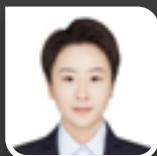


MERGER REMEDIES IN CHINA IN 2022 AND THE PREVALENCE OF “CONTINUE TO SUPPLY UNDER FRAND PRINCIPLES” AS THE REMEDIES



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MERGER REMEDIES IN CHINA IN 2022 AND THE PREVALENCE OF "CONTINUE TO SUPPLY UNDER FRAND PRINCIPLES" AS THE REMEDIES

By John Yong Ren, Christine Zhang & Schiffer Shi

This Article examines the remedy imposed on the conditional approvals in China's merger review in 2022. The five cases of conditional approvals in 2022 are summarised from both procedural and substantive perspectives with the behavioural remedy of "continue to supply under FRAND principles" highlighted. This article studies the prevalence of the remedy of "continue to supply under FRAND principles" in the recent years and analyses SAMR's reasoning behind. The prevalence of "continue to supply under FRAND principles" can result from the need to provide extra protection for contract performance and may also serve as an option to address both competition concerns and industry concerns in light of the AML's multi-dimensional goals. In addition, the reference of such remedy can also provide both the transaction parties and SAMR the foreseeability and predictability to a large extent. As such, we believe such remedy is likely to continue to be frequently imposed in the future.

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I. INTRODUCTION

2022 was the 14th anniversary since China's Anti-Monopoly Law (“AML”) came into force in 2008. 2022 witnessed the first amendment² made to the AML that not only reflected Chinese competition authority's experience accumulated during the past decade's enforcement, but also reflected the evolving expectations attached to the AML.

Examples for the former include the introduction of “stop the clock” mechanism³ in the merger review procedures which one may perceive by referring to the EU Merger Regulation. The new AML's the explicit prohibitions on undertakings' anti-monopolistic conducts in the areas of data, algorithm, technology, and capital advantages, etc., as well as the inclusion of “encouraging innovation” in the General Chapter of the AML can be regarded as the evolving expectations and multi-dimensional aims of the AML.

Against the background of the AML amendments, this article will discuss the topic in relation to the merger control mechanism in China – the remedy imposed on the conditional approvals.

In 2022, as the central competition authority in China, the State Administration for Market Regulation (“SAMR”) approved 5 cases conditionally, which was summarized as follows.

Table 1 | Conditional Approvals in 2022

Case	Relevant Market	Types of Remedies	Main Remedies
Global Wafers' acquisition of Siltronic	8-inch zone-melt wafer	Hybrid	<ul style="list-style-type: none"> • Divestment • Continue to supply wafers under FRAND⁴ principles • No refusal of customers' request for contract renewal after expirations • Training for relevant personnel
AMD's acquisition of Xilinx	GPU, CPU, FPGA	Behavioral	<ul style="list-style-type: none"> • No tying / imposing unreasonable trading conditions • Continue to provide products/service under FRAND principles • Ensure the flexibility and programmability of Xilinx FPGAs • Maintain interoperability • Protection of confidential information from third parties
II-VI's acquisition of Coherent	Laser and laser optics	Behavioral	<ul style="list-style-type: none"> • Fulfil existing contracts and terms • Continue to supply CO2 laser optics under FRAND principles • Continue to multisource and conduct procurement under non-discriminatory term • Protection of competitively sensitive information
Joint venture (“JV”) between Shanghai Airport and Eastern Airlines Logistics (“EAL”)	Airport cargo terminal services and air cargo services	Behavioral	<ul style="list-style-type: none"> • Hold-separate of the parties' cargo terminal business • Keep competition between the parties and the JV • No exchange of competitively sensitive information among the parties and the JV • Fulfil existing contracts and no refusal of customers' request for contract renewal after expirations • Shanghai Airport, EAL and the JV continue to provide service under FRAND principles
Korean Air' acquisition of Asiana Airlines	Air passenger and air cargo services	Behavioral	<ul style="list-style-type: none"> • Return of slots at airport • Return of traffic rights • Continue to supply certain air routes • Renewal of air passenger service agreement • Provide air passenger auxiliary services under FRAND principles

² The amended AML was effective as of 1 August 2022.

³ According to Article 32 of the new AML, the competition authority may decide to suspend the calculation of the review period of a merger review: (1) undertakings fail to submit the documents and materials in accordance with the provisions, resulting in that the review cannot be conducted; (2) the emergence of new circumstances and new facts that have a significant impact on the review of the concentration of undertaking, and the review process cannot be proceeded if they are not verified; (3) the restrictive conditions to be attached to the concentration of undertakings need to be further evaluated, and the undertakings raise a request for suspension.

