

China: Recent Remedy Cases Showcase Impact of Amended Anti-Monopoly Law

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The year 2023 marks the 15th anniversary of the enactment of China's Anti-Monopoly Law (AML). Over the past 15 years, merger review has been front and centre for China's antitrust enforcement, in particular, those cases cleared with remedies as a result of their high-profile nature and often divergent outcomes from other jurisdictions. Since the enactment of the AML in 2008, there have been more than 5,000 cases notified and concluded by China's antitrust regulator, the State Administration for Market Regulation (SAMR) and its predecessor, the Anti-monopoly Bureau of the Ministry of Commerce (MOFCOM), of which 59 were cleared with conditions and only three received prohibitions.^[2] The AML was recently overhauled in 2022 (the Amended AML),^[3] which introduced significant changes to merger reviews, both procedurally and substantively. These changes have already been implemented in the review of recent remedy cases, for example, SAMR's use of the new stop-the-clock mechanism. This chapter examines the evolution and current status of China's conditional clearance decisions, with a spotlight on the unique characteristics of the SAMR review and remedy process.

Overview

Although SAMR is still a young regulator compared to its peers in other major jurisdictions, it has been increasingly active in merger control and has shown the world its ability to review and handle complicated transactions. The primary observations that arise from China's conditional approvals practice, which will be discussed in more detail in the following sections, are that:

- challenging deals can still be successfully guided through the review process, but require a carefully planned global merger review strategy;
- behavioural remedies are accepted as a flexible tool to address China-specific transaction concerns, which can often stem from state industrial policies designed to promote certain sectors of the economy;

- semiconductor adjacent deals with competitive sensitivities have received intense scrutiny, and complex deals in other technology industries have also received close examination; and
- lengthier reviews have been a hallmark of China's reviews for more than the past 10 years – however, this has become even more pronounced since 2018 for remedy cases, amid geopolitical uncertainties and SAMR's heavy caseload.

There have been 11 transactions cleared with conditions by SAMR since 2021, as detailed in the following table.

Table 1: SAMR Conditional Approvals Since 2021

Case	Industry	Where SAMR identified competition concerns	Remedies in China	Outcome in US, EU and UK (if filed)
<i>MaxLinear /Silicon Motion</i> (2023) [4]	Semi-conductors	No specific horizontal, vertical or conglomerate issues were specified in SAMR's decision. The decision noted that the competition concerns were identified in third-party NAND flash memory master control chips, which is a product offered by the target Silicon Motion, but the decision did not mention any relationship between this product and any of MaxLinear's offerings.	Behavioural: continuing to supply on FRAND terms; continuing to honour customer contracts; no substantial change of business model; maintenance of R&D; no addition of malicious codes. Duration: 5 years; lifted automatically.	Cleared in US
<i>Wanhua Chemical/Yantai Juli</i> (2023)	Industrials	Vertical relationship in caustic soda (upstream) and toluene diisocyanate (downstream)	Behavioural: no price increase, maintenance and expansion of production in China; continuing to innovate; continuing to supply on FRAND terms; no tying/bundling or exclusivity arrangements. Duration: 5 years; termination upon application and approval.	Not applicable (to the best of our knowledge, the transaction was not filed in the US, EU or UK)

<p><i>Korean Air/Asiana Airlines</i> (2022)</p>	<p>Aviation/transportation</p>	<p>Horizontal overlap in scheduled air passenger transport services in 15 routes between China and South Korea</p>	<p>Behavioural: return flight slots and traffic rights; continuing to supply; renewal of agreements; no refusal to deal; provision of services on FRAND terms; no price increase; implementation of data protection measures Duration: 10 years; lifted automatically</p>	<p>Cleared in US EU: pending – Phase I decision to be issued UK: CMA accepted undertakings: the merged entity will enter into a binding framework agreement with Virgin Atlantic Airways to facilitate its entry onto the relevant routes</p>
<p><i>Shanghai Airport/Eastern Air Logistics JV</i> (2022)</p>	<p>Aviation/transportation</p>	<p>Horizontal overlap in airport cargo terminal services in Shanghai Pudong Airport Vertical relationship between airport cargo terminal services in Shanghai Pudong Airport (upstream) and international and domestic air cargo services from/to Shanghai Pudong Airport (downstream)</p>	<p>Behavioural: maintenance of independent operations; no exchange of competitively sensitive information; continuing execution and renewal of customer contracts (duration 5 years); provision of services on FRAND terms Duration: 8 years; termination upon application and approval</p>	<p>Not applicable (to the best of our knowledge, the transaction was not filed in the US, EU or UK)</p>
<p><i>II-VI / Coherent</i> (2022)</p>	<p>Semi-conductors</p>	<p>Vertical relationships in: HP CO2 Laser Optics (upstream) and HP CO2 Lasers (downstream); LP CO2 Laser Optics (upstream) and LP CO2 Lasers (downstream); Glass-Based Optics for Excimer Lasers (upstream) and Excimer Lasers (downstream)</p>	<p>Behavioural: continuing execution of contracts; continuing to supply on FRAND terms; multi-channel procurement; implementation of information firewalls Duration: 5 years; lifted automatically</p>	<p>Cleared in US</p>

