review period conducted by MOFCOM shall be 180 days, i.e., 30 days plus 90 days and 60 days, and this is just the case of the acquisition of Sanyo by Panasonic. In consideration of nearly four months period between Panasonic's documents submitting and the formal case initiation, the whole review procedure of the acquisition lasted more than nine months. Among the six intervened cases, the review period of current case is the longest one.

MOFCOM's concerns over competition

MOFCOM conducted a comprehensive assessment on the acquisition of Sanyo by Panasonic and concluded that this acquisition would give rise to the effect of eliminating or precluding the competition in certain segment markets. During the course of investigation, MOFCOM solicited comments from relevant governmental agencies, industry associations, competitors, upstream and downstream users, and other parties related to the acquisition by means of soliciting written comments, holding seminars, conference calls, and so on. It seems that MOFCOM has been diversifying its investigation tools to collect various comments from all levels of the society. In the investigation of this acquisition, MOFCOM not only applied the traditional ways of investigation but also adopted new methods, including conference call, on-site investigation and so on. This is the evidence that MOFCOM is improving its investigation abilities. After investigation, MOFCOM confirmed that this acquisition would have anti-competitive impact in three product markets.

First, this acquisition would have anti-competitive impact in the segment market for coin-shaped rechargeable lithium batteries. The coin-shaped rechargeable lithium batteries can be used in cell phone, video camera and other similar devices. In MOFCOM's prospect, this segment market around the world has been highly concentrated, and Panasonic and Sanyo, the first largest player and the second largest player respectively in this segment market, collectively account for 61.6% market share. Due to the market power of the two companies, the post-merger entity will have the ability to prevail the buyers to increase the price unilaterally and to seek monopoly earnings.

Second, this acquisition would have anti-competitive impact on the segment market for civil nickel-metal hydride batteries. Civil nickel-metal hydride batteries are mainly used in electric tools. MOFCOM concluded that the segment market for civil nickel-metal hydride batteries had been heavily concentrated with few competitors, what is more, Panasonic and Sanyo collectively accounted for 46.3% market share, and the post-merger entity may have the power to increase the price unilaterally. In addition, this segment market is not a fast developing market without adequate potential new comers to promote competition.

Third, this acquisition would have anti-competitive impact on the segment market for vehicle nickel-metal hydride batteries. Vehicle nickel-metal hydride batteries can provide power to mixed power vehicle and electric vehicle. This segment market is highly concentrated. Panasonic BY Energy Co., Ltd. ("PEVE"), a joint venture established by Panasonic and Toyota, holds an absolute dominant position in this segment market with a market share of 77%. In addition, Panasonic and Sanyo are the only competitors of PEVE in this segment market; therefore, the acquisition will impede competition further.

Generally speaking, MOFCOM and EC have the same concerns in some of the foregoing segment markets. It seems that this is not a coincidence. Lots of the
laws and implementing rules regarding anti-monopoly in China, including the AML and series of draft measures in connection with merger control published by MOFCOM, to some extent, are drafted after the pattern of EC's competition law practice. Therefore, at present, before the completed merger control system has been fully established, it is still meaningful to refer to EC's general provisions on merger control, especially on the method of the competition analysis.

Remedies imposed by MOFCOM

In the course of investigation, MOFCOM had conducted several consultations with Panasonic regarding the eliminating of the anti-competitive effect of the acquisition, and Panasonic also proposed some remedies to try to cure the foregoing competition concerns raised by MOFCOM. After a long term negotiating and consultation, Panasonic submitted its final commitment of remedies to MOFCOM on October 22, 2009. Finally, MOFCOM concluded that Panasonic's final remedies were sufficient to eliminate the anti-competitive effect of the acquisition in China's market upon the commitment of Panasonic's control. It appears that MOFCOM's use of remedies has become more and more complex and sophisticated, and the enterprises engaged in merger which shall be reviewed by MOFCOM had better do more preparing work to provide MOFCOM with proper remedies to meet its rigid requirements. Sometimes, emergency response plan is necessary to be prepared in advance. In that way, the enterprises can weather the difficulty when MOFCOM denies their initial proposed remedies. MOFCOM imposed the following remedies on the acquisition as the conditions upon which the acquisition can be cleared.

