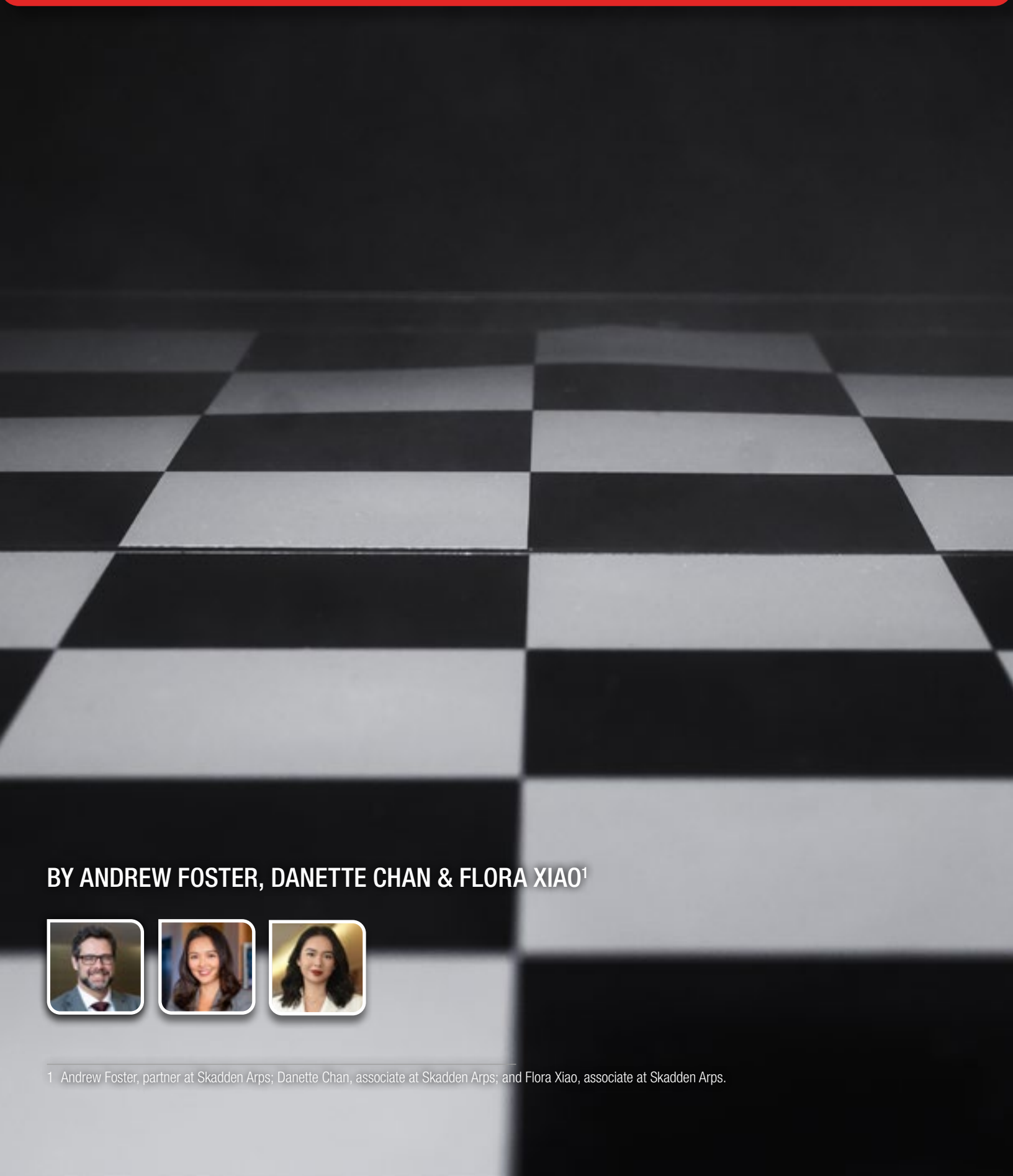
SAMR'S EVOLVING ROLE ON THE GEOPOLITICAL CHESSBOARD



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By Andrew Foster, Danette Chan & Flora Xiao