<p><i>AMD/Xilinx</i> (2022)</p>	<p>Semi-conductors</p>	<p>Neighbouring relationship, giving rise to conglomerate concerns, between AMD's CPUs and GPU accelerators and Xilinx's FPGAs</p>	<p>Behavioural: no bundling; continuing to supply on FRAND terms; maintenance of flexibility, programmability and availability of FPGAs; maintenance of interoperability; implementation of information firewalls Duration: 6 years; termination upon application and approval</p>	<p>Cleared in US, EU and UK</p>
<p><i>GlobalWafers /Siltronic</i> (2022)^[5]</p>	<p>Semi-conductors</p>	<p>Horizontal overlap in 8-inch zone-melting wafers both globally and in China</p>	<p>Structural: divest GlobalWafers' business for zone-melting wafers Behavioural: continuing to supply on FRAND terms; renewal of customer contracts; provision of trainings Duration: 5 years; termination upon application and approval</p>	<p>Cleared in the US. The CMA in the UK indicated that it would not investigate the transaction</p>
<p><i>SK hynix/Intel</i> (2021)</p>	<p>Semi-conductors</p>	<p>Horizontal overlaps in (1) PCIe enterprise SSDs and (2) SATA enterprise SSDs, both globally and in China</p>	<p>Behavioural: reasonable pricing; production expansion; continuing to supply on FRAND terms; no tying/bundling or exclusive dealing, assistance of market entry; no collusion with competitors Duration: 5 years; termination upon application and approval</p>	<p>Cleared in US, EU and UK</p>
<p><i>Illinois Tool Works/MTS</i> (2021)</p>	<p>Industrials</p>	<p>Horizontal overlap in high-end electric mechanical material testing equipment in China</p>	<p>Behavioural: continuing to honour customer contracts; maintenance of service level; no price increase; no refusal to deal or supply of inferior goods or services Duration: 5 years; termination upon application and approval</p>	<p>N/A</p>

<i>Danfoss/Eaton</i> (2021)	Industrials	Horizontal overlap in orbital motors in China	Divest the orbital motor business of Danfoss Power System (Jiangsu) Co, Ltd	The European Commission identified competition concerns in hydraulic steering unit (HSU), electrohydraulic steering valves and orbital motors, and ordered divestiture remedies accordingly ^[6] In the US, competition concerns were found in HSU and orbital motors, where divestitures were again required
<i>Cisco/Acacia</i> (2021)	Semi-conductors	Vertical relationship in coherent DSPs (upstream) and optical transport systems (downstream)	Behavioural: continuing to honour customer contracts; continuing to supply on FRAND terms; no tying/bundling or other unreasonable terms; provision of training Duration: 5 years; lifted automatically	Cleared in US

Navigating the complex remedy procedure requires early and careful planning

China often closely scrutinises transactions in strategically important sectors based on industrial policy

As illustrated in Table 1, above, most conditional clearance decisions in China have involved advanced technology (including more than 10 semiconductor cases as well as others concerning computers, telecommunications and other high-tech sectors). SAMR also focuses on industries closely related to people's livelihood (such as pharmaceuticals, automobiles and agriculture). While some of these cases were concluded with remedies in other jurisdictions, it is not uncommon for China to impose its own remedies above and beyond any 'global' commitments, and these China-specific remedies are often behavioural.^[7]

