

HIGH-PROFILE MERGER FILINGS IN 2019: AN ANALYSIS OF CONDITIONALLY APPROVED CONCENTRATIONS



BY JOHN YONG REN, WESLEY ZHINING WANG & MARTHA SHU WEN¹



¹ Dr. John Yong REN is the Managing Partner of T&D Associates; Dr. Wesley Zhining WANG and Ms. Martha Shu WEN are associates of T&D Associates.

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I. OVERVIEW

For high-profile mergers which may cause anti-competitive effects, according to Article 29 of the Anti-Monopoly Law of the People's Republic of China ("AML"),² "restrictive conditions" (or remedies) can be imposed by the competition authority to reduce potential anti-competitive effects.³ Such decisions are typically called "conditional approvals."

According to Article 3 of the Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) (the "Remedy Provisions"), three types of remedies can be imposed to address potential adverse impacts on competition: (i) structural remedies, i.e. divestiture of tangible or intangible assets, or relevant interests or rights; (ii) behavioral remedies, i.e. opening networks or platforms, licensing key technologies (including patents, preparatory technologies or other intellectual property), or terminating exclusive agreements; and (iii) hybrid remedies, i.e. a combination of structural and behavioral remedies.

According to the official website of the Anti-Monopoly Bureau of the State Administration for Market Regulation ("AMB"), in 2019, there were five cases that were conditionally approved by the AMB, which increases the total number of conditionally approved cases in China to forty-four as of the end of 2019.

II. KEY LEGISLATIVE DEVELOPMENTS

In terms of legislation, some new developments concerning the merger control should be noted, especially those in relation to conditional approvals. Specifically, on January 2, 2020, the State Administration for Market Regulation of People's Republic of China ("SAMR") released a draft amendment to the AML to solicit public comments (the "Draft AML Amendment"). Among the key proposed changes, there is a "stop-the-clock" clause. Article 30 would add new stop-the-clock rules by setting out three scenarios in which the passage of time would not count towards the review period. These three scenarios reflect practical necessities: the clock can stop (i) "upon application or consent by the notifying parties"; (ii) where "supplementary submission of documents and materials " are required; and (iii) to facilitate "consultation in relation to proposals for restrictive conditions." This could be a solution to the common issue whereby notifications are withdrawn and refiled in conditionally approved cases, where the statutory review period is usually not adequate for the SAMR and the notifying parties to negotiate remedies and for the SAMR to reach a final decision. However, more detailed criteria in this regard are required to prevent the stop-the-clock period from being extended indefinitely, which could increase legal uncertainty.

Another newly released draft regulation is the Interim Provisions on Review of Concentration of Undertakings (Exposure Draft) (the "Interim Provisions"). According to its Article 47, the divesting party must make a proposal to divest to a specific buyer, and the SAMR is allowed to require in its conditional approval decision that the divesting party not implement the concentration before the completion of the divestiture. In addition, Article 50 of the Interim Provisions provides that the SAMR must specify in the conditional approval decision whether the notifying party is required to engage a trustee, and set out any applicable procedures.

² 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 on August 30, 2007, entered into force on August 1, 2008).

³ *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").

III. AN ANALYSIS OF AMB'S CONDITIONAL APPROVALS IN 2019

In 2019, there were five merger enforcement decisions resulting in conditional approvals, namely *KLA-Tencor/Orbotech*,⁴ *Cargotec/TTS*,⁵ *II-VI Finisar*,⁶ *Garden Bio DSM*⁷ and *Novelis Aleris*.⁸ Pure behavioral remedies were used in four of these (in which a hold-separate remedy was imposed in three), hybrid remedies (a combination of both divestitures and behavioral remedies) were used in one, while pure structural remedies (normally in form of divestitures) were not used alone in any. Please refer to Table 1 below for a summary of the five conditionally approved cases.

