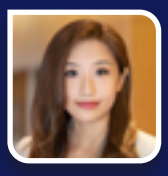
IN PRAISE OF SAMR'S BEHAVIORAL REMEDIES: PREVENTING OVER-DETERRENCE IN GLOBAL MERGER CONTROL

BY ANDREW FOSTER & CINDY LAU[1]



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CPI ANTITRUST CHRONICLE MARCH 2023

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IN PRAISE OF SAMR'S BEHAVIORAL REMEDIES: PREVENTING OVER-DETERRENCE IN GLOBAL MERGER CONTROL

By Andrew Foster & Cindy Lau

This article examines the use of behavioral remedies in merger control in China, and contrasts it with the stance opposing conduct remedies in the U.S., UK, and other jurisdictions including Australia and Germany. It argues that acknowledgement of the benefits offered by behavioral remedies can eliminate a serious risk of over-enforcement, avoiding a chilling effect on even pro-competitive mergers and acquisitions ("M&As"). The nearly fifteen years' experience of implementing behavioral remedies in China demonstrates that many common complaints about behavioral remedies may be overstated, including monitoring difficulties and ineffectiveness at remedying vertical or conglomerate concerns. As many agencies and regulators move away from the traditional "consumer welfare" standard to consider the impact of a transaction more holistically, China's experience shows that behavioral remedies can be an important and useful tool for regulators to achieve a balance between protecting market competition and incentivizing, or at least not over-deterring, legitimate M&A activities.

In recent years, agencies and regulators responsible for merger control in the U.S., UK, and other jurisdictions (including Australia and Germany) have taken an increasingly hardline stance opposing the implementation of behavioral remedies to rectify competition concerns, even in cases without obvious anticompetitive red flags. While classic ideological considerations support the use of behavioral remedies in transactions with vertical or neighboring relationships, the U.S. and UK have gone further in their recent practice, effectively precluding the use of behavioral remedies in most cases. By contrast, China's State Administration for Market Regulation ("SAMR") has been willing to use behavioral remedies as a solution for concerns under the Anti-Monopoly Law ("AML"), and has indeed allowed conduct commitments in the majority of its conditional clearances over the past fifteen years, while the European Commission continues to consider behavioral remedies as potentially useful in some vertical and conglomerate assessments.

A failure to acknowledge the potential benefits offered by behavioral remedies brings a serious risk of over-enforcement, potentially leading to a chilling effect on even pro-competitive mergers and acquisitions as a whole. Indeed, it has been recognized that behavioral remedies could at times generate greater efficiencies than structural commitments. A governmental aversion to behavioral remedies can lead to prohibitions of efficiency-creating mergers with only limited potential competitive issues – an arbitrary result at best, and intentionally chilling at worst.[2] This happens where complex, headline-grabbing M&A transactions in dynamic and innovative industries such as digital platforms or semiconductors encounter agencies and regulators willing to speculate on novel and untested theories of competitive harm. Many of those same agencies and regulators will then refuse to engage on solutions for such speculative theories, instead flatly rejecting an approach to craft tailored remedies, absent a problematic horizontal overlap with a clear structural fix. The nearly fifteen years' of experience of SAMR and its predecessor[3] in implementing and enforcing behavioral remedies, however, belies many of the most common complaints about behavioral remedies – for example, that they are difficult to implement or monitor, or ineffective at remedying vertical or conglomerate concerns in dynamic markets.

SAMR's continued willingness and flexibility to accept behavioral remedies is to some degree driven by its unique mandate under the AML to consider not only competition concerns but also the impact of a transaction on China's national economy.[4] This means that SAMR has long experience considering a deal's effects outside the traditional "consumer welfare" standard previously embraced by most competition practitioners. Now, as many agencies and regulators move away from that traditionally accepted standard to consider the impact of a transaction more holistically, SAMR's experience has become all the more important. SAMR's preference to avoid prohibitions in favor of tailored solutions achieves a balance between protecting market competition and incentivizing (or at least not deterring) legitimate M&A activities. This is all the more important when the impact of over-enforcement in merger control leads inevitably to the death of a proposed transaction, while the dangers of under-enforcement can subsequently be remedied by a vigilant enforcer using its dominance or monopolization toolbox. Seen in this light, although China has a well-earned reputation for being one of the most difficult jurisdictions with respect to regulatory approvals for complex M&A, its use of behavioral remedies balances its ability to conduct a holistic review and entertain multiple theories of harm while avoiding the unjustified and overly broad deterrent of flat prohibitions for largely pro-competitive transactions.

