

# HIGH PROFILE CONCENTRATIONS IN CHINA: AN ANALYSIS OF CONDITIONAL APPROVALS IN 2018



BY JOHN YONG REN, WESLEY WANG & SCHIFFER SHI<sup>1</sup>



<sup>1</sup> Dr. John Yong REN is the Managing Partner of T&D Associates; Dr. Wesley WANG and Dr. Schiffer SHI are associates of T&D Associates.

# CPI ANTITRUST CHRONICLE

## MARCH 2019

CPI Talks...  
...with Zhenguo Wu



**High Profile Concentrations in China: An Analysis on Conditional Approvals in 2018**  
By John Yong Ren, Wesley Wang & Schiffer Shi



**Challenges and Prospects for Merger Control in China in the Digital Economy**  
By Wei Han & Yajie Gao



**Made in China: The Global Influence of China's Merger Control Regime in the High-Tech Sector**  
By Michael Han & Bivio Yu



**Economic Analysis Under the Anti-Unfair Competition Law in China: Tencent v. Xinghui**  
By Vanessa Yanhua Zhang, John Jiong Gong & Nina Yin



**China's Internet Industry: New Challenges in Antitrust Regulation and Compliance**  
By Josh Yi Xue



**Life Science in The Crosshairs of China's Public Antitrust Enforcement**  
By Jet Deng & Ken Dai



**A Ten-Year Review of China's Antitrust Enforcement in the Chemical Industry**  
By Zhan Hao, Song Ying, Wu Yuanyuan, Yang Zhan & Lv Hongjie



**The Development of Antitrust Enforcement in China's Automotive Industry**  
By Wei Huang & Bei Yin



**Intellectual Property Antitrust Laws in China: Retrospect and Prospect (2008 – 2018)**  
By Zhao Ye



Visit [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com) for access to these articles and more!

CPI Antitrust Chronicle March 2019

[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)  
Competition Policy International, Inc. 2019<sup>©</sup> Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

## I. OVERVIEW

2018 was the 10<sup>th</sup> anniversary since the enactment of the *Anti-Monopoly Law of the People's Republic of China* ("AML")<sup>2</sup> on August 1, 2008, which is at the core of the competition regime in China.

For high-profile mergers which may cause anti-competitive effects, according to Article 29 of the AML, remedies can be imposed by the competition authority to reduce potential anti-competitive effects generated by the proposed concentration in the event that it decides not to prohibit such a transaction.<sup>3</sup> The other key document regarding merger remedies is the *Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation)* ("Remedy Provisions"), which entered into force in January 2015.<sup>4</sup> The Remedy Provisions is an important part of the regulatory framework to implement the AML with respect to the imposition, implementation and supervision of conditions with respect to concentrations in merger reviews. However, the Remedy Provisions primarily address structural remedies rather than more complicated behavioral remedies.

The Remedy Provisions comprise seven chapters and 32 articles, and include detailed provisions on the type of remedy, decision-making procedures, enforcement procedures, supervision and trustees' responsibilities, as well as modification and elimination of restrictive conditions. Some 14 articles are specifically devoted to structural remedies, i.e. divestitures.

Article 3 provides three types of remedies that can be imposed to address potential adverse impacts on competition: (i) structural remedies: divestiture of tangible assets, intangible assets such as intellectual property, or relevant interests or rights; (ii) behavioral remedies: open networks or platforms, licensure of key technologies (including patents, preparatory technologies or other intellectual property), or termination of exclusive agreements; and (iii) hybrid remedies, i.e. a combination of structural and behavioral remedies.

In terms of enforcement, from 2008 to the end of 2018, there are in total 39 cases which were conditionally approved. Among the 39 conditional approvals, the number of cases in which pure divestitures and pure behavioral remedies were used were 11 and 17, respectively. Hybrid remedies (being a combination of both divestitures and behavioral remedies)

<sup>2</sup> See Standing Committee of the National People's Congress, *Anti-Monopoly Law of the People's Republic of China* (中华人民共和国反垄断法) (Adopted August 30, 2007, entered into force August 1, 2008).

