

**MMLC Comment:** The Chinese Anti-Monopoly Bureau (*AMB*) handed down its decision in early November 2009, regarding Panasonic's acquisition of Sanyo. The AMB approved the transaction subject to divestiture of certain assets. The decision is more comprehensive than previous decisions, although this case was the first to go into a third phase of investigation by the AMB indicating the complications involved.

The following is an English translation of the decision, directly from the AMB website. The original decision in Chinese text can be seen at the end of this document.

*MMLC Group*

*Beijing*

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*[www.mmlcgroup.com](http://www.mmlcgroup.com)*

## **Announcement No.82, 2009 of Ministry of Commerce**

(Announcement of Ministry of Commerce on the examination decision of the approval of Panasonic Company's acquisition of Sanyo Company with restrictive conditions)

The Ministry of Commerce of P.R.C received the Concentration of Business Operator Anti-monopoly Application of Panasonic Joint-stock Corporation's (Panasonic Company) acquisition of Sanyo Electric Joint-stock Corporation (Sanyo Company). After examination, it is currently decided to approve this Concentration of Business Operator with restrictive conditions. According to Article 30 of Anti-monopoly Law, the related issues are announced as follows:

### **1 Accreditation and Examination Process**

On 21 January 2009, the Ministry of Commerce of P.R.C received the Concentration of Business Operator Anti-monopoly Application of Panasonic Company's acquisition of Sanyo Company. After examination, the Ministry of Commerce of P.R.C thought the application materials were incomplete and asked the applicant for further improvement and supplement. The applicant provided supplementary materials on 30 April. After examination, the Ministry of Commerce of P.R.C considered that the materials submitted achieved the standards stipulated by law, filed this case on 4 May, and started preliminary examination. During the preliminary examination, the Ministry of Commerce of P.R.C found that the market share of some overlap products of the new enterprise after this acquisition will increase significantly, and the market structure will change substantially. So the Ministry of Commerce of P.R.C decided to give further examination after the preliminary stage examination finished, the deadline of the further examination is 3 September 2009. On August 14, the Ministry of Commerce of P.R.C pointed out the competition problems found during the examination to the applicant and asked the applicant to provide corresponding solution within the specified time limit. On August 26, the applicant requested an extension of the examination period for the purpose to prepare the detailed scheme for solving the above competition problems. According to Article 26 of Anti-monopoly Law, the Ministry of Commerce of P.R.C decided to extend the examination period for another 60 days, the deadline is 3 November 2009.

### **2 Content of Examination**

According to Article 27 of the Anti-monopoly Law, the Ministry of Commerce of P.R.C proceeded with a comprehensive examination of this concentration from the following several aspects:

i) market share in the relevant market of the undertakings concerned and their ability

to control the market;

(ii) concentrate degree of the relevant market;

(iii) effect on the market entry and technology improvement;

(iv) effect on consumers and other undertakings;

(v) effect on national economical improvement;

### **3 Examination**

After the filing of this case, the Ministry of Commerce of P.R.C sought advices from the related government departments, industry associations, verified the truthfulness and completeness of the filed materials and relevant supplementary materials, demanded an explanation and supplementary materials for some particular problems. During the examination, the Ministry of Commerce of P.R.C required the applicant to provide relevant documents and evidence with respect to the overlap products' type of the two parties, sale data, products difference, product pricing and strategy, distribution pattern, negotiated with downstream users, productivity change and possible longitudinal relationships, etc. In order to understand the opinions of relevant aspects, the Ministry of Commerce of P.R.C sent questionnaire to 39 intratype competitors and downstream users, conducted telephone interviews with individual enterprises, and went to Shenzhen for field investigation. The Ministry of Commerce of P.R.C and the applicant has conferred on the limitation or exclusion of competition problems found during the examination and reached a consensus on the solution of eliminating the disadvantage influence on competition.