⁴ FRAND refers to Fair, Reasonable and Non-Discriminatory.

As can be observed from Table 1, all conditional approvals were subject to the so-called “continue to supply under FRAND principles.” Therefore, against the background of the AML amendment, it can be natural to ask: why such remedies, which was originated from Standard Essential Patents of the intellectual property field, were so prevalent in China’s merger review? What can we learn from SAMR’s such practice (if not preference)? what can be expect in the future cases?

To answer these questions and to present the readers the general picture of the conditional approvals in 2022, this article will be structured as follows. Section II will recap the conditional approvals in 2022 from both procedural and substantive perspectives to give the readers an overview of SAMR practice of merger control in 2022. Section III will discuss and explore the possible considerations and reasons behind the mentioned prevalence of continue to supply under FRAND principles. Conclusions and observations will be presented in Section IV.

II. AN ANALYSIS ON SAMR’S CONDITIONAL APPROVALS IN 2022

A. Procedural Perspectives

1. Timing

As mentioned, the year 2022 saw five conditionally approved merger cases in China, including, for the first time ever, one case that only concerned domestic enterprises. The timing for the merger review of these cases was summarized in Table 2.

Table 2 | Reviewing Time for Conditional Approvals in 2022

Case Name	Timing	Total Months	
<i>Globalwafers/Siltronic AG</i>	2020.12.25	Submission of the Notification	Approx. 13 months
	2021.3.29	Initiation	
	2021.9.24	Withdrawal	
	2021.9.29	<u>Refile</u>	
	2022.1.20	Conditional approved	
<i>AMD/Xilinx</i>	2021.1.19	Submission of the Notification	Approx. 12 months
	2021.4.7	Initiation	
	2021.9.30	Withdrawal	
	2021.9.30	<u>Refile</u>	
	2022.1.21	Conditional approved	
<i>II-VI/Coherent</i>	2021.6.22	Submission of the Notification	Approx. 12 months
	2021.9.18	Initiation	
	2022.3.14	Withdrawal	
	2022.3.15	<u>Refile</u>	
	2022.6.28	Conditional approved	
<i>Shanghai Airport Authority/Eastern Air Logistics (both were domestic enterprises)</i>	2021.10.21	Submission of the Notification	Approx. 11 months
	2021.11.8	Initiation	
	2022.4.29	Withdrawal	
	2022.4.29	<u>Refile</u>	
	2022.9.13	Conditional approved	

<i>Korean Air/Asiana Airlines</i>	2021.1.15	Submission of the Notification	Approx. 23 months
	2021.3.23	Initiation	
	2021.9.18	Withdrawal	
	2021.10.8	<u>First refile</u>	
	2022.4.2	Withdrawal again	
	2022.4.7	<u>Second refile</u>	
	2022.4.26	Initiation again	
	2022.12.26	Conditional approved	

The average reviewing time for these conditional approvals in 2022 accounting from the submission of notifications till approvals was around 14.2 months, with all cases being withdrawn and refiled. Comparatively, the average reviewing time for conditional approvals in 2020 and 2021 was, respectively, 9.75 months and 11.5 months. Of the 4 conditional approvals in 2020, 2 cases were withdrawn and refiled, while all cases in 2021 were withdrawn and refiled. In particular, *Cisco/Acacia* (2021) was refiled twice, like *Korean Air/Asiana Airlines* in 2022. Therefore, it seems to be fair to conclude that in 2022, it took longer time for SAMR to review these conditional approvals which were featured as complexity and the percentage of “withdrawal and refiling” was 100 percent for 2021 and 2022, and 50 percent for 2020.

Accordingly, it is natural to perceive that the introduction of “stop the clock” mechanism in the amended AML can be a solution to help the competition authority to get out of the dilemma where they need more time to review the notified transactions while they run out of the time under the timeline in the old AML (i.e. 180 calendar days in total from case initiation till the expiration of the extension of Phase II), which was featured as “non-stop.”

2. Acceptance and approval of the remedy proposal

The following table summarizes the dates for acceptance and approvals of the remedy proposals.

Table 3 | Date for Accepting Remedy Proposal and Final Approvals

Case Name	Date for SAMR Accepting the Final Version of the Remedy Proposal	Approval date	Time In-between
<i>Globalwafers/Siltronic AG</i>	2022.1.18	2022.1.20	2 days
<i>AMD/Xilinx</i>	2022.1.13	2022.1.21	8 days
<i>II-VI/Coherent</i>	2022.4.1	2022.6.28	Around 3 months
<i>Shanghai Airport Authority/Eastern Air Logistics</i>	2022.7.18	2022.9.13	Around 2 months
<i>Korean Air/Asiana Airlines</i>	2022.12.2	2022.12.26	24 days

It can be observed that the time between the acceptance of the final draft remedy proposal and the approval of the case varied greatly. According to the authors’ experience, such difference can be resulted from which draft that SAMR rested on when conducting market tests.