<sup>3</sup> *Ibid.* Article 29. Since April 2018, the newly-established State Administration for Market Regulation of the P.R.C. ("SAMR") is responsible for merger review rather than the Ministry of Commerce of the P.R.C. ("MOFCOM").

<sup>4</sup> See The Ministry of Commerce of the People's Republic of China, *Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation)* (关于经营者集中附加限制性条件的规定(试行)) (Adopted December 4, 2014, entered into force January 5, 2015).

were used in the other 11 cases. Please refer to Table 1 as below:

**Table 1: Types of remedies from 2008 to 2018**

Types of remedies	Number	Percentage
Pure structural remedies	11	28.2%
Pure behavioral remedies	17	43.6%
Hybrid remedies	11	28.2%
Behavioral remedies included	28	71.8%
Total	39	100%

The data in Table 1 proves the long-lasting impression that the Anti-Monopoly Bureau of the State Administration for Market Regulation (“AMB”) prefers behavioral remedies to pure structural remedies, which is different from its counterparts in the United States and EU Commission.

More specifically, in 2018, there were four cases that were approved conditionally, namely, *Bayer/Monsanto*,<sup>5</sup> *Essilor/Luxottica*,<sup>6</sup> *Linde/Praxair*,<sup>7</sup> and *UTC/Rockwell Collins*.<sup>8</sup> This article will focus on analyzing the conditional approvals issued by the AMB in 2018. The table below provides a summary of the four cases.

**Table 2: Summary of Four Conditional Approvals in China in 2018**

Approved date	Parties Concerned	Remedies	Approval stage	Notifications in the U.S. and the EU
Mar. 13, 2018	<i>Bayer/Monsanto</i>	Hybrid remedies	Withdraw and re-file; Approved in Phase III	√
Jul. 25, 2018	<i>Essilor/Luxottica</i>	Behavioral remedies	Withdraw and re-file; Approved in Phase III	√
Sep. 30, 2018	<i>Linde/Praxair</i>	Hybrid remedies	Withdraw and re-file twice; Approved in the first Phase in its third notification	√
Nov. 23, 2018	<i>UTC/Rockwell Collins</i>	Hybrid remedies	Withdraw and re-file; Approved in Phase III	√

It can be seen from Table 2 that hybrid remedies are popular. Only *Essilor/Luxottica* contains a pure behavioral remedy, although the case involves an horizontally overlapped relevant market. Another interesting fact is that all four conditional approvals have experienced withdraw and refile and were approved within or after Phase III. This means the AMB’s review of these high-profile cases took more than 6 months.<sup>9</sup>

5 See MOFCOM Official Websites, *MOFCOM Public Notice 2018 No. 31, Conditionall Approval regarding the acquisition of shares of Monsanto Company by Bayer Aktiengesellschaft, Kwa Investment Co.* (March 13, 2018) <http://fldj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml>.

6 See SAMR Official Websites, *SAMR Public Notice of the Conditionall Approval regarding the merger between Essilor International and Luxottica Group S.p.A.* (July 25, 2018) [http://samr.saic.gov.cn/gg/201807/t20180726\\_275250.html](http://samr.saic.gov.cn/gg/201807/t20180726_275250.html).

7 See SAMR Official Websites, *SAMR Public Notice of the Conditionall Approval regarding the merger between Linde AG and Praxair, Inc.* (September 30, 2018) [http://samr.saic.gov.cn/gg/201809/t20180930\\_276188.html](http://samr.saic.gov.cn/gg/201809/t20180930_276188.html).

8 See SAMR Official Websites, *SAMR Public Notice of the Conditionall Approval regarding the acquisition of shares of Rockwell Collins, Inc. by United Technologies Corporation* (November 23, 2018) [http://samr.saic.gov.cn/gg/201811/t20181123\\_277177.html](http://samr.saic.gov.cn/gg/201811/t20181123_277177.html).