### **4 Competition Issues**

After examination, the Ministry of Commerce of P.R.C confirmed this concentration will have effect of eliminating or restricting competition in the three product markets as below:

#### **1. Cointype Lithium Secondary Battery**

Cointype lithium secondary battery is used as back source for mobile phone, camera, etc. Upon examination, this products form an independent market, its regional market is the world market. This concentration will have effect of eliminating or restricting competition in this product market, the reasons are:

- 1) The cointype lithium secondary battery market is a highly concentrated market. Both parties involved are the first and second largest producers in this market. After the merger, Panasonic Company will occupy 61.6% of the market share, cause

downstream user's choice to be very limited. Because most of downstream users have the strategy to buy products from two or more suppliers, such effect of eliminating or restricting competition will become more significant.

- 2) After the merger, Panasonic Company will have the capacity of unilateral advance in price. On one hand, because the competitors in this market are very limited, after the merger, it is difficult for the Panasonic Company's price advance behavior to be bound by effective competition, on the other hand, other competitors may also be benefit from the Panasonic Company's price advance behavior, it is lack of a strong drive for effective competition with Panasonic.
- 3) The Buyers are not capable to undo the above effects of eliminating or restricting competition. Although part of the downstream large scale users has the strength to compete against the entity after merger, this buyer's strength can not extend to other middle-size and small-size users that do not have the same bargaining power.

## 2. Nickel-hydrogen Battery for Civilian Use

Nickel-hydrogen battery for civilian use is used as back source for electric tools, etc. This products form an independent market, its regional market is the world market. This concentration will have effect of eliminating or restricting competition in this product market, the reasons are:

- 1) The Nickel-hydrogen battery market is a highly concentrated market, and the competitors are numbered. Panasonic Company will occupy 46.3% of the market share after merger, which is far higher than other competitors. Panasonic may have the capacity of unilateral advance in price.
- 2) Designated transaction may damage the market competition. In the survey, the Ministry of Commerce of P.R.C found that part of the parties in request of the downstream users of nickel-hydrogen battery for civilian use require the downstream users to use Sanyo or Panasonic brand battery products. This designated transaction has eliminated or restricted the market competition, inhibited other brand products, such effect of eliminating or restricting competition will become more significant after this merger.
- 3) The development of nickel-hydrogen battery market has slowed down, it is difficult to attract sufficient market to offset the afore-mentioned effect of eliminating or restricting competition.

## 3. Automobile-used Nickel-hydrogen Battery

Automobile-used nickel-hydrogen battery is used for providing driving power for hybrid vehicles and electric automobiles. This concentration will have effect of

eliminating or restricting competition in this product market, the reasons are:

This market is a highly concentrated market, Panasonic EV Energy Joint-stock Corporation (PEVE Company), which was established by Panasonic company and Toyota Company, has hold 77% of the total market, and taken the absolutely advantage position. Other competitors in the market are only the two parties involved. The merger will make the competitors in this market diminish in quantity. Panasonic Company may use its PEVE Company's influence to further weaken the market competition.

## **5 Negotiation of Attaching Restrictive Conditions**

In order to solve these problems, according to Article 29 of the Antitrust Law, the Ministry of Commerce of P.R.C transacted with the applicant for remedies several times on 20 August 2009, 26 August 2009, 10 September 2009, 24 September 2009, 20 October 2009. On 22 October 2009, the applicant put forward the final solution. After evaluation, the Ministry of Commerce of P.R.C confirmed such solution is enough to eliminate adverse effects on Chinese market.

## **6 Examination Decision**

Considering the limiting competition effect on cointype lithium secondary battery, nickel-hydrogen battery for civilian use and automobile-used nickel-hydrogen battery, in order to reduce the unfavorable influences to the market competition, the Ministry of Commerce of P.R.C decided to approve this concentration with restrictive conditions, require Panasonic Company and Sanyo Company to perform the following obligations:

### **1. About Cointype Lithium Secondary Battery**

1) To strip all the current Sanyo Company's cointype Lithium Secondary Battery business, which means to transfer Sanyo Company's cointype Lithium Secondary Battery business of its Tottori Factory in Tottori, Japan to a third party (Purchaser). The choice of the Purchaser should conform with the principle of being helpful to the development of stripped business and market competition, and be approved by the Ministry of Commerce of P.R.C. According to the purchaser's need, Sanyo shall transfer the related assets to the Purchaser, including production equipment for operating cointype lithium secondary battery business, sales and research and development departments and customer resources. At the same time, Sanyo Company shall allow the Purchaser to use its intellectual property rights related to the production of cointype lithium secondary battery.