Table 1: Summary of Five Conditional Approvals in China in 2019

Approved Date	Case Name	Type of Concentration	Remedies	Approval stage	Notifications in the U.S. and the EU?
Feb. 13, 2019	<i>KLA-Tencor / Orbotech</i>	Acquisition	Behavioral remedies	Withdraw and re-file; Approved in Phase II	Notified and approved without Conditions
Jul. 5, 2019	<i>Cargotec / TTS</i>	Acquisition	Behavioral remedies (hold-separate)	Withdraw and re-file; Approved in Phase III	Notified and approved without Conditions by German Federal Cartel Office
Sept. 18, 2019	<i>II-VI / Finisar</i>	Acquisition	Behavioral remedies (hold-separate)	Withdraw and re-file; Approved in Phase I	Notified and approved without Conditions
Oct. 16, 2019	<i>Garden Bio / DSM</i>	Joint Venture	Behavioral remedies (hold-separate)	Withdraw and re-file; Approved in Phase III	Notified and approved by Austrian FCA
Dec. 20, 2019	<i>Novelis / Aleris</i>	Acquisition	Hybrid remedies	Initiation under simplified procedure and then revoked and re-filed as a normal case; Withdraw and re-file twice; Approved in Phase I	Notified and approved with conditions

This table again demonstrates the long-lasting impression that the AMB prefers behavioral to pure structural remedies, which differs from the practice of its counterparts in the United States and the EU Commission. In addition, 2019 saw an increase in the use of hold-separate remedies. To sum up, with the five new conditional approvals, from 2008 to 2019, the number of cases in which pure behavioral remedies were used increased to 21, accounting for 47.7 percent of the 44 cases, which increased by 4.1 percent compared with 2018. Pure structural remedies and hybrid remedies were used in 11 and 12 cases, respectively. In other words, behavioral remedies were applied in 33 cases, representing 75 percent of all the conditionally approved cases in China.

4 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of shares of Orbotech Ltd. by KLA-Tencor Corporation* (February 13, 2019) http://gkml.samr.gov.cn/nsjg/xwxs/201902/t20190220_290940.html.

5 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of certain business of TTS Group ASA by CargotecOyj* (July 5, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjz/201907/t20190712_303428.html.

6 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of shares of Finisar Corporation by II-VI Incorporated* (September 18, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjz/201909/t20190920_306948.html.

7 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the establishment of a joint venture by Garden Bio and DSM* (October 16, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjz/201910/t20191018_307455.html.

8 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of shares of Aleris Corporation by Novelis Inc.* (December 20, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjz/201912/t20191220_309365.html.

Please refer to Table 2 below for a summary of remedy types used the 44 cases as of 2019 and a comparison with the statistics as of 2018.

Table 2: Types of Remedies in Conditional Approvals from 2008 to 2019

Types of remedies	Number (as of 2019)	Percentage (as of 2019)	Number (as of 2018)	Percentage (as of 2018)
Pure structural remedies	11	25.00%	11	28.2%
Pure structural remedies	21	47.7%	17	43.6%
Hybrid remedies	12	27.3%	11	28.2%
Total	44	100%	39	100%
Behavioral remedies included	33	75.0%	28	71.8%

Further analysis of the five conditional cases is provided below from both procedural and substantive perspectives.

A. Procedural Perspectives (including Comparison with 2018)

1. Timing of Conditional Approvals

Unsurprisingly, based on the published conditional approval decisions, in all five cases in 2019, the notifying parties experienced withdrawal and refiling, which made the review period longer than the theoretical statutory review period.⁹ Please refer to Table 3 below, which illustrates the timeline of the review process for the five conditional approvals in 2019.

Table 3: Timeline of the review process for the 5 conditional approvals in 2019

Case Name	Timeline		Total Months (Approx.)
<i>KLA/Orbotech</i>	Apr. 28, 2018	Submission of the notification	11.5
	Dec. 18, 2018	Withdrawal	
	Dec. 20, 2018	Refile and initiated	
	Apr. 17, 2019	Conditionally approved	
<i>Cargotec/TTS</i>	Jun. 15, 2018	Submission of the notification	12.7
	Jan. 11, 2018	Withdrawal	
	Jan. 14, 2018	Refile and initiated	
	Jul. 5, 2019	Conditionally approved	
<i>II-VI/Finisar</i>	Dec. 29, 2018	Submission of the notification	8.6
	Aug. 14, 2019	Withdrawal	
	Aug. 20, 2019	Refile and initiated	
	Sep. 18, 2019	Conditionally approved	
<i>Garden Bio/DSM</i>	Apr. 12, 2018	Submission of the notification	18.1
	Oct. 24, 2018	Withdrawal	
	Dec. 21, 2018	Refile	
	Oct. 16, 2019	Conditionally approved	

⁹ According to the AML, the review period after case initiation can be divided into preliminary review period (lasting for 30 calendar days), further review period (lasting for 90 calendar days) and extended further review period (lasting for 60 calendar days).