This article examines China's application of antitrust and competition laws in the wider context of the geopolitical landscape, and the increasingly prominent role the State Administration for Market Regulation (SAMR) is playing in the protection of China's interests. By introducing substantive and procedural tools such as flexibility with regard to behavioral remedies and the stop-the-clock mechanism, SAMR is able to protect Chinese consumers and extract benefits for Chinese competitors and industry, or sometimes, even delay or encumber deals that could pose a strategic challenge to China. For the first time, SAMR appears to be considering re-opening commitment negotiations from past conditional approvals, and even raising the potential for post facto nullification of approvals. This may help ensure that China continues to get the "benefit of the bargain" it expected, and to counteract foreign trade policies that China deems unjust or inappropriate. At the same time, the timing and public nature of SAMR's conduct investigations may not be intended solely as scrutiny of suspected anticompetitive conduct, but could also send a broader message with respect to international relations. Despite the important role SAMR appears to play in furthering China's objectives on the world stage and the regulatory uncertainty that comes with this new role, SAMR is likely to continue as it has always done – policing enforcement and protecting China's consumers and domestic stakeholders while approving the vast majority of deals without conditions.

In recent years, China has been expanding its tool kit to help it navigate the changing geopolitical environment. From implementing tariffs on imported goods, to imposing export controls on key raw materials and processing technology, to levying sanctions on U.S. companies exporting technology with military potential to Taiwan, China has been exploring new methods to enforce its priorities in the global landscape. One of China's most important set of tools in this regard has been its use of antitrust and competition laws, from merger control relating to international transactions to conduct investigations for suspected violations of China's Anti-Monopoly Law ("AML"). With geopolitical uncertainty reaching new heights in recent months, China's competition regulator, the State Administration for Market Regulation ("SAMR"), appears set to play an important and tactical role in carrying forth China's objectives on the world stage.

I. CHINA'S MERGER CONTROL REGIME AFFORDS OPPORTUNISTIC EXTRACTION OF BENEFITS FOR CHINESE CUSTOMERS, COMPETITORS AND INDUSTRY

For nearly two decades, China's merger control regime has provided an important tool to manage and respond to geopolitical tensions. Notwithstanding the fact that SAMR unconditionally approves the overwhelming majority of all transactions it reviews – indeed over 90 percent of its reviews result in Phase I unconditional approvals in the Simplified Procedure – for global transactions relating to strategic industries, China's merger control process can present significant regulatory uncertainty.

Under article 33 of the AML, when reviewing global transactions, SAMR is empowered (some may say mandated) to consider not only "pure" competition concerns but also how a transaction may impact the development of China's national economy. In addition to considering the usual bread and butter of a merger control review (e.g. market shares of the parties, concentration in any relevant or neighboring markets and effects of the transaction on market access, innovation and consumer welfare), SAMR will therefore also solicit and consider input from important domestic stakeholders to understand whether and how a transaction might endanger supply or disadvantage Chinese industrial players.

Thus, where a global transaction touches upon areas vital to China's economic or national security, SAMR has the statutory ability to use its review selectively to safeguard China's supply chains and delay (or even obstruct) certain deals through the imposition of conditions or remedies on the merging parties. With respect to particularly important industries – including semiconductors, semiconductor manufacturing equipment, artificial intelligence, rare earth materials, information technology and telecommunications, pharmaceuticals and medical devices, and food security and agriculture – savvy parties have long been prepared to navigate these additional dangers that SAMR's review process can raise.

To ensure that it can effectively carry out its enforcement in this regard, SAMR has introduced both substantive and procedural tools to protect and benefit Chinese consumers, and even arguably to delay or encumber deals that could pose a strategic challenge to China. Key among these are flexibility with respect to behavioral conditions and its procedural stop-the-clock mechanism. More recently, SAMR's investigation into companies' compliance with past approvals has also now for the first time raised the potential for SAMR to reopen negotiations on transactions long considered settled.