I. STRUCTURAL REMEDIES PREFERRED OVER BEHAVIORAL REMEDIES IN U.S. AND UK

Structural remedies seek to directly influence the competitive structure of the relevant market(s) in order to maintain or improve the conditions for competition.[5] The classic structural remedy is a divestiture of a business. Behavioral remedies seek to address the identified competition concerns through commitments by the undertakings concerned to behave or not to behave in a certain manner. Examples include supply obligations, licensing key technology, providing access to key infrastructure, firewall provisions, and refraining from raising prices above a certain level. The classic approach to remedies attached to conditional clearances of merger transactions identifies structural remedies as superior to behavioral remedies. Structural remedies directly and permanently resolve competitive issues, ensuring lasting conditions preserving dynamic competition.[6] Behavioral remedies have traditionally been considered less effective in addressing competitive harm and less desirable where they result from activist governmental intervention that nevertheless fails ultimately to address the underlying structural flaws in the market itself. Behavioral remedies are also said to be more burdensome, as they require monitoring post-transaction, and to be more difficult to implement. In the U.S. and UK, the agencies and regulators have cited these reasons for refusing to accept behavioral remedies, and overall there has been a lower proportion of cases that end up with behavioral remedies as conditions to clearances, compared to China.

2 Ezrachi, *Under (and Over) Prescribing of Behavioral Remedies*, The University of Oxford Centre for Competition Law and Policy Working Paper (L) 13/05.

3 SAMR was officially established in 2018. From 2008 until 2018, the Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM") administered merger control reviews under the AML. For the purposes of this article, references to SAMR should be taken to include its predecessor at MOFCOM where time appropriate.

4 Art. 33(5) AML.

5 Maier-Rigaud and Loertscher, *Structural vs. Behavioral Remedies,* CPI Antitrust Chronicle (April 2020).

6 See Ezrachi, *supra* note 2.

In the U.S., there is a strong preference for structural remedies, such as divestitures, over behavioral remedies. Former U.S. Assistant Attorney General Makan Delrahim commented that, *"behavioral remedies often fail to let the competitive process play out, [requiring] centralized decisions instead of free market process"*.[7] Moreover, in the U.S., conduct remedies are seen as ineffectual in addressing competitive harm, because of perceived administrative difficulties of enforcing and monitoring compliance.[8] The U.S. Department of Justice ("DOJ")'s Merger Remedies Manual states that remedies should not create ongoing government regulation of the market, therefore stand-alone conduct relief is appropriate only when the parties prove that: (1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm, and (4) the remedy can be enforced effectively.

Similarly, the UK Competition and Markets Authority ("CMA") prefers structural remedies to behavioral remedies, because behavioral remedies are unlikely to be as comprehensive or lasting as a structural fix in resolving a substantial lessening of competition and its adverse effects.[9] In its 2019 Merger Remedy Evaluations, the CMA expressed its belief in the superiority of structural remedies, in terms of their effectiveness, risk profile and durability, but still acknowledged some limited circumstances in which behavioral remedies might be effective (for example, where a merger takes place in a technologically mature sector with an established and well-resourced regulatory regime and where there is clear evidence that the remedies will only be required for a limited period).[10]

In recent years, however, the CMA's stance on behavioral remedies has hardened significantly, consistent with its highly interventionist approach to merger control in general. As reported in 2020, the CMA was *"the most active antitrust enforcer"* and it frustrated the highest share of deals worldwide.[11] Indeed, in 2021, the CMA issued a joint statement with the Australian Competition and Consumer Commission ("ACCC") and Germany's Bundeskartellamt, ("FCO")[12] highlighting the importance of rigorous and effective merger enforcement and discrediting *any* potential pro-competitive effects of behavioral remedies:

> *It is widely acknowledged that complex behavioral remedies that create continuing economic links and dependencies are unlikely to recreate the pre-merger competitive intensity of the market, can raise significant circumvention risks, and can quickly become outdated as market conditions change … Structural remedies – whether prohibition or divestment of a standalone business – are more likely to preserve competition and lead to an optimal solution for stakeholders and are therefore in the best interests of consumers. Importantly, the threshold of proof required to prohibit a merger is not higher when no divestment would be effective in restoring the lost competition; indeed, protecting competition and consumer welfare can sometimes only be achieved by blocking a merger outright.*[13]

Traditionally it has been accepted that some competitive harm may be better dealt with by a behavioral remedy than a structural one,[14] such as where a merger involves vertical elements and may limit access to infrastructure and result in foreclosure, or when a behavioral remedy of non-discriminatory open access may be sufficient to address the competitive harm while preserving the efficiencies associated with a transaction.[15] Additionally, the flexibility and reversibility of behavioral remedies make them superior tools for dealing with changing market realities, e.g. in technology markets, and addressing limited market effects, e.g. where the competitive harm is confined to one market, in which case imposing a global divestiture would amount to over-fixing.[16]

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7 Keynote Address at American Bar Association's Antitrust Fall Forum, Washington D.C. (Nov. 16, 2017).