9 According to T&D’s experience, AMB normally will take 2 months to initiate the case after submission. According to the AML, Phase I lasts for 30 calendar days, Phase II lasts for 90 calendar days.

## II. AN ANALYSIS ON AMB'S CONDITIONAL APPROVALS IN 2018

### A. Procedural Perspectives

#### 1. Timing for Merger Review

As mentioned above, in all four cases in 2018, the notifying parties withdrew the notifications of their proposed transactions and refiled. Generally, the Parties may withdraw their notifications just before the expiration of Phase III (see details below) to avoid a possible prohibition from the competition authority. There is no mandatory waiting time between the withdrawal and the refiling, whereas the notifying parties are likely to refile their transaction soon after the withdrawal to restart the merger review clock and to obtain the approval at the earliest time possible.

According to the AML, the merger review procedures in China can be divided into two periods and three stages, both of which are summarized in Table 3 as follows.

**Table 3: Timeframe for Non-Simplified Merger Review in China**

Stage	Timing	SAMR's Decisions
<b>Pre-initiation Period for Non-Simplified Cases</b>		
	approximately <b>2 months</b>	<ul style="list-style-type: none"> <li>Assessing the completeness of the submitted documents; and</li> <li>Issuing an Initiation Notice to initiate the case or requiring supplementary documents</li> </ul>
<b>Post-initiation Period</b>		
Preliminary investigation (Phase I)	Within <b>30</b> calendar days	<ul style="list-style-type: none"> <li>Conducting preliminary investigations and to deciding whether to approve or to initiate an in-depth investigation.</li> </ul>
In-depth investigation (Phase II)	within <b>90</b> calendar days	<ul style="list-style-type: none"> <li>Conducting in-depth investigations and to deciding whether to approve or to extend the in-depth investigation.</li> </ul>
Extension of Stage II (Phase III)	<b>60</b> calendar days at most	<ul style="list-style-type: none"> <li>Reviewing the transaction and to finally deciding whether to approve (or with remedies) or to prohibit the notified transaction.</li> </ul>
Withdraw and refile	The time clock restart from Phase I	<ul style="list-style-type: none"> <li>If the review process cannot be finished within Phase III, the authority may ask for withdraw and refile</li> </ul>

As noted in Table 3, it can take up to 8 months if a notified transaction is approved before the expiration of Phase III. The wait can be even longer if the notification of a transaction was withdrawn and refiled. Given that all four cases in 2018 were refiled, the timing for the review was extremely long, which is summarized below.

**Table 4: Time Spent in Four Conditional Approvals in China in 2018**

Case Name	Timing	Total months
<i>Bayer/Monsanto</i>	Feb. 9, 2017 Submission of the Notification Sep. 8, 2017 Withdrawal Sep. 19, 2017 Refile Mar. 13, 2018 Conditional approved	More than 13 months

<i>Essilor/Luxottica</i>	May 25, 2017 Feb. 11, 2017 Mar. 7, 2018 Jul. 25, 2018	Submission of the Notification Withdrawal Refile Conditional approved	14 months
<i>Linde/Praxair</i>	Aug. 14, 2017 Mar. 23, 2018 Apr. 4, 2018 Sep. 27, 2018 Sep. 28, 2018 Sep. 30, 2018	Submission of the Notification Withdrawal Refile Withdrawal Refile Conditional approved	More than 13 months
<i>UTC/Rockwell Collins</i>	Nov. 16, 2017 Jun. 7, 2018 Jun. 8, 2018 Nov. 23, 2018	Submission of the Notification Withdrawal Refile Conditional approved	More than 12 months

As noted in Table 4, the average time for reviewing the four conditional approvals was about 13 months after submission.

## 2. Submission and Approval of the Remedy Proposals

Generally, the remedy proposals can be submitted during any stage of merger review, usually after the authority indicates the competition concerns. There can be several rounds of negotiations before the remedy proposals are finally accepted. During the negotiations, in order to solve the competition concerns, AMB may ask the parties to modify the remedy proposals, issue supplemental questions, and conduct market survey, etc.