<i>Novelis/Aleris</i>	Aug. 31, 2018	First-time Submission as a simplified case	15.6
	Oct. 26, 2018	Revocation of the simplified procedure	
	Nov. 1, 2018	Refile as a normal case	
	Dec. 13, 2018	Initiated as a normal case	
	Jun. 6, 2019	Withdrawal	
	Jun. 12, 2019	Refile	
	Dec. 20, 2019	Conditionally approved	
Average	N/A	N/A	13.3

There are two notable takeaways from Table 3:

- First, in *Garden Bio/DSM*, the period between withdrawal and refiling lasted almost 2 months, which is long compared with the period in other conditional approvals. For example, in *KLA/Orbotech*, it only took 2 days for withdrawal and refiling.
- Second, in *Novelis/Aleris*, the authority took a particularly long time (3.4 months) to determine whether to initiate the review process compared with the other four cases with conditional approvals. In *Novelis/Aleris*, the period between the first submission and its withdrawal as a “normal” case was extremely long (i.e. about 10 months). According to the decision, the *Novelis/Aleris* notification was initially filed as a “simplified” case on August 31, 2018 but this notification was refused by the authority. The case then was then re-filed as a “normal” case and the review period was formally initiated on December 13, 2018. *Novelis/Aleris* illustrates the importance of correctly assessing whether a case qualifies for simplified treatment before submission.

Please see the more detailed timelines of the five conditional approvals in Table 4 below:

Table 4: Timeline of the Conditional Approvals

Case Name	Period between Submission and Initiation (Approx. Month)	Period between 1st Initiation and Approval (Approx. Month)
<i>KLA/Orbotech</i>	2.0	9.5
<i>Cargotec/TTS</i>	1.4	11.3
<i>Il-VI/Finisar</i>	1.7	6.9
<i>Garden Bio/DSM</i>	0.7	17.5
<i>Novelis/Aleris</i>	3.4	17.5
Average	1.84	17.5

As illustrated by Table 4, the average period between submission and formal initiation is about 1.84 months, and the average period between initiation and approval is about 11.5 months. Therefore, it is notable that in general, in 2019, the entire period between submission and approval lasted about 13.3 months, while in 2018, the average time for reviewing the five conditional approvals was about 13 months after submission.

2. Submission and Approval of the Remedy Proposals in 2019

In practice, remedy proposals are usually offered after the authority indicates its competition concerns. There can be several rounds of negotiations before the remedy proposals are finally accepted. During the negotiations, in order to solve any competition concerns, the AMB may ask the parties to modify their remedy proposals, issue supplemental questions, and conduct market surveys, etc.

Based on the published decisions of the five conditional approvals in 2019, the following table summarizes the date of acceptance of the proposed remedy and the date of final approval for each case.

Table 5: Date for Accepting Remedy Proposal and Final Approvals

Case Name	Date for Accepting Remedy Proposal	Approval Date	Timing
<i>KLA/Orbotech</i>	Feb. 1, 2019	Feb. 13, 2019	12 days
<i>Cargotec/TTS</i>	Jun. 16, 2019	Jul. 5, 2019	19 days
<i>II-VI/Finisar</i>	Sep. 11, 2019	Sep. 18, 2019	7 days
<i>Garden Bio/DSM</i>	Oct. 11, 2019	Oct. 16, 2019	5 days
<i>Novelis/Aleris</i>	Nov. 26, 2019	Dec. 20, 2019	24 days
Average	-	-	13.4 days

Once the proposed remedies are finally accepted by the authority, the internal approval procedure follows. The supervisor(s) of the case handler will review the internal merger filing report and assessment prepared by the case handler before the written approval is finally signed and issued. As illustrated by Table 5, the internal approval procedure takes 13.4 days on average. Compared with the conditional approvals in 2018, cases in 2019 took less time to obtain approval decisions, from the submission of the final proposed remedies (by contrast, in 2018, this internal approval period could last for months). In this respect, it is fair to say that the authority's efficiency increased in 2019.