8 U.S. DOJ Antitrust Division, *Merger Remedies Manual* (Sep. 2020), p. 16.

9 CMA, *Merger Remedies* (Dec. 13, 2021), p. 6.

10 CMA, *Merger Remedy Evaluations – Report on Case Study Research* (Jun. 18, 2019), p. 3.

11 Javier Espinoza and others, *UK competition watchdog is most active antitrust enforcer* (Financial Times, Mar. 2, 2020).

12 Under German merger control rules, behavioral remedies are said to be "sometimes, in appropriate cases, also an effective measure … [i]n some cases, it may be sufficient to enable third companies to enter the market or to lower entry barriers to facilitate market entry." See p. 41 of FCO's Guidance on Remedies in Merger Control (May 2017). That said, behavioral commitments that require continued control of the merged entity's market conduct (e.g. Chinese walls) are not considered effective and are not accepted by the FCO in its remedies practice, which is somewhat unusual by international standards. See e.g. Wilson, *Merger remedies – is it time to go more behavioral?* (Kluwer Competition Law Blog, Feb. 21, 2020).

13 CMA, ACCC and Bundeskartellamt, *Joint statement on merger control enforcement* (Apr. 20, 2021) (emphasis added).

14 See Ezrachi, *supra* note 2.

15 See Ezrachi, *supra* note 2.

16 See Ezrachi, *supra* note 2.

While classic ideological considerations support behavioral remedies in certain types of vertical or conglomerate transactions, the CMA goes much further to preclude behavioral remedies in most cases, except for instance, in regulated infrastructure markets, where the CMA considers that behavioral remedies may be appropriate. The CMA has been clear that the bar to show that behavioral remedies can address competition concerns is high.[17] In a recent speech by the Chief Executive of the CMA, Sarah Cardell explained that behavioral remedies typically involve arrangements that the parties would not enter into under normal circumstances, and once the remedy expires, the underlying causes of the competition concerns may remain. Moreover, the CMA sees many practical challenges to designing an effective behavioral remedy.[18] As will be discussed below, the CMA's approach is in stark contrast to SAMR's policy of promoting economic development and consensus-based approach of balancing competing interests, which entails a consideration of the effects on M&A incentives.

II. A MORE MEASURED APPROACH FROM THE EUROPEAN COMMISSION

The European Commission ("EC") has notably continued to take a more measured stance with respect to behavioral remedies – while expressing some skepticism regarding their effectiveness, it is still willing to consider them in certain circumstances.[19] In recent years, there have been voices calling for a more open approach towards behavioral remedies in Europe,[20] and EC cases and speeches by EC officials have shown some receptiveness to these views.

Commissioner for Competition Margrethe Vestager said in July 2019 that she was open to behavioral remedies in digital mergers, noting that in digital markets the merging parties are not always straightforward competitors and the issue is not necessarily the removal of a competitor, but how markets interact and whether there are important input services such as access to technology.[21] An example is *Qualcomm/NXP* (2018),[22] which was cleared by the EC, subject to behavioral commitments. A key concern in that case centered around NXP's MIFARE, a technology for contactless payments in transport and other domains that was licensed by NXP to third parties. One of the competition concerns was the merged entity's incentives to license MIFARE, once it could offer its own bundles with baseband chipsets and secure elements. Among other commitments, the parties undertook to offer licenses to NXP's MIFARE technology and trademarks on terms that are at least as advantageous as those available then, and to ensure the interoperability of the merged entity's products with those of rivals.

More recently, the EC cleared *Google/Fitbit* (2020)[23] and *Meta/Kustomer* (2022)[24] imposing behavioral commitments in both cases. Google committed, for example, to not use users' health and wellness data collected from Fitbit devices in its Google Ads business, and also committed to store relevant Fitbit user data in a "data silo" separate from any other Google data used for advertising. Notably, the ACCC refused to accept similar behavioral undertakings, reasoning that long term behavioral undertaking of this type in such a complex and dynamic industry could not be effectively monitored and enforced in Australia, instead opting to open an investigation into the transaction.[25] The EC also cleared the acquisition by Meta (formerly Facebook) of customer relationship management software maker Kustomer, subject to a set of 10-year commitments that would guarantee access to the social network's publicly available application programming interfaces ("APIs").