The AML instructs SAMR to specifically consider a transaction's 'impact to the development of state economy',^[8] in addition to weighing more traditional competition-focused factors such as market shares, market power, market concentration, market entry, innovation, consumer welfare and impact on other relevant undertakings. Further, Article 33(6) of the Amended AML contains a broad catch-all item that entitles SAMR to take into account 'other factors that affect market competition and that shall be taken into account as deemed by [SAMR]'. Items (5) and (6) under Article 33 in practice entitle SAMR to analyse industrial policy concerns during merger review, especially in cases involving industries that are of strategic importance to China. Indeed, the very first prohibition decision made by SAMR's predecessor (*Coca-Cola/Huiyuan* (2009)) was widely viewed as being influenced by industrial policy concerns (namely, the acquisition of a famous brand in China by a powerful Western enterprise) and the most recent public decision issued by SAMR (*MaxLinear/Silicon Motion* (2023)) appears on its face to have been decided solely based on non-competition considerations, as it lacks any persuasive detail articulating a cognisable competition concern in any relevant market.

This ability – or even mandate – to consider the impact of industrial policy during merger review thus very often results in divergent outcomes with other jurisdictions, as illustrated in Table 1, above, given the fact that other major regulators do not openly include such considerations in their reviews.

However, SAMR will also often grant unconditional approvals in complex or high-profile cases that raise global issues but do not raise material competition or industrial policy problems in China. Recent examples of such unconditional approvals by SAMR include, for example, *Microsoft/Activision Blizzard* (2023), *Aon/Willis Towers Watson* (2021)^[9] and *Konecranes/Cargotec* (2022).^[10] In each of these transactions, the competitive landscape in China was strikingly different from the global landscape. For example, the gaming industry in *Microsoft/Activision Blizzard* and the insurance industry in *Aon/Willis Towers Watson* are both highly regulated in China for foreign investment, resulting in vastly different (and minimised) competitive and industrial effects in China, while in *Konecranes/Cargotec*, which involved the sector for material handling and port equipment, SAMR acknowledged that China's strong national competitors provided a significant competitive constraint locally that eliminated concerns.

Lengthier review for conditional cases

SAMR's review procedure consists of a Phase I review of 30 calendar days, a Phase II review of 90 days and a possible extension of Phase II by an additional 60 calendar days (sometimes informally referred to as 'Phase III'). As a practical matter, in complex cases, using the usual procedures, SAMR almost always requires the parties to consent to an extension to Phase III.^[11]

Examining the 43 conditional approvals from 2013 to 2023, SAMR's review of remedy cases took approximately 10 months on average from the parties' initial submission of the filing (which starts the completeness review) to the clearance date. However, the review period has generally grown longer over more recent years.

As set forth in Table 2, below, the average review time from 2018 to 2023 was approximately 11.9 months, almost a 50 per cent increase over the average time of 7.8 months from 2013 to 2017. The two longest reviews were *Korean Air/Asiana Airlines* (2023) and *Zhejiang Garden/Royal DSM* (2019), which took more than 23 months and 18 months respectively. The third to fifth longest reviews all took between 14 and 16 months (i.e., for *Novelis/Aleris* (2019), *Bayer/Monsanto* (2018) and *Cisco/Acacia* (2021)), almost as long as the lengthiest review between 2013 and 2018 in *Advanced Semiconductor Engineering/Siliconware Precision Industries* (2017)), which took 15 months.

The fastest review between 2013 and 2017 for a remedy case took only 4.5 months (in *Merck/AZ Electronic Materials* (2014)), although since 2018 none of the remedy cases have been cleared in less than eight months.^[12]

Table 2: Average Review Time for Remedy Cases in China, 2013–2023 to date (source: SAMR's website^[13])

Year(s)	Average Review Time (Months)
2013	10.9
2014	5.7
2015	6.8
2016	5.3
2017	10.2
2013–2017	7.8
2018	13.8
2019	12.9
2020	9.5
2021	11.6
2022	14.2
2023 to date	9.2
2018–2023 to date	11.9

Year(s)	Average Review Time (Months)
2013–2023 to date	10

Traditionally, if the review clock runs out and the case has not yet reached a conclusion, SAMR requires the parties to pull-and-refile, beginning again in Phase I. In this way, the review period can effectively be extended beyond the statutory time frame of a Phase III review. The Amended AML introduced an important change, giving SAMR the right to suspend the review clock when:

- the parties have not yet submitted documents or information required by SAMR, thereby preventing the review from moving forward;
- new facts have arisen such as to have a significant impact on the review; or
- proposed remedies need to be further evaluated and the parties have filed a request for suspension.^[14]

In recent merger decisions, SAMR used both options to extend its review time. Using the pull-and-refile route, the parties must withdraw the filing at the expiry of the 180-day review period, and then refile to restart the review clock at the beginning of Phase I. Over the past 10 years, nearly 70 per cent (30 of 43) of all conditional decisions went through pull-and-refile, and four cases were pulled and refiled twice, including *Praxair/Linde* (2018), *Novelis/Aleris* (2019), *Cisco/Acacia* (2021) and *Korean Air Lines/Asiana Airlines Inc.* (2023). In the most recent five years – as shown in Table 3 below, the pull-and-refile rate has increased to 87.5 per cent, compared to only 47.4 per cent between 2013 and 2017.

Table 3: Conditional decisions going through pull-and-refile, 2013–2023

	Number of conditional approvals with pull-and-refile	Percentage of conditional approvals with pull-and-refile
2013	3	75%
2014	0	-
2015	1	50%
2016	0	-
2017	5	71.4%
2013–2017	9	47.4%
2018	4	100%
2019	5	100%
2020	2	50%
2021	4	100%
2022	5	100%
2023 to date	1	50%
2018–2023 to date	21	87.5%
2013–2023 to date	30	69.8%

As the option to stop the clock was only introduced one year ago, *MaxLinear/Silicon Motion* (2023) is the only published decision where SAMR expressly indicated that the review process had been paused – according to its decision, the review clock was paused for six months without specifying the reason for the suspension. Anecdotally, it has been reported that

SAMR also stopped the clock in other transactions that were eventually abandoned.^[15] Therefore, there are no published decisions or guidelines explaining how the clock suspension tool should work with SAMR's delivery of competition concerns.

Designing remedies to satisfy the Chinese authority

Behavioural remedies: a flexible and effective tool to address China-specific concerns

Both SAMR and its predecessor MOFCOM have traditionally taken a flexible approach with regard to behavioural remedies, which are often required as 'creative' solutions to resolve concerns raised by the local stakeholders for transactions in strategically important industries, such as semiconductors, advanced equipment manufacturing, aviation and aerospace, life sciences and agriculture. At present, 83.1 per cent (49 of 59) of China's conditional decisions have involved non-structural remedies, while only 16.9 per cent (10 of 59)^[16] have had purely structural remedies. By comparison, across a similar time frame, the US Department of Justice (DOJ) required divestitures in 95 per cent of its conditional merger decisions (2010–2021).^[17] Common non-structural remedies include:

- continuing to supply on FRAND terms: ensuring stable supply to customers on fair, reasonable, and non-discriminatory (FRAND) terms;
- pricing commitment: committing to sell products at reasonable prices, for example, not higher (or lower) than historical average prices;
- minimum supply volume: ensuring to supply at least at the same volume as the historical average or higher;
- no-tying or bundling: ensuring no bundling or tying of products to those where the parties have high market shares;
- maintenance of interoperability: ensuring continued interoperability of the relevant products with other products supplied by competitors;
- no exclusivity: ensuring no exclusivity clause imposed on customers, preventing them from purchasing from competitors;
- restriction on future deals: prohibition against acquisition by the combined entity of any stake (even minority shares) in any competitor active in the relevant markets;
- implementation of information firewalls: setting up firewalls to protect customers' or other third parties' confidential information; and
- hold separate: requiring the merged entity to run the relevant businesses of the parties separately and independently without integration.

Since the enactment of the AML, the most commonly imposed behavioural remedy is the commitment to continue to supply on FRAND terms, which was imposed 28 times. This is followed by a pricing commitment (16 times) and a no-tying or bundling commitment (12 times). The other behavioural remedies as set forth above are also commonly deployed by SAMR.