First, Sanyo shall divest all of its business of coin-shaped rechargeable lithium batteries in the plant located in Japan. MOFCOM also requested Panasonic and Sanyo to implement the aforesaid measure within six months, provided that this period can be extended to 12 months upon MOFCOM's approval. In addition, MOFCOM also imposed certain behavioural remedies apart from structural remedies.

Second, Panasonic or Sanyo shall divest its civil nickel-metal hydride batteries in accordance with the detailed divestment plan which shall be approved by MOFCOM in advance. The six months and 12 months requirements in the above paragraph are also applicable. It is noteworthy that this is the first time for MOFCOM to grant discretion regarding the implementing of the remedies to the parties of the merger. It marks MOFCOM's increasing merger control skills.

Third, MOFCOM requested Panasonic to divest part of its vehicle nickel-metal hydride batteries and imposed six months and 12 months requirements. What is more, MOFCOM paid specific attention on PEVE. Among other things, Panasonic shall decrease its share in PEVE to 19.5% from 49%, waive its voting power in the shareholders meeting of PEVE, and waive the right to appoint director of the PEVE. Compared with the decision issued by EC, MOFCOM's decision takes a more active position in this segment market through imposing intervening on specific subsidiary of Panasonic.

Legal framework of merger control in China

In the decision issued by MOFCOM on the acquisition of Sanyo by Panasonic, certain articles in AML have been quoted frequently. In the practice of filing of the notification, the enterprises shall abide by certain applicable laws and rules. It is important for the enterprises proposing to conduct merger which shall be reviewed by MOFCOM to keep a close eye on the applicable rules regarding the merger control in China.

China's merger control legal framework is currently composed of five levels: law, administrative regulations issued by State Council, implementing rules issued by ministries and commissions directly under the State Council, Guidelines informally issued by the Anti-Monopoly Bureau of MOFCOM, and the decisions issued by MOFCOM regarding specific cases.

AML is the most important law regarding merger control and sets forth the basic rules and the general principles of the merger control. All of the detailed rules have derived from and will derive from the AML. However, containing 57 articles, the AML is too general to be used effectively in the actual practice of merger control. To clarify the scope of the merger review, State Council issued Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings, an administrative regulation. This administrative regulation established a detailed threshold of notification. On July 15, 2009, MOFCOM, People's Bank, China Securities Regulatory Commission, China Banking Regulatory Commission, and China Insurance Regulatory Commission jointly issued an implementing rule to clarify the threshold for financial undertakings to detail the AML further. Anti-Monopoly Commission of the State Council, a competent authority in charge of anti-monopoly directly under the State Council, also issued an administrative rule to define the relevant market to provide MOFCOM and other anti-monopoly authorities with analysis tools. In summary, at present, there are one law, one administrative regulation, and two implementing rules regarding merger control.

Apart from the foregoing formal laws and rules, MOFCOM also issued five draft measures on merger control notification, review, evidence collection, and investigation. MOFCOM issued many guidelines at its official website on merger control, including guidelines in connection with notification documents requirements, review procedure and so on. Although these guidelines do not have legal force, they are very useful for enterprises during the course of notification. Precedents, i.e., the decisions regarding specific cases issued by MOFCOM, are also very meaningful for the market players. They can obtain the first-hand materials on the merger control policies and tendency in China through MOFCOM's decisions.

MOFCOM is continuing to finalize some of its rules and guidelines on merger notification and review, market player should better follow theses new development closely to ensure the compliance of the merger control policies of China.

(Author: Assistant Lawyer of an international law firm in Beijing)