17 See CMA, *Merger Remedy Evaluations, supra* note 9, p. 2 ("*The need to put addressing likely consumer harm from problematic mergers at the forefront of decisions about merger remedies – where the CMA accepts a risk that a remedy may not be fully effective in doing so, this risk is ultimately borne by consumers*").

18 CMA, *A speech delivered by Sarah Cardell, Chief Executive of the CMA to the UK Competition Law Conference 2023* (Feb. 27, 2023).

19 EC, *Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004*, p. 6.

20 See e.g. Wilson, *Merger remedies – is it time to go more behavioral?* (Kluwer Competition Law Blog, Feb. 21, 2020)

21 *Speech by Margrethe Vestager on dealing with mergers in a digital age* (Practical Law Competition, Jun. 19, 2019).

22 EC Case M.8306 - *Qualcomm/NXP Semiconductors* (Jan. 18, 2018).

23 EC Case M.9660 – *Google/Fitbit* (Dec. 17, 2020).

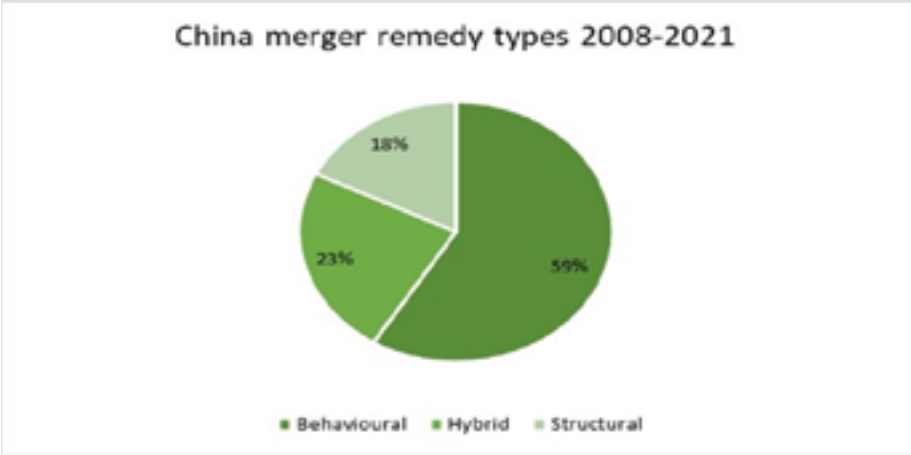
24 EC Case M. 10262 – *Meta (formerly Facebook)/Kustomer* (Jan. 27, 2022).

25 ACCC, *ACCC rejects Google behavioral undertakings for Fitbit acquisition* (Dec. 22, 2020).

III. CONTINUED WILLINGNESS AND FLEXIBILITY OF SAMR TO ACCEPT BEHAVIORAL REMEDIES

Compared to regulators in the U.S. and UK, SAMR has traditionally been more willing and flexible to accept behavioral remedies; classic structural remedies, such as divestitures, have also been less common in SAMR remedy cases than behavioral remedies.[26] In a 2021 survey of all SAMR remedy cases, it was found that those involving non-structural remedies represent a materially larger portion than the cases reviewed by the U.S. DOJ.[27] Around 82 percent of all conditional clearances from 2008 to 2021 involved behavioral remedies, and only 18 percent had purely structural remedies; as a comparison, the U.S. DOJ required divestitures in 95 percent of its conditional merger approvals from 2010 to 2021.[28]

Figure 1 - China Merger Control Remedies 2008-2021



Source: PaRR.[29]

Over time, SAMR has developed an effective, and innovative, toolbox of behavioral remedies to address concerns arising from Chinese stakeholders, particularly, customer concerns about input foreclosure and interoperability, and industrial policy concerns presented by industry associations. In cases involving strategically key industries (e.g. semiconductors, information and communications technology, healthcare, and agriculture) that receive heightened scrutiny in China, "creative" behavioral remedies can address China-specific concerns, whether or not competition-related, without irretrievably damaging the value of the underlying deal. Common behavioral remedies imposed in China include: continuous commitments to supply products on existing terms as to price, quality, quantity, *etc.*; fair, reasonable, and non-discriminatory ("FRAND") sales commitments, particularly to enable local players' access to input and IP; pricing commitments; prohibitions against bundling or the imposition of other unreasonable commercial terms; interoperability commitments for third-party products, seen particularly in semiconductor cases; firewall provisions to protect third-party competitively sensitive information; and commitments to continue to invest in R&D activities to address concerns of stifling innovation.