2) Panasonic Company and Sanyo Company must finish the above measures for of eliminating influence within 6 months after completion of this concentration. If can

not finish within this time limit, they can extend for another 6 months with the approval in advance of the Ministry of Commerce of P.R.C. If they still can not finish within the extended time limit, the Ministry of Commerce of P.R.C shall have the right to appoint a new trustee to transfer the stripped business to a third party;

3) From the date of completion of this concentration to the date of the completion of the implementation of the aforesaid measures, the related business of Panasonic Company and Sanyo Company shall be operated independently, both parties shall not disclose relevant prices, customer information and other competitive information to each other, except for the disclosure of information for performing legal obligations purpose.

## 2. About nickel-hydrogen battery for civilian use

The approval of the Ministry of Commerce of P.R.C is necessary before the detailed strip-off scheme is decided.

(1) Sanyo Company will transfer its nickel-hydrogen battery for civilian use business of Takasaki Factory in Takasaki, Gunma, Japan to an independent third party (Purchaser). Sanyo Company will transfer its Sub-C•D battery business of Suzhou factory in Suzhou province, China to Purchaser by means of OEM form. According to the purchaser's need, Sanyo Company shall transfer the related assets to the Purchaser, including production equipments for operating nickel-hydrogen battery for civilian use business, sales and research and development departments and customer resources. Sanyo Company shall allow the Purchaser to use its intellectual property rights related to the production of nickel-hydrogen battery for civilian use; Or Panasonic Company will transfer its nickel-hydrogen battery for civilian use business in Wuxi Factory, Jiangsu Province to the Purchaser. According to the purchaser's need, Panasonic Company shall transfer the related assets to the Purchaser, including production equipments for operating nickel-hydrogen battery for civilian use business, sales and research and development departments and customer resources. Panasonic Company shall allow the Purchaser to use its intellectual property rights related to the production of nickel-hydrogen battery for civilian use

The choice of the Purchaser should conform with the principle of being helpful to the development of stripped business and market competition, and approved by the Ministry of Commerce of P.R.C.

(2) Panasonic Company and Sanyo Company must finish the above measures for eliminating influence within 6 months after completion of this concentration. If can not finish within this time limit, they can extend for another 6 months with the approval in advance of the Ministry of Commerce of P.R.C. If they still can not finish within the extended time limit, the Ministry of Commerce of P.R.C shall have the right to appoint a new trustee to transfer the stripped business to a third party;

(3) From the date of completion of this concentration to the date of the completion of the implementation of the aforesaid measures, the related business of Panasonic Company and Sanyo Company shall be operated independently, both parties shall not disclose relevant prices, customer information and other competitive information to each other, except for the disclosure of information for performing legal obligations purpose.

### 3. About automobile-used nickel-hydrogen battery

#### (1) About automobile-used nickel-hydrogen battery business of Panasonic Company

- 1) Panasonic Company will transfer its nickel-hydrogen battery for HEV use business of Lovin Factory in Chigasaki, Kanagawa, Japan to an independent third party (Purchaser). The choice of the Purchaser should conform with the principle of being helpful to the development of stripped business and market competition, and approved by the Ministry of Commerce of P.R.C. According to the purchaser's need, Panasonic Company shall transfer the related assets to the Purchaser, including production equipments for operating automobile-used nickel-hydrogen battery business, sales and research and development departments and customer resources. Panasonic Company shall allow the Purchaser to use its intellectual property rights related to the production of automobile-used nickel-hydrogen battery
- 2) Panasonic Company and Sanyo Company must finish the above measures for of eliminating influence within 6 months after completion of this concentration. If can not finish within this time limit, they can extend for another 6 months with the approval in advance of the Ministry of Commerce of P.R.C. If they still can not finish within the extended time limit, the Ministry of Commerce of P.R.C shall have the right to appoint a new trustee to transfer the stripped business to a third party;
- 3) From the date of completion of this concentration to the date of the completion of the implementation of the aforesaid measures, the related business of Panasonic company and Sanyo Company shall be operated independently, both parties shall not disclose relevant prices, customer information and other competitive information to each other, except for the disclosure of information for performing legal obligations purpose.