B. Substantive Perspectives

1. Related Industry

Each of the five conditional approval decisions concerns a different industry. However, industries relating to semiconductors (and the national economy) remained the AML's focus in 2019. Of the five conditional approvals in 2019, *KLA/Orbotech* and *II-VI/Finisar* are related to semiconductors, illustrating the importance that the antitrust authority attached to the semiconductor industry. Please refer to Table 6:

Table 6: Industry Concerned in the Conditional Approvals in 2019

Case Name	Industry Concerned
<i>KLA/Orbotech</i>	Semiconductor
<i>Cargotec/TTS</i>	Merchant Ship Handling Equipment
<i>II-VI/Finisar</i>	Semiconductor
<i>Garden Bio/DSM</i>	Vitamin, Cholesterol
<i>Novelis/Aleris</i>	Aluminum Sheet for Automobile

2. Types of Remedies

As to the types of remedies imposed in 2019, please refer to Table 7:

Table 7: Types of Remedies in 2019

Case Name	Types of Remedies
<i>KLA/Orbotech</i>	Behavioral
<i>Cargotec/TTS</i>	Behavioral (Hold Separate)
<i>II-VI/Finisar</i>	Behavioral (Hold Separate)

<i>Garden Bio/DSM</i>	VBehavioral (Hold Separate)
<i>Novelis/Aleris</i>	Structural + Behavioral

a. Structural Remedies

Unsurprisingly, the only type of structural remedy used by the authority is divestiture, which seeks to eliminate competition concerns with respect to horizontal overlap(s). For example, in *Novelis/Aleris*, the parties had a horizontal overlap in aluminum inner and outer sheet plates for automotive bodies. Since the combination of Novelis and Aleris was deemed to raise competition concerns in those markets in which the parties were the top 1 and top 3 suppliers, respectively, the authority ordered the combined entity to divest the aluminum inner and outer sheet plates for automotive bodies business as a whole in the European Economic Area.

It is notable that in 2019 structural remedies were still not popular compared with behavioral remedies. All of the five conditional approvals in 2019 involved behavioral remedies (including *Novelis/Aleris*), which suggests that behavioral remedies ought to be to the forefront of notifying parties' minds when proposing solutions.

b. Behavioral Remedies

For more details of the behavioral remedies imposed in 2019, please refer to Table 8 below:

Table 8: Summary of behavioral remedies in 2019

Case Name	Relevant Market	Summary of Behavioral Remedies	Period of remedies
<i>KLA/Orbotech</i>	<ul style="list-style-type: none"> Semiconductor processing control 	<ul style="list-style-type: none"> Maintaining the supply of semiconductor process control equipment and service to customers in China under FRAND terms No tying or bundling Protecting the information of customers in China (deposition and / or etching M manufacturing equipment suppliers) 	5 years
<i>Cargotec/TTS</i>	<ul style="list-style-type: none"> Hatch cover Merchant ship ro-ro equipment Merchant ship crane 	<ul style="list-style-type: none"> Hold-separate 	2 years
		<ul style="list-style-type: none"> No increase of price No refusal or restriction of the supply to Chinese customers 	5 years (SAMR's ex ante permission required)
<i>II-VI/Finisar</i>	<ul style="list-style-type: none"> Semiconductors (optical communication devices) 	<ul style="list-style-type: none"> Hold-separate Maintaining the supply of wavelength selector switch to customers under FRAND terms 	3 years (SAMR's ex ante permission required)
<i>Garden Bio/DSM</i>	<ul style="list-style-type: none"> Vitamin Cholesterol 	<ul style="list-style-type: none"> Hold-separate 	5 years
<i>Novelis/Aleris</i>	<ul style="list-style-type: none"> Aluminum inner and outer sheet plates for automotive body 	<ul style="list-style-type: none"> Not supply steel plate cold commercial to any competitors in the Chinese market of aluminum sheet plates for automotive body 	10 years

The behavioral remedies set out in Table 8 display the following features:

First, taking a closer look at the behavioral remedies imposed in 2019, there are two main types: hold-separate and supply maintenance. Of all the five conditional approvals, three contain a hold-separate remedy (i.e. *Cargotec/TTS*, *II-VI/Finisar* and *Garden Bio/DSM*), while three contain a supply maintenance remedy (i.e. *KLA/Orbotech*, *Cargotec/TTS*, and *II-VI/Finisar*). These two main remedy types suggest that the SAMR cares about maintenance of market competition following transactions, as well as the welfare of customers in China. For notifying part(ies), it is important to pay attention to potential concerns in relation to consumer welfare.