In 2021, SAMR imposed remedies in four cases, of which three used behavioral remedies *(Cisco/Acacia; ITW/MTS; SK hynix/Intel)* and one used structural remedies *(Danfoss/Eaton)*. In 2022, all five of the conditional approvals granted by SAMR involved behavioral remedies, although two involved hybrid remedies (that is, including both structural and behavioral remedies). Table 1 below summarizes recent conditional cases with behavioral remedies in China.

26 In the rare cases where structural remedies were imposed by SAMR, e.g. *Novelis/Aleris (2019), Danaher/GE Healthcare* (2020) and *Danfoss/Eaton* (2021), overseas competition regulators also imposed structural remedies.

27 Zhou, Peng and Eichlin, *Non-Structural Remedies* (GCR, Nov. 8, 2021).

28 Klein and Fan, *71% of Chinese divestment remedies same as other regulators* (PaRR Analytics, Dec. 8, 2021).

29 *Ibid.*

Table 1 - Notable Transactions Reviewed by SAMR in China with Behavioral Remedies (2021-2022)

Case	Competition Concerns	Behavioral Remedies in China	Outcome in U.S., EU, and UK (if filed)
***Shanghai Airport / Eastern Air Logistics JV* (2022)**	· **Horizontal** overlap in airport cargo terminal services · **Vertical** relationship between airport cargo terminal services (upstream) and international and domestic air cargo services (downstream)	· Continuous execution of customer contracts on cargo terminal services at Pudong Airport and renewal of such contracts upon customer request (with a shorter duration of 5 years) · Provision of cargo terminal services at Pudong Airport on FRAND terms · Duration: 8 years; termination upon application and approval	N/A
***Korean Air / Asiana Airlines* (2022)**	· **Horizontal** overlap in scheduled air passenger transport services and air cargo transport services	· Commitment to return a certain number of flight slots and to return part of the traffic rights for specific routes, upon the request of new entrants · Commitment that the annual supply of specific routes shall remain at a certain level · Commitment to renew interline, special prorate and code-sharing agreements with Chinese airline companies upon request · Commitment to provide air passenger transport ground services at Korean airports to Chinese entrants for specific routes on FRAND terms · Duration: 10 years; lifted automatically	· Cleared in U.S. · EU: Phase I decision to be issued · UK: Phase I decision found that the proposed transaction could result in higher prices and harm competition. Undertakings were offered, which the CMA proposed to accept, subject to public comments. CMA extended the period to consider the undertakings until Mar. 23, 2023.
***AMD / Xilinx* (2022)**	· Neighboring relationship, giving rise to **conglomerate** concerns, between AMD's CPUs and GPU accelerators and Xilinx' FGPAs. The merged entity would have strong market power in FGPA as Xilinx had a 50-55 percent share in the global and Chinese markets, and the merged entity would be the only manufacturer in the world able to simultaneously supply all three products.	· Continuous supply on FRAND terms of CPUs, GPU accelerators and FGPAs in China · Prohibition against bundling · Guaranteed interoperability with third-party products · Protection of third party information · Duration: 6 years; termination upon application and approval	Cleared in U.S., EU, and UK
***II-VI / Coherent* (2022)**	· **Horizontal** overlaps in seven markets: laser gain crystals; non-linear optical crystals; laser diodes; laser diode modules; beam delivery components; diode lasers; and diode pumped solid-state lasers. · 22 **vertical** relationships in 16 relevant markets	· Continued execution of supply contracts, and continued supply, of CO_2 laser optics on FRAND terms · Commitment to adopt multiple supply channels for procurement of glass-based laser optics · Protection of third-party information · Duration: 5 years; lifted automatically	Cleared in U.S.