#### (2) About PEVE Company

- 1) Panasonic Company's proportion of capital contribution of the PEVE Company shall decrease from current 40% to 19.5%;
- 2) Panasonic Company shall abstain from voting in general stockholders' meeting

of PEVE Company;

3) Panasonic Company shall give up its right of appointing directors to PEVE Company;

4) To give up veto right related to automobile-used nickel-hydrogen battery business stipulated in the joint-venture contract with PEVE Company's parent company Toyota Motor;

5) PEVE Company shall change its name to exclude the word "Panasonic" in its company name;

6) The aforesaid measures shall be finished within 6 months after completion of this concentration, and none of such measures shall be changed within 3 years. To terminate these measures for eliminating influence, the relevant parties shall first obtain the approval from the Ministry of Commerce of P.R.C.

This announcement shall take effect as of the date of the announcement.

Ministry of Commerce  
October 30, 2009

## 中华人民共和国商务部[2009年]第82号公告

### (关于附条件批准松下公司收购三洋公司反垄断审查决定的公告)

中华人民共和国商务部收到松下株式会社(简称“松下公司”)与三洋电机株式会社(简称“三洋公司”)的经营者集中反垄断申报。经审查,商务部决定附条件批准此项经营者集中。根据《中华人民共和国反垄断法》第三十条,现公告如下:

#### 一、立案和审查程序

2009年1月21日,商务部收到松下公司收购三洋公司的经营者集中申报申请。经审查,商务部认为该申报材料不完整,要求申报方进一步补充完善。4月30日,申报方提交了补充材料。经审核,商务部认为经补充后的申报材料达到了法定标准,5月4日予以立案,开始初步审查。初步审查过程中,商务部认为此项收购导致合并后新企业在某些重合产品市场的份额明显增高,市场结构发生实质性改变,初步审查工作结束后,决定实施进一步审查,进一步审查截止日为9月3日。8月14日,商务部向申报方指出了审查发现的竞争问题,并要求其限期提出相应的解决方案。8月26日,申报方向商务部提出申请,请求延长进一步审查期限,以便准备解决上述竞争问题的具体方案。根据《中华人民共和国反垄断法》第二十六条,商务部决定将进一步审查期限延长60日,截止日为2009年11月3日。

#### 二、审查内容

根据《中华人民共和国反垄断法》第二十七条,商务部从如下几个方面对此项经营者集中进行了全面审查:

- (一)参与集中的经营者在相关市场的市场份额及其对市场的控制力;
- (二)相关市场的市场集中度;
- (三)经营者集中对市场进入、技术进步的影响;
- (四)经营者集中对消费者和其他有关经营者的影响;
- (五)经营者集中对国民经济发展的影响。

#### 三、审查工作

立案后,商务部书面征求了相关政府部门、行业商会和协会的意见,对申报材料及相关补充材料的真实性、完整性进行了审核,要求申报方对特定问题进行了补充和澄清。审查中,商务部要求申报方就申报双方的重叠产品种类、销售数据、产品差异性、产品的定价方式与策略、分销模式、与下游用户的谈判、产能变化以及可能存在的纵向关系等问题提供相关文件与证据。为了解相关方面意见,商务部还向涉及不同产品的39家同行竞争者和下游用户发放了调查问卷,对个别企业进行了电话采访,并赴深圳等地进行了实地调查。针对审查中发现的限制或排除竞争问题,商务部与申报方进行了充分磋商,并就消除不利影响的解决方案达成共识。

#### 四、竞争问题

经审查，商务部确认此项集中将在以下三个产品市场产生限制或排除竞争影响：

#### （一） 硬币型锂二次电池

硬币型锂二次电池是用于手机、摄像机等电器的后备电源。经审查，该产品构成独立的产品市场，地域市场界定为世界市场。此项集中将在该产品市场产生限制或排除竞争影响，理由是：