As discussed above, SAMR's willingness to adopt behavioural remedies can be attributed to its mandate under the AML to not only protect fair market competition and consumer welfare, but also to promote state economy (more specifically, to encourage innovation, enhance the efficiency of economic operations, protect social public interest and facilitate the healthy development of a socialistic market economy).^[18] Behavioural remedies provide SAMR with the flexibility to reconcile the viewpoints of various important Chinese stakeholders and try to fit those under the traditional theories of harm under antitrust laws, to reach a balance between the interest of domestic stakeholders and alignment with international antitrust practice. SAMR's open and flexible attitude towards behavioural remedies is seen in contrast to the stance opposing conduct remedies in the US, UK and other jurisdictions including Australia and Germany.^[19]

Structural remedies: a traditional approach largely consistent with that of other major jurisdictions

SAMR may also impose traditional structural remedies. Since 2021, SAMR has only imposed structural remedies in two transactions: *GlobalWafers/Siltronic* (2022) (structural plus behavioural remedies) and *Danfoss/Eaton* (2021) (purely structural remedies). While some of the structural remedies ordered by the Chinese authority may seem to be China-specific and narrowed down to the China market, they often are a subset of the global divestiture adopted in other major jurisdictions and are thus consistent with such global divestiture. Sometimes SAMR prefers to adopt more tailored language for structural remedies to show that such remedies can address the competition concerns specific to China. Examples of these cases include *Dow/DuPont* (2017), *Beckton Dickinson/Bard* (2017) and *Danfoss/Eaton* (2021). However, notably in *GlobalWafers/Siltronic* (2022), SAMR ordered divestiture of GlobalWafers' business for zone-melting wafers at the global level, even though no other antitrust regulator imposed remedies on the same transaction.

SAMR's remedy procedure during merger reviews

Unlike in the EU and certain other jurisdictions, in China there is no statutory difference in terms of timeline as to whether competition concerns are raised during Phase I, II or III. Typically, the earliest time that concerns would be raised in practice is in Phase II, and more often in Phase III. For cases that do not entail China-specific concerns, SAMR usually prefers not to

be the first mover and, instead, waits to see where other major jurisdictions are headed in their respective reviews. They commonly exchange review opinions with other regulators through waivers, although still very much make their own independent decisions.

For cases that are notified through the ordinary procedure, SAMR seeks local stakeholders' views on the transaction. This is a formal process that involves SAMR sending letters to the relevant stakeholders, including Chinese customers, suppliers, competitors (usually through consultation with trade associations) and important ministries, such as the Ministry of Industry and Information Technology and the National Development and Reform Commission. Comments received form a critical element in SAMR's formulation of concerns.

Once SAMR has formed its concerns, it will convene a short state-of-play meeting to formally convey those concerns to the parties. SAMR does not typically suggest appropriate remedies, but instead identifies the issues to be resolved. The parties must formulate and deliver a proposal to SAMR to address those concerns. There is no formal timeline for delivery of a remedy proposal, but after this point SAMR typically will not be receptive to purely legal argumentation pushing back on the formal concerns. Unless SAMR actively pauses the review clock as discussed above, the clock continues to run while the parties prepare and negotiate remedy proposals with SAMR.

In practice, for high-profile cases with concerns already raised by the EC and the US DOJ or Federal Trade Commission, the parties may choose to proactively engage with SAMR to initiate remedy conversations, even before SAMR officially raises any concerns. There is no statutory guideline on how this process works, so it remains subject to SAMR's discretion as to whether it is ready to engage in such discussions. Either way, SAMR appreciates receiving regular updates on reviews in overseas jurisdictions.

Pre-approval: remedy negotiations and market test

Similar to the EU and other jurisdictions, upon receipt of a remedy proposal, SAMR will assess its effectiveness, viability and timeliness, and will inform the notifying party of its assessment outcome.^[20] Only after SAMR receives a proposal that it considers sufficient to effectively address the formal concerns will it put that proposal to a market test. Thus, parties can expect from one to several rounds of feedback from the case team and SAMR hierarchy prior to SAMR even being willing to test the proposed remedy with stakeholders. SAMR's Supervision and Enforcement Division (which will ultimately be responsible for checking and confirming compliance with the remedies) will also often give feedback as to the perceived workability of the parties' suggestions.