Case	Competition Concerns	Behavioral Remedies in China	Outcome in U.S., EU, and UK (if filed)
***SK hynix / Intel* (2021)**	· **Horizontal** overlaps in four markets: PCI enterprise-class SSDs (with a combined share of 40-45 percent globally and 50-55 percent in China), SATA enterprise-class SSDs (with a combined share of 30-35 percent globally and 55-60 percent in China), customer-class SSDs and NAND flash memory · Two **vertical** relationships: (1) between DRAM (upstream) and SSDs (downstream); and (2) between NAND flash memory (upstream) and SSDs (downstream)	· Pricing commitment: not to increase prices for PCIe enterprise-class SSDs and SATA enterprise-class SSDs above a certain level in the Chinese market · Commitment to expand production of PCIe and SATA enterprise-class SSDs · Commitment to supply all products of the merged entity in China on FRAND terms · Prohibition against exclusive dealing and bundling · Commitment to assist third party market entry · Commitment not to collude with competitors in China on price, sales, and production volumes · Duration: 5 years; termination upon applicant and approval	Cleared in U.S., EU, and UK
***ITW / MTS* (2021)**	· **Horizontal** overlaps in four markets: ground vehicle durability testing equipment, static material testing equipment, electric mechanical material testing equipment, and high-end electro-hydraulic servo material testing equipment	· Continued fulfilment of existing contracts with Chinese customers · Commitment not to raise relevant product prices above a certain level · Prohibition against unreasonable trading terms, or degrading product or service quality or technical level, in relation to Chinese customers · Duration: 5 years; termination upon application and approval	N/A
***Cisco / Acacia* (2021)**	· **Vertical** relationship, giving rise to input foreclosure concerns. Acacia is active in the upstream coherent Digital Signal Processors ("DSP") market, with a 45-50 percent global share and a 40-45 percent China share. Cisco operates in the downstream optical transmission systems market. SAMR found that the merged entity will have the ability and motive to block material supplies, through refusal to deal and raising coherent DSP prices. · Neighboring relationship, giving rise to **conglomerate** concerns, in optical transceiver modules and routers.	· Continuous execution of existing customer contracts · Continuous supply on FRAND terms of coherent DSPs to Chinese customers · Prohibition against bundling · Training for management staff and employees · Duration: 5 years; lifted automatically	Cleared in U.S.

IV. CHINA'S RECEPTIVENESS TO BEHAVIORAL REMEDIES

China's receptiveness and recourse to behavioral remedies can be explained on a few possible grounds. As noted above, industrial policy considerations pertaining to the national economy play an influential part in SAMR's decision-making. The Anti-Monopoly Law of China ("AML") expressly authorizes and mandates SAMR to consider, among other factors, the impact on national economic development in reviewing any concentration of undertakings.[30] This means that SAMR must consider and try to reconcile viewpoints from many different stakeholders in China with respect to the clearance of a transaction – not only customers, but trade associations, competitors, and other government ministries and agencies. As a result, SAMR has never had the luxury of trying to defend a single ideological standard (such as the traditional consumer welfare standard) and instead must find a way to satisfy the sometimes conflicting views of many while not over-deterring foreign investment or global transactions more generally.

Thus, while SAMR has an ostensibly broader mandate than its Western counterparts to consider extra-competition concerns, it has been careful still not to over-reach in prohibiting transactions. Indeed, since the establishment of the AML in 2008 to date, only three transactions have been blocked in China.[31] In this way, SAMR seeks to address and resolve issues raised by specific transactions, rather than relying on over-deterrence that could discourage foreign investment in China or business activities more generally.

In this way, as SAMR solicits and considers input from a wide range of Chinese stakeholders, which can in many cases be conflicting, it engages with stakeholders with a view to reconciling competing interests and achieving a consensus on the terms of a clearance. Often "threading the needle" to resolve complaints without arbitrarily blocking deals requires the flexibility of behavioral commitments. Indeed, SAMR uses behavioral remedies to preserve flexibility while giving regulators visibility and some degree of control over competitive dynamics in the market. A senior Chinese antitrust official has explained that *"behavioral remedies can be tweaked and adapted over time to reflect shifts in the market."*[32] Implicit in this statement is the fact that ideological differences as to theories of harm should not hinder China from pursuing what might otherwise be an effective remedies solution.

Importantly, with respect to the purported administrative difficulties and burdens of monitoring, SAMR has proven more willing than its counterparts to bear the regulatory burden of negotiating remedies and monitoring compliance, and has developed a sophisticated enforcement regime. Generally, the parties will submit a commitment proposal (before which there can already be multiple rounds of communications with SAMR), and SAMR will evaluate the proposal by consulting with stakeholders and conducting market tests. The parties will then go through a monitoring trustee selection process with SAMR, and will submit a detailed implementation plan ("DIP") for SAMR's approval. The monitoring trustee will produce its own DIP on how to monitor implementation, and can take actions including on-site examination, requests for information, meeting with the parties and contacting stakeholders.