According to the published decisions of the four conditional approvals in 2018, the following table summarizes the date for accepting the proposed remedy and the date for approvals.

**Table 5: Date for Accepting Remedy Proposal and Final Approvals**

Case Name	Date for accepting remedy proposal	Approval date	Timing
<i>Bayer/Monsanto</i>	Jan. 25, 2018	Mar. 13, 2018	Around 2 months
<i>Essilor/Luxottica</i>	Jul. 20, 2018	Jul. 25, 2018	5 days
<i>Linde/Praxair</i>	(Unpublished)	Sep. 30, 2018	-
<i>UTC/Rockwell Collins</i>	Aug. 2, 2018	Nov. 23, 2018	3 months and 3 weeks

Once the remedy proposal is finally accepted by the AMB, the internal approving procedures will follow, during which the supervisor(s) of the case handler will review the internal report and assessment prepared by the case handler before the transaction is finally approved. Normally, according to the practice of the competition authority, it may take two to four weeks for such an internal procedure. However, given the special economic and political situations in 2018, the timing for the final approvals after the remedy proposals were finally accepted varied significantly in the four cases. This, to some extent, increases the difficulty of predictability.

## **B. Substantial Perspectives**

### 1. Related Industry

Among the four conditional approvals, the industry concerned varies. However, each industry is related to people's daily lives and the national economy in China, making them high-risk targets in 2018. Please refer to Table 6 as below.

**Table 6: Industry Concerned in the Conditional Approvals in 2018**

Case Name	Industry Concerned
<i>Bayer/Monsanto</i>	agricultural products
<i>Essilor/Luxottica</i>	spectacles lenses; eyeglasses frames
<i>Linde/Praxair</i>	industrial gas
<i>UTC/Rockwell Collins</i>	airplane parts

## 2. Types of Remedies

### a) Structural Remedies

The main structural remedy used in the cases was divestiture, which deals with competition concerns in horizontal overlapping relevant market(s). For example, in *Bayer/Monsanto*, vegetable seeds, non-selective herbicide and traits of corn, soybean, cotton and rape are horizontally overlapped businesses of Bayer and Monsanto. In order to solve competition concern in such relevant markets, the remedy adopted by the authority is divesting the relevant businesses. As a comparison, in *Linde/Praxair*, one of the structural remedies was divesting capacity of helium, rather than the business itself. Similar structural remedies can be found in *WDC/Hitachi Storage* which was approved with conditions by Chinese antitrust authority on March 2, 2012.<sup>10</sup>

It is also noteworthy that in *Essilor/Luxottica*, the parties have horizontal overlap in the optical lens, optical frames, sunglasses wholesale, and optical products retail markets. Nevertheless, the authority did not choose any structural remedies to address the competition concern in such horizontal overlapped markets. It still remains to be seen whether the behavioral remedies in *Essilor/Luxottica* can solve the competition concern in the horizontally overlapped markets effectively. As a contrast, the EU Commission cleared this case in March 2018 without conditions. The U.S. Federal Trade Commission also unconditionally cleared this case in March 2018.

### b) Behavioral Remedies

It is believed that Chinese antitrust authority, compared to its counterparts in the United States and the European Union, has a stronger preference for using behavioral remedies in its merger review process to resolve competition concerns. As of 2018, behavioral remedies were used in 28 (out of 39) conditional approvals in China, which is about 72 percent.

In 2018, all 4 conditional approvals contained behavioral remedies:

**Table 7: Summary of behavioral remedies in the conditional approvals in 2018**

Case Name	Relevant Market	Summary of Behavioral Remedies
<i>Bayer/Monsanto</i>	Digital Farming	<ul style="list-style-type: none"> <li>Chinese developers should be allowed to connect their digital agricultural software applications to the digital agriculture platform in China used by Bayer, Monsanto and the entity after the Transaction based on FRAND<sup>11</sup> conditions</li> <li>Allowing all Chinese users to register or use digital agricultural products or applications of Bayer, Monsanto and after-transaction entities</li> </ul>

<sup>10</sup> See, MOFCOM's official website: <http://fdj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml>.