Like the EC’s practice, SAMR consults with relevant stakeholders as part of its assessment on the sufficiency and suitability of a remedy proposal. It believes that if a remedy proposal was submitted to SAMR before it disclosed its competition concerns, or SAMR’s market test was conducted based on a near-to-final version of remedy proposal, suggesting SAMR’s assessment and the market test happened simultaneously, then it is likely that the time gap between the final draft remedy proposal and the case approvals can be short.

By contrast, if SAMR conducted its market test based on the very near-to-final version of a remedy proposal, meaning SAMR assessed the remedy proposal first followed by a market test, then likely, there would be a long gap between the submission of the final draft and the case’s approval because it takes time for the stakeholders to respond to SAMR’s consultation.

B. Substantial Perspective

1. Industry Concerned

As Table 4 demonstrates, the conditionally approved transactions in 2022 concerned sensitive industries such as semiconductors.

Table 4 | Industry Concerned in the Conditional Approvals in 2022

Case Name	Industry Concerned
<i>Globalwafers/Siltronic AG</i>	Semiconductors (wafers)
<i>AMD/Xilinx</i>	Semiconductors (GPU/CPU/FPGA)
<i>II-VI/Coherent</i>	Semiconductors (lasers/laser optics)
<i>Shanghai Airport Authority/Eastern Air Logistics</i>	Airport cargo terminal services/Air cargo service
<i>Korean Air/Asiana Airlines</i>	Air cargo service/Air passenger service

There is high sensitiveness around those semiconductor-related cases, which may stoke SAMR's extra concerns about industry development in addition to its competition concerns. Consideration of industry development is actually in line with the multi-dimensional goals of the AML, which include to promote the healthy development of socialist market economy. Such sensitiveness was likely to result in SAMR's scrutiny on these cases.

2. Competition Concerns and Remedies

Based on Table 1 supra, Table 5 below further summarized the types of competition concerns and the imposed remedies of these conditional approvals in 2022.

Table 5 | Competition Concerns and Remedies of Conditional Approvals in 2022

Case Name	Horizontal Overlap	Vertical Relationship	Conglomerate Relationship	Types of Remedies
<i>Globalwafers/Siltronic AG</i>	√			Hybrid
<i>AMD/Xilinx</i>			√	Behavioral
<i>II-VI/Coherent</i>		√		Behavioral
<i>Shanghai Airport Authority/Eastern Air Logistics</i>	√	√		Behavioral
<i>Korean Air/Asiana Airlines</i>	√			Hybrid

As can be observed from Table 1 and Table 5, consistent with practice of the EC, structural remedies were adopted by SAMR to address horizontal concerns, while Behavioral remedies were used to address non-horizontal concerns.

Further, as mentioned above, FRAND terms are commonly imposed by SAMR and in 2022, all conditional approvals were subject to the so-called "continue to supply under FRAND principles," regardless of whether the transactions concerned horizontal concerns or not. The section below will explore the reasons behind the prevalence of such remedies.

III. EVOLUTION OF "CONTINUE TO SUPPLY UNDER FRAND PRINCIPLES" AND THE POSSIBLE REASONS BEHIND

A. Evolution of "Continue to Supply under FRAND Principles"

The remedy of "continue to supply under FRAND principles" did not form its shape in one move. Indeed, similar remedy was for the first time imposed on *General Motors/Delphi*, a case that was conditionally approved in 2009 – one year after the enactment of the AML in 2008. In this