Notably, the burden of drawing up a behavioral remedy proposal falls to a large extent to the parties (not the government), and costs associated with on-going compliance are also borne largely by the parties. As can be seen from Table 1 above, a proportion of behavioral commitments in China automatically expire, while others are lifted upon application, showing the benefits of flexibility offered by these remedies. For instance, in April 2020, SAMR lifted the remedies imposed in 2014 in respect of the establishment of a joint venture by Corun, Toyota, Primearth EV Energy and Sinogy upon the parties' application, on the ground that there have been material changes in the competitive dynamics of the market, including the changes in the applicable policies in the automotive industry, the advancement of technology and the parties' decreasing market share.

SAMR's approach then raises the question as to whether the administrative difficulties of monitoring compliance are indeed so insurmountable as perceived in other jurisdictions. Public records show that non-compliance with behavioral remedies is not a common occurrence in China. Indeed, there have only been two instances in which administrative sanctions have been imposed for non-compliance: *Western Digital/Hitachi* (2012) and *Thermo Fisher/Life Technologies* (2014).

- *Western Digital/Hitachi* (2012): A fine of approximately USD 97,369 (RMB 600,000) was imposed on Western Digital for its failure to comply with the hold separate remedy attached to the conditional clearance of Western Digital's acquisition of Hitachi's hard disc drive unit. According to the hold separate condition, Viviti Technologies (previously named Hitachi Global Storage Technology) would continue to operate as an independent competitor and maintain independent business operations for two years after the transaction closed. It was

30 Article 33(5), AML.

31 The three prohibited transactions in China are: *Coca-Cola/Huiyuan Juice* (2009); *Maersk-Mediterranean Shipping-CMA CGM (P3 Network)* (2014); and *Huya/DouYu* (2021).

32 McConnell, *Top Chinese official defends use of behavioral remedies* (GCR, Jul. 7, 2021).

found that Western Digital had violated this condition, by consolidating two of Viviti's business units into Western Digital and transferring employees thereunder to Western Digital.

- *Thermo Fisher/Life Technologies* (2014): Thermo Fisher was fined approximately USD 23,824 (RMB 150,000) for its failure to comply with one of the behavioral conditions imposed for its acquisition of Life Technologies – to provide the requisite level of discounts to Chinese customers. It was found that the failure was due to an unintentional error and it occurred only for a small percentage of the relevant products. Moreover, Thermo Fisher took immediate measures to remedy its wrongdoing. These mitigating circumstances were taken into account in the total penalty imposed.

Based on these experiences in China, it would appear that the costs and uncertainties of successful implementation traditionally associated with behavioral remedies may be over-stated.

It is noteworthy that the AML, as amended since Aug. 1, 2022, now imposes much heavier fines for remedy breaches than the AML of 2008. Under the current, amended AML, the maximum fines for merger control violations, including breach of remedies or prohibitions, failure to notify, and gun-jumping, are significantly increased to 10 percent of the revenues in the preceding year, for concentrations that eliminate or restrict competition; or approximately USD 750,000 (RMB 5 million) for concentrations that do not lead to competition concerns.[33] Before the amendment, the maximum penalties were only approximately USD 75,000 (RMB 500,000).[34] Another amendment to the AML was the introduction of an aggregated penalties provision, allowing violations with "particularly serious circumstances, egregious impact, and serious repercussions" to be punished by two to five times the base amount.[35] With these amendments, the current AML is expected to be able to better deter non-compliance with behavioral remedies.

V. POLICY IMPLICATIONS

From a policy perspective, SAMR's willingness to accept behavioral remedies to avoid unnecessarily blocking generally pro-competitive transactions has the benefit of encouraging parties to pursue creative and flexible solutions. The contrasting approach in the U.S. and UK may be leading to over-enforcement and have a chilling effect on M&A activities, as it disincentivizes complex transactions,[36] especially vertical deals that could have achieved procompetitive efficiency benefits through improving synergy. Based on recent statistics from the U.S., this seems plausible.

In the U.S. in 2022, 60 percent of significant merger investigations resulted in a complaint or abandoned transaction, marking a significant increase from 37 percent in 2021, which was already a record high since 2016; 2022 also witnessed the highest number of litigation complaints filed to block transactions since 2011.[37] This was perhaps not surprising, given DOJ Assistant Attorney-General Jonathan Kanter's remark in Nov. 2021 that investigations resolved with merger remedies should be the exception, not the rule. Only two significant investigations concluded in the fourth quarter of 2022, which is a record low for what is normally the most active quarter of the year, suggesting that there could have been a drop in overall activity in the U.S.