<sup>11</sup> "FRAND" in this article refers to fair, reasonable, and non-discriminatory

<i>Essilor/Luxottica</i>	Spectacles lenses; eyeglasses frames	<ul style="list-style-type: none"> <li>• No tying glasses products</li> <li>• Chinese optical shops can choose frames and sunglasses via the parties or after-transaction entity freely</li> <li>• No imposition of exclusive conditions on Chinese optical shops (except for single-brand stores and franchise stores)</li> <li>• No discriminatory treatment based on FRAND conditions</li> </ul>
<i>Linde/Praxair</i>	Helium	<ul style="list-style-type: none"> <li>• Transfer the helium contract to buyer</li> <li>• Provide the buyer with the necessary support to enable it to transport helium to China</li> </ul>
	Inert gas	<ul style="list-style-type: none"> <li>• Continue to supply Chinese customers with inert gas mixtures in a timely and stable manner at reasonable prices and quantities.</li> </ul>
<i>UTC/Rockwell Collins</i>	Aircraft parts and systems	<ul style="list-style-type: none"> <li>• No tying in Chinese market</li> <li>• Maintain the current business model</li> <li>• Promise to continue the contract and organization form for Chinese customers</li> </ul>

It can be seen from Table 7 that the main types of the behavioral remedies imposed in 2018 include allowing or maintaining supply of the product/service for Chinese customers based on FRAND conditions, no tying/bundling, and no other restrictive conditions, such as discriminatory treatment and exclusive conditions.

Another noteworthy point is that, like in *Essilor/Luxottica*, the AMB explicitly requires that the undertaking concerned should apply *ex ante* to the AMB for the removal of the behavioral remedies. The AMB will then decide on whether to remove the conditions. This new requirement may enhance the burden for the undertakings being imposed behavioral remedies.

Depending on the company's business practices, strict compliance with these behavioral remedies may become quite burdensome both in terms of time and expenses. These additional operational costs can become even more pronounced given the long tenures of some of the remedy periods, which may last for five or even 10 years. Indeed, some remedies do not have a specified expiration date, meaning that the post-closing entities are bound by these remedies indefinitely, or at least until the remedies are lifted by SAMR.

These additional operational costs will be exacerbated not only by the fees for the services of the monitoring trustee (which are borne by the subject company of the remedy), but also by additional legal fees to help ensure that the company remains in compliance. These additional costs can easily run into the hundreds of thousands or even millions of dollars over a full review period.

Apart from the above variations, it is generally accepted that AMB's remedies imposed on the conditional approvals in China is to a large extent consistent with its counterparts in EU and US. Please refer to Table 8 as below.

**Table 8: Remedies imposed by U.S. and EU antitrust Authorities**

Case Name	US	EU
<i>Bayer/Monsanto</i>	Conditionally approved on March 29, 2018 <ul style="list-style-type: none"> <li>• Divestitures</li> <li>• Hold separate</li> <li>• Affidavit</li> <li>• Firewall</li> </ul>	Conditionally approved on March 21, 2018 <ul style="list-style-type: none"> <li>• Divestitures</li> </ul>
<i>Essilor/Luxottica</i>	<ul style="list-style-type: none"> <li>• <b>Unconditionally</b> approved on March 1, 2018</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Unconditionally</b> approved on March 1, 2018</li> </ul>
<i>Linde/Praxair</i>	Conditionally approved on October 22, 2018 <ul style="list-style-type: none"> <li>• Divestment</li> </ul>	Conditionally approved on August 20, 2018 <ul style="list-style-type: none"> <li>• Divestment of gas business;</li> <li>• Divestment of helium sourcing contracts</li> <li>• The transfer of Praxair's stake in SIAD, an Italian joint venture, to Praxair</li> </ul>
<i>UTC/Rockwell Collins</i>	Conditionally approved on October 1, 2018 <ul style="list-style-type: none"> <li>• Divestment</li> <li>• Hold separate</li> <li>• Asset preservation obligation</li> </ul>	Conditionally approved on May 4, 2018 <ul style="list-style-type: none"> <li>• Divestment</li> </ul>