A. Flexible Behavioral Remedies . . . and an Opportunity to Reopen Negotiations on Settled Deals

Historically, SAMR has imposed conditions in global transactions to secure the supply of strategic products or services to address stakeholder concerns. Such behavioral remedies have been imposed in many high-profile technology-related deals over the past five years, including *MaxLinear/Silicon Motion* (2023), *Broadcom/VMware* (2023), *II-VI/Coherent* (2022), *AMD/Xilinx* (2022), *GlobalWafers/Siltronic* (2022), *SK hynix/Intel* (2021), *Cisco/Acacia* (2021), *Nvidia/Mellanox* (2020) and *Infineon/Cypress* (2020).

Most commonly, conditions include commitments to continue to sell products on fair, reasonable and nondiscriminatory ("FRAND") terms matching historical volumes. These remedies intend to secure favorable access to products and technologies that are considered critical for China's economic development. In *Nvidia/Mellanox* (2020), for example, Nvidia committed to continue supplying GPU accelerators, network interconnection devices and other relevant software and accessories in China on FRAND terms for a period of six years. Similarly, in *AMD/Xilinx* (2022), AMD committed to supply GPUs, central processing units and field-programmable gate arrays in China on FRAND terms for a period of six years. Additionally, Infineon, in *Infineon/Cypress* (2020), agreed to supply to Chinese customers automotive-grade NOR flash, insulated gate bipolar transistors and microcontroller units on FRAND terms for five years.

Once commitments have been made and a transaction has received approval, SAMR (with the help of a monitoring trustee) will closely monitor compliance with those commitments throughout the remedy period. There have been more than 60 conditional approvals since the first one in 2008, and for nearly every one of those decisions the parties have strictly complied without any public enforcement for failures to

observe their obligations. Indeed, there have only been two instances where China has imposed administrative sanctions for failure to comply with remedies: (i) in 2014 Western Digital was fined RMB600,000 (approximately USD84,250) and agreed to organizational realignment in order to remedy failures to strictly comply with obligations related to its 2012 acquisition of Hitachi's hard disk drive business; and (ii) in 2018 Thermo Fisher was fined RMB150,000 (approximately USD21,062) for a self-reported failure to meet pricing commitments related to its 2014 acquisition of Life Technologies.[2]

In December 2024, however, China publicly announced that it is investigating Nvidia for a suspected failure to continue supply in accordance with its commitments made as part of its 2020 acquisition of Mellanox. This investigation likely results from Nvidia's inability to comply as a result of restrictions imposed by the U.S. on the export of certain semiconductors (such as GPUs) and related materials to China. The potential repercussions of this investigation are far higher than those faced by Western Digital and Thermo Fisher, which both escaped with reasonably light fines and assurances that they would scrupulously observe their obligations in the future. First of all, the potential penalties for failure to comply have increased tenfold – up to RMB5,000,000 (approximately USD702,080) or even higher depending on the nature of the breach. Potentially more important, however, SAMR also seems to be considering whether Nvidia's failure to provide China with the "benefit of the bargain" made in the original commitments should lead either to a post facto nullification of the approval or else a material revision of the original commitments such that the burden falls on Nvidia to find – by hook or by crook – some other way of satisfying SAMR that does not also fall afoul of the U.S. export control restrictions.

The specter of such post facto annulment of an approval decision – especially years after the consummation of a deal and subsequent integration of the two businesses – raises significant questions for parties thinking about deal certainty in planning future transactions. Moreover, the potential for SAMR to reopen remedies, which are often the result of months of hard-fought negotiations, also raises significant issues relating to the finality of SAMR approval decisions.

The ultimate outcome of SAMR's investigation of Nvidia remains to be seen. At the very least, parties should be aware that the review process may not end with securing approval and that vigilance must be maintained to ensure that Chinese stakeholders continue to receive the expected benefits and protections throughout the duration of the remedy period. SAMR also appears poised, however, to use these investigations to counteract or push back against unilateral U.S. export control measures that China considers unjust or inappropriate.