Although the EU is less hawkish compared to the U.S. and UK, deal statistics suggest that the regulatory challenges in the EU also might have dampened the incentives for M&A transactions. In 2022, six deals were abandoned or blocked following a Phase II investigation, the highest number ever recorded since 2011 and nearly 200 percent above the average between 2011 and 2021. Regulatory challenges were explicitly cited as the reason for abandoning the transactions in *Nvidia/Arm, Kronospan/Pfleiderer Polska* and *Kingspan Group/Trimo.*

33 Article 58, AML (current version).

34 Article 48, AML (2008 version).

35 Article 63, AML (current version).

36 SAMR's policy of encouraging M&A activities can also be observed from cases that received unconditional clearances in China, but were blocked by other regulators. For instance, *AoN/Willis Towers Watson* (2021) was unconditionally cleared in China, but blocked in the U.S. and subjected to structural remedies (divestment) in the EU. *Konecranes/Cargotec* (2021) was unconditionally cleared in China but blocked in the U.S. and UK.

37 DAMITT 2022 Annual Report: Timing and Remedy Risks Grow for Transactions Hit with Significant Investigations.

VI. TAKEAWAYS AND THE WAY FORWARD

Ideological considerations aside, China has shown that behavioral remedies can successfully be implemented and monitored, and administrative costs and burdens on the government may have been overstated. This is so considering the fact that many behavioral commitments in China automatically expire, and others can be lifted by SAMR upon application by the parties to reflect changing circumstances. The flexible manner in which behavioral remedies can be employed and adapted over time undercuts the argument of administrative burden.

It remains to be seen whether the U.S. and UK can soften their stance against behavioral remedies to avoid disincentivizing transactions that could otherwise be beneficial to the economy. In the UK, with the establishment of the new Digital Markets Unit ("DMU") within the CMA to operationalize the regulatory regime for digital markets with the resources and express authority to *"implement pro-competition interventions including interoperability and access to data,"*[38] there is, theoretically speaking, a potential path forward for the CMA to be more receptive to behavioral remedies. Indeed, CMA official Colin Raftery indicated in a speech in Feb. 2023 that behavioral remedies could theoretically be used in regulated markets or to address very short-term concerns, but speculated again that they are difficult to employ in fast-moving markets.[39]

On a more positive note, recent developments in the EU signal that behavioral remedies will continue to be a viable solution in cases where foreclosure or conglomerate concerns are the issues. In a Dec. 2022 speech, Olivier Guersent, the Director-General of the Directorate General for Competition, commented that behavioral remedies are well-suited for deals in which the merging parties are active in neighboring markets, such as digital ones. He cited the data silo remedy that the EC accepted in its clearance of Google's acquisition of Fitbit, the access remedy accepted in Meta's acquisition of Kustomer and the interoperability remedy used in the LinkedIn/Microsoft transaction. Mr. Guersent acknowledged that monitoring should not be difficult, and breaches should be quickly and easily identifiable.[40]

The experience in China shows that behavioral remedies can be an important and useful tool for competition regulators to achieve a balance between, on one hand, protecting and preserving market competition, and on the other hand, avoiding the chilling effects of over-enforcement on M&A transactions. The "politicization of antitrust" has been observed by some as a common trend across jurisdictions.[41] As regulators move away from the traditional "consumer welfare standard" to consider the impact of a transaction more holistically, deal parties face increasingly strong regulatory headwinds and greater uncertainties in regulatory outcomes. If SAMR's lessons in behavioral remedies could be of reference value to other regulators, that could be positive news to transactional parties.

38 *CMA's Digital Markets Unit: exciting opportunities to influence the regulation of big tech* (CMA Blog, Jan. 7, 2022).

39 Madge-Wyld, *DMU could steer rethink on behavioral remedies in digital mergers, CMA official says* (GCR, Feb. 2, 2023).

40 *EC Official Endorses Behavioral Remedies in Digital Markets Merger Cases* (PaRR, Dec. 14, 2022).

41 See, e.g. Pasquale & Green, *Two Politicizations of U.S. Antitrust Law*, Symposium: Consumer Welfare, Market Structure, and Political Power (2019); Zhang, *Chinese Antitrust Exceptionalism, How the Rise of China Challenges Global Regulation* (Oxford University Press, 2021); and Ezrachi, *Sponge*, Journal of Antitrust Enforcement (2016) 1-26.

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