With respect to market testing, there is no statutory timeline on this process – in practice, each round of market testing typically takes two to three weeks, depending on how fast SAMR can gather feedback from the relevant stakeholders. Subject to the stakeholders' comments, there may be multiple rounds of market tests. During this process, SAMR plays more of a mediator role and will remain in regular contact with the parties to pass on any additional comments stakeholders have raised that still need to be addressed. Particular incidents, sanctions or legislation arising out of geopolitical tensions may cause temporary delays with or reactions from SAMR. For example, the China–US trade disputes of the past five years, coupled with China's determination to achieve 'chip independence', have led to significant scrutiny of semiconductor and related deals that went through extended reviews, with some abandoned due to the failure to achieve China's approval by the drop-dead date.^[21] SAMR's official yearly antitrust enforcement reports disclosed that in both 2021 and 2022 two transactions were abandoned due to the failure to address SAMR's competition concerns.^[22]

Once SAMR confirms that all stakeholders are satisfied with a remedy proposal, SAMR starts its internal administrative process for case approval. Upon the finalisation of the substantive content, there may also be a few rounds of back and forth to refine or polish the wording of the commitments for accuracy. As this is an internal process, there is no statutory guidance on its length, which can vary from weeks to several months due to the geopolitical headwinds, or the additional time required for the case team to gather all internal approvals required for the decision to be published.

Post-approval: remedy implementation

Post-approval, a remedy case will be transferred to the Supervision and Law Enforcement Division for remedy implementation according to Section IV of the Provisions of Review of Concentration of Undertakings (2023) (the Provisions). During the remedy implementation period, the parties will be required to submit compliance reports to SAMR and the monitoring trustee, which are usually required either once a year or every six months as set forth in the approval decision. In addition, the parties will need to respond to any supplementary questions raised by the trustee. In many cases, SAMR or the trustee will also request site visits or interview requests with the companies as additional measures for remedy supervision.

Remedy lifting: thorough examination to ensure full compliance

Among the 21 conditional decisions cleared with behavioural remedies since 2018, nine decisions (43 per cent) prescribed that the commitments would automatically expire at the end of the remedy period while 12 decisions (57 per cent) required the parties to apply for release.

The criteria and process for remedy lifting under automatic expiration and by application circumstances are different. Pursuant to the Provisions, remedies with automatic expiration will be lifted upon verification at the end of the remedy period that there has been no violation of the relevant decision throughout the entire remedy period. By contrast, 'lifted by application' remedies require a higher standard of proof, requiring the parties to demonstrate one of the following criteria:

- significant changes have happened to the parties;
- significant changes have occurred in the competition for the relevant markets;
- it has become unnecessary or impossible to implement certain conditions; or
- other relevant factors have led the remedy implementation to its sunset.^[23]

This is usually a much lengthier process as it requires SAMR to make a full assessment and deliberation of the competitive or commercial conditions that essentially override its previous conditional decision.

For example, in *Marubeni/Gavilon* (2013), its (provisional two-year) hold separate remedy was not lifted until 2023, on the basis that earlier in 2022 Marubeni had sold the relevant Gavilon grains and ingredients business to a third party, Viterra Limited, rendering the conditions moot.^[24] Thus, in fact it took 10 years rather than the original two proposed in the decision for the application for lifting to be successful.

By comparison, in *Wal-Mart/Yihaodian* (2012) (remedies lifted in 2016),^[25] MOFCOM found that, since 2014, the competitive landscape of the China market for value-added telecommunication services had changed significantly, with increasingly lower entry barriers, attracting a larger number of new competitors. The decision cited the Ministry of Industry and Information Technology's Announcement on Lifting Restrictions on Foreign Shareholdings in Online Data Processing and Transaction Processing Businesses (Business E-Commerce) (issued on 19 June 2015), which permitted foreign investors to hold an equity percentage up to 100 per cent in the relevant industry – a policy that further promotes competition.

Other observations from recent conditional approvals

Most transactions approved with conditions in China are foreign-to-foreign transactions

The vast majority of conditional decisions (81.8 per cent (nine of 11) since 2021 and 89.8 per cent (53 of 59) since 2008) only involve foreign (i.e., non-Chinese) companies as transaction parties. While some have questioned whether Chinese companies, especially state-owned enterprises, are de facto exempt from difficult merger reviews, SAMR has recently demonstrated in the *Shanghai Airport/Eastern Air Logistics JV* decision rendered in 2022 and the *Wanhua Chemical/Yantai Yongli* decision issued in 2023 that it will not shy away from rigorous reviews in dealing with domestic companies, even state-owned enterprises. Indeed, compared with the first five years of China's review regime – when Chinese companies were less diligent about filing transactions – over the past 10 years SAMR (and MOFCOM before it) has emphasised repeatedly that it expects all companies to comply with the AML, whether foreign or Chinese.