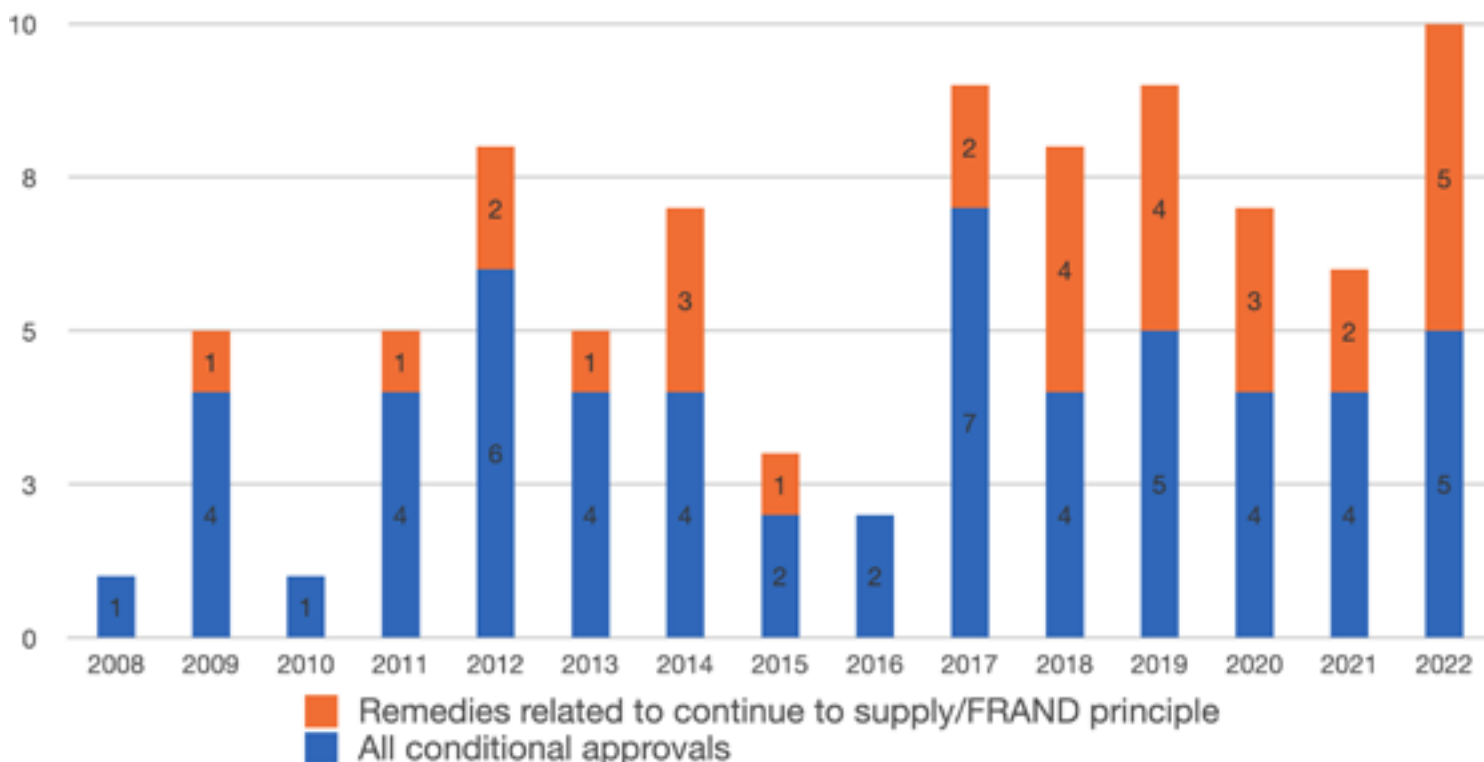
case, the parties were required to continue to supply “without discrimination.” *Henkel/Tiande Chemical* (2013) was the first case on which a full array of “FRAND principles” were imposed, i.e. the parties were required to continue to supply ethyl cyanoacetate under fair, reasonable, and non-discriminatory principles.

When looking back at these precedents, one may notice that when the parties were required to continue to supply products/services, conditions of “Fair, Reasonable and Non-Discriminatory” may or may not be included, or one or more of such conditions can be included. Table 6 below provides a summary regarding how the language can be structured. Figure 1 further summarizes the use of such remedies since 2008.

Table 6 | Evolution of “Continue to Supply under FRAND Principles” in Conditional Approvals (selected)

Case	Relevant Remedies
<i>General Motors/Delphi</i> (2009)	Supply its auto customers in China <u>without discrimination</u> , and continue timely and reliably supply and to maintain the quality of its products...
<i>Henkel/Tiande Chemical</i> (2012)	Tiande Chemical shall provide ethyl cyanoacetate to <i>all downstream clients</i> <u>under the principle of fairness, reasonableness, and non-discrimination</u> ...
<i>Glencore/Xstrata</i> (2013)	Glencore shall <i>continue to offer to supply</i> Chinese customers with zinc concentrate and lead concentrate ...the offered terms (including price-related terms) <u>shall be fair and reasonable</u> ...
<i>KLA-Tencor/Orbotech</i> (2019)	KLA-Tencor, Orbotech and the Combined Entity <i>shall continue to maintain stable supply</i> of semiconductor process control equipment and related services...on <u>fair, reasonable and non-discriminatory terms</u> .