### III. CONCLUDING REMARKS AND FUTURE TRENDS

This article analyzed the four conditional approvals in 2018 reviewed by AMB. From a procedural perspective, one of the most significant features may have been the long review time. The review time for such high-profile cases can be extremely long, due to the possibility of several rounds of negotiations of remedies and the complexity of cases. In 2018, the average review time of the four conditional approvals was more than 13 months. Therefore, for high profile or extremely complex transactions in China, the Parties are advised to be prepared for a long review period.

To save time to the extent possible, the Parties are also advised to be cooperative and keep in close communication with the competition authority in China so as to understand its thoughts and its competition concerns. In addition, experienced local antitrust counsels help a lot in this regard, because, generally, they are familiar with the procedures and can have a good understanding of the competition authority's requirements and working style, which can be important to proceed with the notification process in China.

From the substantive perspective, the AMB tends to adopt tailor-made behavioral remedies to address competition concerns, rather than pure structural remedies. As of 2018, behavioral remedies were used in 28 (out of 39) conditional approvals in China, which implies the prevalence of behavioral remedies in China. Such an approach is in contrast with the practice in the U.S. and the EU, where divestitures are traditionally favored over behavioral remedies because they are deemed as straightforward and no long-term monitoring is required.<sup>12</sup>

<sup>12</sup> See, for example, Mengmeng Shi, "The Divestiture Remedies under Merger Control in the US, the EU and China: a comparative law and economics perspective," (unpublished Ph.D. dissertation, Faculty of Law, Maastricht University 2017), Chapter 13, p. 410.

The reasons behind China's preference for behavior remedies can be complicated. One of the reasons can be the flexibility of behavioral remedies in China. As demonstrated, the form of behavioral remedies in China varies. It is possible that a divestiture may not be sufficient to solve competition concerns in some cases in the eyes of AMB. For example, in *UTC/Rockwell Collins (2018)*, apart from divestiture, the parties also promised to continue the supply of certain products and not to engage in any illegal tying. Another example in this regard is *Thermo Fisher/Life Tech (2014)* where the Parties committed themselves to reduce price by 1 percent per year without reducing the discount to Chinese distributors for certain products in order to address the Chinese competition authority's concerns of post-merger price increase.<sup>13</sup> Therefore, it seems the competition authority in China is open to various forms of behavioral remedies, as long as such a remedy can address its concerns.

Last, but not the least, according to the conditional approvals in 2018, when a global transaction was reviewed by different competition authorities in several jurisdictions, including China, it can be observed that, first, if a divestiture was imposed by the competition authorities in other jurisdictions, then, most likely, such a divestiture will also be included in China. Second, in 2018, with the exception *Linde/Praxair*, there was no case in which a divestiture was imposed only in China.<sup>14</sup> Third, it is possible that a behavioral remedy could be required in a notified transaction in China, whereas the same transaction could be approved unconditionally in other jurisdictions, as was the case in *Essilor/Luxottica (2018)*.

---

<sup>13</sup> For the full text, see: MOFCOM Official Websites, *MOFCOM Public Notice 2014 No. 3, Conditionally Approval regarding the acquisition of Life Technologies Corporation by Thermo Fisher Scientific, Inc.* (January 14, 2014) <http://fdj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml>.

<sup>14</sup> In *Linde/Praxair*, AMB required Linde to divest its shares in the four JVs in Canton, China. This condition was neither mentioned in the EU nor U.S.'s *Linde/Praxair* decision.

## CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit [competitionpolicyinternational.com](http://competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