Theories of harm cover behavioural, vertical and conglomerate concerns

In the 11 conditional approvals issued by SAMR since 2021, 63.6 per cent (seven of 11) involved only horizontal concerns; 27.3 per cent (three of 11) involved only vertical concerns; 9.1 per cent (one of 11) involved both horizontal and vertical concerns; and 9.1 per cent (one of 11) involved only conglomerate concerns. In a break from long-established precedent, SAMR's latest decision *MaxLinear/Silicon Motion* did not specify any horizontal, vertical or conglomerate concerns but solely focused on one product offered by the target company without articulating a competitive theory of harm.

Horizontal concerns

Most of SAMR's competition concerns stem from horizontal overlaps between the transaction parties. In its review of these cases, SAMR typically pays close attention to the parties' combined market shares, market share increments, market concentration (Herfindahl-Hirschman Index or HHI) and additional economic analysis. In reviewing high-profile transactions, SAMR often engages external economists to assist it with economic analysis. Remedies required by the Chinese authority in transactions with horizontal concerns include both structural and behavioural remedies. For example, in *GlobalWafers/Siltronic* (2022), SAMR:

- noted that the parties had relatively high combined shares in the relevant market;
- observed the over-90 per cent combined share pre-transaction of the top five competitors and the relatively high HHIs pre- and post-transaction both globally and in China; and
- identified, among other things, that the relevant market had high entry barriers and transparent pricing.

As a result, SAMR imposed both structural and behavioural remedies. However, given that usually the divestiture of one party's relevant products permanently and completely removes the offending overlap, the additional behavioural remedies should not have been necessary from a traditional competition perspective and might have been driven by industrial policy concerns in the domestic industry.

Vertical concerns

SAMR focuses primarily on input foreclosure in conditional decisions involving vertical concerns, but also sometimes examines customer foreclosure. For example, in *Cisco/Acacia* (2021), SAMR considered Acacia's position in the upstream market for coherent DSPs and the heavy reliance by downstream customers. Also, in *Shanghai Airport/Eastern Air Logistics JV* (2022), SAMR held that the combined entity may make use of its dominant position in the upstream market for airport cargo terminal services at Shanghai Pudong Airport to foreclose Eastern Air's competitors downstream. In *II-VI/Coherent* (2022), SAMR identified (1) the effect of input foreclosure on the downstream markets for high-power and low-power CO₂ lasers based on the market power II-VI enjoyed in the upstream optics markets; and (2) the effect of customer foreclosure on the upstream market for glass-based optics for excimer lasers based on a finding of Coherent's dominant position in the downstream excimer laser market. The conditions imposed by SAMR in this type of vertical case usually include the commitment to continue the supply and execution of existing customer contracts, among other things.

Conglomerate concerns

Cases where the parties do not have horizontal overlaps or vertical relationships can still be reviewed closely in China for conglomerate effects. SAMR adopts a broader definition of conglomerate effects: any two products that can eventually be used in the same final product (however remotely) can theoretically be seen by SAMR as neighbouring to each other. The most recent conditional clearance decision involving conglomerate concerns, *AMD/Xilinx* (2022), is very typical. SAMR took the view that the three relevant products faced the same customer group and thus were neighbouring to each other. The conditions imposed by SAMR are also typically seen in other conglomerate cases, including (most notably) the no-tying or bundling commitment and the maintenance of interoperability commitment. The most notable example is *United Technologies/Rockwell Collins* (2018), where such remedies were imposed on a wide range of 10 products sold to China.

Non-competition concerns

As discussed above, the AML empowers SAMR to consider non-competition concerns when reviewing a transaction. In recent conditional approvals, industrial policy concerns may be playing an increasingly important role, although it is difficult to discern this strictly from the text of the decisions, as SAMR prefers to ground all of its decisions (with the recent exception of *MaxLinear/Silicon Motion* (2023)) in the language of traditional competition concerns. Nevertheless, some textual clues can still be identified. For example, the second condition in *AMD/Xilinx* (2022) requires the parties to 'further facilitate cooperation with Chinese companies on the basis of existing cooperation'. In *MaxLinear/Silicon Motion* (2023), the decision failed to identify any horizontal overlap, vertical relationship or conglomerate relationship with the buyer's offerings. The 'competition' concerns discussed in the decision are de facto industrial policy concerns focused on Chinese customers' worries about supply security, and indeed even include a novel condition on the parties not to add malicious codes in the design of the products sold to China, which seems untethered from any traditional competitive analysis.