B. Stopping the Clock Allows Tailoring of Deal Reviews to Dovetail with Geopolitical Timelines

First introduced in 2022, SAMR has also increasingly been using its "stop-the-clock" mechanism to suspend a deal's review clock. This tactic provides SAMR greater flexibility with respect to time constraints on its statutory review period. For global deals, SAMR can now better align its review with the timing of approvals of other regulators but also potentially with important geopolitical events to allow SAMR's approvals (or lack thereof) to send additional messages to China's trading partners.

For example, as disclosed in its conditional approval of *Broadcom/VMware*, SAMR suspended the review clock in that deal for approximately two months and only resumed its review days before the date of the parties' final remedy proposal and conditional approval. In what may have been a coincidence, but at least providing an interesting note for speculation, SAMR issued its approval only four days following the high-profile meeting of Presidents Joe Biden and Xi Jinping at the November 2024 Asia-Pacific Economic Coordination ("APEC") Summit.

SAMR will undoubtedly continue to review and unconditionally approve the vast majority of transactions under its review. As noted, the overwhelming majority of deals that SAMR has reviewed – including those involving U.S. companies – have been approved without conditions. Furthermore, despite rising geopolitical tensions, SAMR also recently approved high-profile global deals in important sectors, including *Microsoft/Activision, Broadcom/VMware* and *MaxLinear/Silicon Motion*. However, SAMR remains confident and strategic in its ability to use merger control to secure protections and benefits for Chinese stakeholders, and it appears increasingly willing and able to use these tools on the wider global stage to support China's ultimate geopolitical goals.

II. CONDUCT INVESTIGATIONS

While investigations into anticompetitive conduct have always been a part of SAMR's enforcement tool kit, they have not traditionally played a notable role in China's geopolitical strategy. In contrast to policing strict compliance with behavioral remedies, which is limited to companies with deals subject to conditional approval by SAMR, the range of potential targets for conduct investigations can be much broader.

In February 2025, SAMR announced that it has launched an investigation against Google for suspected anticompetitive conduct. SAMR has not thus far disclosed the specific conduct that is subject to investigation, leading to speculation that SAMR's probe into Google could be an abuse of dominance investigation relating to Google's Android operating system. The conduct at issue may not be new – it has been reported that Huawei made similar complaints in 2019 after Google allegedly restricted Huawei's access to proprietary Android services. However, it does seem noteworthy that the investigation was publicly announced in an atmosphere in which the U.S. executive branch has been publicly decrying global antitrust investigations of U.S. technology firms.

While it is unclear what consequences (if any) Google may face, China has been willing to levy significant fines for abusive conduct by other technology companies in the past. In 2015, China found that Qualcomm had abused a dominant position with respect to licensing of standard essential patents for baseband chips and issued a penalty of RMB6.088 billion (approximately USD854,852,072) – equivalent to eight percent of Qualcomm's annual revenue in China for 2013. Similarly, in 2021, SAMR found that Alibaba engaged in abusive conduct with respect to online retail-platform services and fined the company RMB18.23 billion (approximately USD2,559,782,075), or four percent of its domestic revenue in 2019.

Of course, SAMR and its counterparts in various other jurisdictions have always been active in scrutinizing anticompetitive conduct regardless of geopolitical influences and regardless of any escalation in trade tensions. It nevertheless bears monitoring whether SAMR's investigatory powers – typically exercised with precision and only after careful consideration – may begin to play a larger role on the global stage.

SAMR plays a critical but pragmatic role in protecting China's interests, not only with respect to antitrust enforcement but also in China's dealings with the wider world. As international relations become more volatile and trade tensions further escalate, SAMR may find itself playing a more prominent role in the global spotlight. For the vast majority of transactions and activity, SAMR is likely to continue as it has always done – policing enforcement and protecting China's consumers and domestic stakeholders. But if SAMR is called upon to defend China's interests more broadly in the world, it appears that SAMR's tool kit has been opened more widely than before and SAMR is ready and able to use those tools in new ways in the evolving geopolitical landscape.

2 1 USD = 7.1217 RMB, according to the 2024 yearly average USD/RMB exchange rate of the State Administration of Foreign Exchange.

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