Second, it is also noteworthy that in *Cargotec/TTS* and *II-VI/Finisar*, the authority explicitly required that the undertaking concerned obtain the SAMR's *ex ante* permission for the disapplication of the behavioral remedies imposed. This is not a new development. In the *Essilor/Luxottica* case in 2018, the SAMR also required the undertaking concerned to apply for *ex ante* permission to remove behavioural remedies.¹⁰ This type of requirement can increase the burden on the undertakings subject to behavioral remedies. On the other hand, in *KLA/Orbotech*, *Cargotec/TTS*, *Garden Bio/DSM*, and *Novelis/Aleris*, the authority agreed that the restrictive conditions could expire automatically when a given time limit expired (though did not do so for the hold-separate remedies in *KLA/Orbotech* and *Cargotec/TTS*).

Third, although popular, behavioral remedies can in practice be burdensome both in terms of time and expense. Such remedies generate costs, including not only the fees for monitoring trustee services (which are borne by the company subject to the remedy), but also additional legal costs to ensure compliance. These costs can become even more pronounced depending on the length of the remedy period, which last for five or even 10 years (in *Novelis/Aleris*). Especially, in those cases where remedies cannot be lifted if SAMR disagrees, this may create significant burden and uncertainty for the post-closing entities. On the other hand, behavioral remedies do have their advantages. For instance, behavioral remedies at least maintain the integrity of an acquired business to the greatest possible extent.

IV. CONCLUDING REMARKS AND FUTURE TRENDS

2019 was another remarkable year in terms of merger control developments in China. From the legislative perspective, developments in 2019 may have significant impact on future merger control enforcement. The “stop-the-clock” clause proposed by the Draft AML Amendment may give the authority and undertakings concerned more time to process a transaction, but may also introduce legal uncertainty. In addition, the Interim Provisions set out procedural rules for conditional approval cases. Although the two pieces of legislation are not yet formally adopted, they are indicative of future trends in merger control in China.

From a procedural perspective, one of the most significant features of 2019 may be the long review periods. In particular, *Garden Bio/DSM* took 18.1 months to obtain approval. Moreover, experience in 2019 underlines how important it is to correctly assess whether a transaction satisfies the criteria for simplified treatment before submission. In *Novelis/Aleris*, the notification was first filed as a simplified case on August 31, 2018 but later it was revoked by the SAMR. The case then was filed as a normal case and finally initiated on December 13, 2018, which took almost 3.4 months. In order to ensure a smooth review process and to avoid unnecessary delays, experienced local antitrust counsel can play an important role in the preparation and review process. They are familiar with the merger filing procedures and standards, and can help companies to make the right decision at every stage, including but not limited to applying for the right procedures, based on their understanding of the authority's requirements and working style.

From a substantive perspective, it can be summarized that the SAMR paid close attention to the semiconductor industry. In terms of the remedies adopted, the SAMR preferred tailor-made behavioral remedies to address competition concerns rather than pure structural remedies. In 2019, all conditional approvals contained behavioral remedies. This trend is not new and is consistent with the authority's practices in 2018. We took a closer look at the behavioral remedies imposed by the SAMR in 2019, and noted three particular features. First, there are two main types of behavioral remedies, i.e. hold-separate obligations and supply maintenance. Second, in some conditional approvals in 2019, the SAMR required that the parties should apply *ex ante* for permission from the SAMR for the removal of the behavioral remedies; while in other conditional approvals, the restrictive conditions can be relieved automatically. Third, behavioral remedies may last for a long time.

We suspect that Chinese merger control in 2020 will be consistent with the 2019 experience, which benefits legal certainty. For instance, we think the industries concerned in 2019 will likely still be the focus in 2020, and that behavioral remedies such as hold-separate obligations and supply maintenance will remain popular. Nevertheless, from a procedural perspective, if the “stop-the-clock” clause is adopted in the revised AML, the review process of merger control in China will be changed.

¹⁰ See, SAMR Official Websites, SAMR Public Notice of the Conditional 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.

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