第一，硬币型锂二次电池市场高度集中。申报双方分别是该市场的第一和第二大生产商，合并后松下公司占据 61.6% 的市场份额，导致下游用户的选择权受到很大限制。由于多数下游用户有从两家以上供应商采购产品的策略，合并导致的限制竞争效果将更为显著。

第二，合并后松下公司将具有单方面提价的能力。一方面，由于市场上竞争者非常有限，合并后松下公司的提价行为难以受到有效的竞争约束；另一方面，由于合并后松下提高价格行为对其他竞争者也可能是有利的，缺乏与松下进行有效竞争的动力。

第三，买方力量不足以消除上述限制竞争效果。虽然部分下游大型用户具有与合并后实体抗衡的买方力量，但此种买方力量并不能扩展至其他不具备同等议价能力的中小型用户。

#### （二） 民用镍氢电池

民用镍氢电池主要用于电动工具等电器的主电源。该产品构成独立的产品市场，相关地域市场为世界市场。此项集中将在该产品市场产生限制或排除竞争影响，理由是：

第一，民用镍氢电池市场是一个集中度较高的市场，且竞争者数量有限，合并后松下公司市场份额达 46.3%，远高于其他竞争者，合并可能导致松下公司具有单方面提价的能力。

第二，指定交易可能损害市场竞争。在调查中，商务部发现部分民用镍氢电池下游用户的需求方指定要求该下游用户使用三洋或松下品牌的电池产品。此种指定交易方式抑制了市场竞争，导致其他品牌的电池产品受到排挤，合并将进一步加剧此种限制竞争的效果。

第三，镍氢电池市场发展趋缓，较难吸引充分的市场进入抵消上述限制和排除竞争效果。

#### （三） 车用镍氢电池

车用镍氢电池是为混合动力汽车或纯电动汽车提供驱动动力的电池。此项集中将在该产品市场产生限制或排除竞争影响，理由是：

该市场高度集中，其中松下公司和丰田公司合资设立的企业---松下 EV 能源株式会社（简称“PEVE 公司”）在该市场占 77% 的市场份额，具有绝对优势地位，加之市场上其他竞争者仅限于申报双方。合并将导致该市场竞争者数量进一步减少，松下公司很可能利用其在 PEVE 公司的影响力进一步削弱市场竞争。

### 五、附加限制性条件的商谈

为了解决上述竞争问题，根据《反垄断法》第二十九条的规定，2009 年 8 月 20 日、8 月 26 日、9 月 10 日、9 月 24 日、10 月 20 日，商务部与申报方就救济方案进行了多次商谈。2009 年 10 月 22 日，申报方提出了最终救济方案。经过评估，商务部确认该救济方案足以消除此项集中对中国市场造成的不利影响。

## 六、审查决定

鉴于松下公司与三洋公司的经营者集中将对硬币型锂二次电池、民用镍氢电池和车用镍氢电池等相关产品市场产生限制或排除竞争效果，为了减少集中对市场竞争产生的不利影响，商务部决定附条件批准此项集中，要求松下公司和三洋公司履行如下义务：

### （一）关于硬币型锂二次电池

1、剥离三洋公司目前全部的硬币型锂二次电池业务，即将三洋公司位于日本鸟取县岩见町的鸟取工厂的硬币形锂二次电池业务全部转让给独立第三方（购买人）。遴选购买人应按照有利于被剥离业务的发展和有利于市场竞争的原则进行，并需经商务部批准。三洋公司根据该购买人的需求，向购买人转让包括经营硬币形锂二次电池业务所需的生产设备、销售、研发部门及客户资源在内的相关资产；同时，三洋公司将许可购买人使用其所拥有的硬币型锂二次电池生产相关的专用知识产权。