Notes

^[1] Andrew L Foster is a partner and Kexin Li and Julia Zhu are counsel at Skadden, Arps, Slate, Meagher & Flom. The authors wish to thank Danette Chan and Rachel (Weiran) Yang for their helpful input. Statistics in this chapter were gathered as at 1 September 2023, and do not account for the conditional decision in Simcere's acquisition of Tobishi, which was approved on 22 September 2023.

^[2] Before 2018, the merger review function was undertaken by the Anti-Monopoly Bureau at MOFCOM, which was transferred to SAMR amid ministerial reorganisation.

^[3] The term 'AML' hereinafter may also refer to the amended version in 2022, as the context requires.

^[4] MaxLinear announced that it exercised its contractual rights to terminate the transaction on 26 July 2023, the same day on which SAMR issued its decision. See <https://investors.maxlinear.com/press-releases/detail/509/maxlinear-provides-update-on-proposed-acquisition-of>.

^[5] The transaction was terminated on 1 February 2022 due to failure to obtain the foreign investment approval in Germany.

^[6] The divestiture ordered in China is essentially a subset of the divestiture ordered in the EU.

^[7] China may also adjust the wording of the global divestiture offered in other jurisdictions so that it will look China-specific to address China-specific concerns.

^[8] Article 33(5), Amended AML.

^[9] The transaction was abandoned amid concerns raised in the United States.

^[10] The transaction was abandoned after it was blocked in the United Kingdom.

^[11] Articles 30 and 31, Amended AML.

^[12] *Infineon/Cypress* (2020), *Illinois Tool Works Inc./MTS Systems Corporation* (2021) and *Wanhua Chemical Group/Yantai Juli Fine Chemical* (2023) were all cleared in approximately eight months.

^[13] Cases prior to 2018 are published by MOFCOM, who handled merger reviews in China before the agency reorganisation.

^[14] Article 32, Amended AML.

^[15] Reports indicated that the review clock had been suspended in *Intel/Tower Semiconductors*, which was abandoned in August 2023. Fineman, 'China stops clock in review of Intel's planned Tower Semiconductor deal' (Seeking Alpha, 12 January 2023).

^[16] The conditions in relation to PEVE in the *Panasonic/Sanyo* (2009) decision are classified by this chapter as a structural remedy, as they essentially required Panasonic to give up its control rights in PEVE (its joint venture with Toyota).

^[17] Klein and Fan, '71 per cent of Chinese divestment remedies same as other regulators' (PaRR Analytics, 8 December 2021).

^[18] Article 1, Amended AML.

^[19] Foster and Lau, In Praise of SAMR's Behavioral Remedies: Preventing Over-Deterrence in Global Merger Control (*CPI Antitrust Chronicle*, March 2023).

^[20] Article 39 of the Provisions of Review of Concentration of Undertakings (2023).

^[21] For example, *AMAT/Kokusai* was abandoned in 2021 as SAMR did not clear the deal after 20 months.

<https://ir.appliedmaterials.com/news-releases/news-release-details/applied-materials-announces-update-kokusai-electric-acquisition>.

^[22] China Antitrust Enforcement Annual Report (2022), p.15, available at <https://www.gov.cn/lianbo/bumen/202306/P020230612294618624831.pdf>. China Antitrust Enforcement Annual Report (2021), p.16, available at https://scjgj.cq.gov.cn/zwx_225/bmdt/zj/202206/P020220608633059136754.pdf.

^[23] Articles 54 and 55 of the Provisions.

^[24] See SAMR's decision to lift the *Marubeni/Gavilon* remedy in 2023 here: https://www.samr.gov.cn/fldes/tzgg/ftj/art/2023/art_489e3947def64fa6a49a495452eeabff.html.

^[25] See MOFCOM's decision to partially lift the *Wal-Mart/Yihaodian* remedy in 2016 here: <http://fldj.mofcom.gov.cn/article/ztzx/201606/20160601335200.shtml>.

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