2、松下公司和三洋公司应在本次经营者集中完成日之后 6 个月内完成上述消除影响措施。如在该期限内未能实施完毕，可再延长 6 个月，但事前必须取得商务部批准。如果集中双方在该延长期内仍未能完成前述消除影响措施，则商务部有权指定独立受托人将前述拟剥离业务转让给独立第三方。

3、从本次经营者集中完成之日至前述措施实施完毕止日的期间内，松下公司与三洋公司的相关事业主体独立运营，不得向对方披露有关价格、客户信息及其他竞争性信息，为履行法定义务而披露的信息不在此限。

### （二）关于民用镍氢电池

剥离三洋公司或松下公司其中一方的民用镍氢电池业务，具体剥离对象可由集中双方确定，具体剥离方案确定前须取得商务部批准。

1、三洋将其在日本群馬县高崎市的高崎工厂的民用镍氢电池业务转让给独立的第三方（购买人）；三洋将其在中国江苏省的苏州工厂生产的 Sub-C•D 型电池通过 OEM 形式供应给该购买人。三洋根据该购买人的需求，向购买人转让包括经营民用镍氢电池业务所需的生产设备、销售、研发部门及客户资源在内的资产，并许可该购买人使用其拥有的民用镍氢电池生产相关的知识产权；或者松下公司将其在江苏省无锡工厂的民用镍氢电池业务转让给购买人。松下公司根据该购买人的需求，向购买人转让包括经营民用镍氢电池事业所需的生产设备、销售、研发部门及客户资源在内的资产，并许可该购买人使用其拥有的民用镍氢电池生产相关的知识产权。

遴选购买人应按照有利于被剥离业务的发展和有利于市场竞争的原则进行，并需经商务部批准。

2、集中双方应在本次经营者集中完成日之后 6 个月内实施前述消除影响措施，如在该期限内未能实施，在取得商务部认可后，可再延长 6 个月。集中双方如果在该延长期内仍未能实施完毕前述消除影响措施，则商务部有权指定独立的受托人将前述拟剥离事业转让给独立第三方。

3、从本次经营者集中完成至前述措施实施完毕的期间内，松下公司与三洋公司的相关事业主体独立运营，不得向对方披露有关价格、客户的信息及其他竞争性信息，为履行法定义务而披露的信息不在此限。

### （三）关于车用镍氢电池

#### 1、关于松下公司剥离其车用镍氢电池业务

第一，松下公司将其在日本国神奈川県茅崎市的湘南工厂的 HEV 用镍氢电池业务转让给独立第三方（购买人）。遴选购买人应按照有利于被剥离业务的发展和有利于市场竞争的原则进行，并需经商务部批准。松下公司根据该购买人的需求，向购买人转让包括经营车用镍氢电池事业所需的生产设备、销售、研发部门及客户资源在内的资产，并许可该购买人使用其拥有的 HEV 用镍氢电池生产相关的知识产权。

第二，集中双方应在本次经营者集中完成日之后 6 个月内实施前述消除影响措施，如在该期限内未能实施完毕，在取得商务部认可后，可再延长 6 个月。集中双方如果在该延长期内仍未能实施完毕前述消除影响措施，则商务部有权指定独立的受托人将前述拟剥离事业转让给独立第三方。

第三，从本次经营者集中完成至前述措施实施完毕的期间内，松下公司与三洋公司的相关事业主体独立运营，不得向对方披露有关价格、客户的信息及其他竞争性信息，为履行法定义务而披露的信息不在此限。

#### 2、关于 PEVE 公司

第一，松下公司对 PEVE 的出资比例从目前的 40% 降到 19.5%；

第二，松下公司放弃在 PEVE 股东大会的表决权；

第三，松下公司放弃对 PEVE 的董事委派权；

第四，放弃与 PEVE 的母公司丰田汽车的合资合同中关于车用镍氢电池业务的否决权；

第五，PEVE 公司名称变更为不含“Panasonic”字样的公司名称。

前述措施应在本次经营者集中完成日之后 6 个月以内实施完毕，且在三年内对该措施内容不进行任何变更。终止该消除影响措施时，须获得商务部的认可。

本决定自公告之日起生效。

中华人民共和国商务部  
二〇〇九年十月三十日