Figure 1 | Conditional Approvals and Inclusion of “Continue to Supply on FRAND Principle” Remedies during 2008 to 2022



The average percentage of the use of “continue to supply under FRAND principles” in the recent five years (2018 – 2022) was 81.8 percent, nevertheless, such percentage for the years from 2008 to 2017 was only 31.4 percent, which clearly demonstrates the increasingly prevalence of such remedies in China.

B. Possible Reasons for the Prevalence

1. Extra Protection for Contract Performance

According to the authors’ experience, once the competition authority disclosed its concerns on stable supply post-transaction, the parties were likely to argue that their customers were protected by legally binding contracts, and it would be unnecessary to make commitments like “continue to supply under FRAND principles.” The parties can also provide supportive analyses to argue that they were lack of ability and incentives to stop their supply or supply in an unfair, unreasonable, and discriminatory way. However, the competition authority can quite persist to the inclusion of remedies of “continue to supply under FRAND principles.”

In fact, “continue to supply (perform contract)” is a remedy which originated from the previous Contract Law and the current Article 577 of the China Civil Code, which regards “continue to perform” as a liability for the party that breach a contract. In practice, it may take long time and require significant cost for one party of a contract to claim its rights and require the other party that breaches the contract to continue to perform the contract, either through litigations or through mediations. In the context of merger filings, this may largely stoke SAMR’s concerns for the effectiveness and timeliness of the protection of the parties’ customers post-transaction in relation to contract performance.

From this perspective, the inclusion of remedies of “continue to supply under FRAND principles” may provide extra security of contract performance. Such a remedy provides customers with another approach to seek protection under the AML when the post-transaction entity breaches the supply contract.

2. A Solution to Address Both Competition Concerns and Industrial Concerns

The goals of the AML, including protecting the interests of consumers and the public, and promoting a healthy development of the socialist market economy (can be understood as promoting industry development), is featured as multi-dimensional. In the context of merger remedies, such a feature results in the fact that a remedy is expected to address not only competition concerns, but also industry concerns.

Like the EC practice, SAMR consults with stakeholders during its review of a notified transaction and such stakeholders always include relevant industrial associations whose feedbacks represent the voice of the relevant industry that a notified transaction concerned. It is possible that while a transaction may have limited competition concerns, it stokes industry concerns. Take cases concerning semiconductors as an example.

Semiconductor industry is of high strategically importance to China. For certain semiconductors, Chinese companies may largely rely on overseas suppliers for inputs. While a transaction in such relevant market can be a conglomerate one and according to theory of harm, such a merger is unlikely to result in anti-competitive effects, downstream Chinese companies can feel highly insecure about the parties’ post-transaction supply practice strategy. Due to their high reliance on the parties, any stop of supply (or even delay of supply) would result in significant loss, even endanger the future development of the relevant market. In such a situation, remedies of “continue to supply under FRAND principles” can be one of the optimal options to respond to these concerns.

While the semiconductor cases are only one example, it may to a large extent reveal one of the reasons behind the prevalence of “continue to supply under FRAND principles,” i.e. to address not only competition concerns, but also industrial concerns.

3. Reference to Precedents During Remedy Negotiations

The remedy negotiation is a process of bargaining with the parties and their counsels on the one side and SAMR and its case team on the other side. While in some exceptional cases, same goal may not be shared by two sides – remedies negotiation might be used by SAMR as a way to drag a transaction to dead, and this can be particularly true when a transaction received strong industry complaints from stakeholders, but the possible competition concerns did not justify a straightforward prohibition from SAMR, which is the competition authority rather than an industrial regulator.

For those transactions in which both sides shared the same goal, i.e. clear the transactions, during the remedy negotiation, both sides refer to the precedents with similar competition concerns to persuade the other side and to reach a consensus on the remedies as soon as possible.

From the parties' and counsels' perspective, borrowing language from precedents provide with them the sense of security to the extent possible because, *inter alia*, they clearly know that there are predecessors that made similar commitments and SAMR accepted that. This can be particularly important when the parties are foreign enterprises that are unfamiliar with the AML and SAMR's practice and thus foreseeability and predictability are required when assessing the possible impact of a remedy. These precedents provide such insights perfectly.

This is also true from SAMR perspective. As the gatekeeper, SAMR needs to know whether and to what extent a remedy will address the competition concerns effectively. Precedents provides SAMR with such knowledge. SAMR can be in a better position to assess the sufficiency of a remedy proposal if such proposal refers to precedents. Also, this gives SAMR case team more comfort as the wordings used in precedents have already been reviewed and approved by other SAMR case teams and superior officials.

Accordingly, "continue to supply under FRAND principles" form its current shape through different cases referring to precedents and further being tailored to address SAMR's concerns on post-transaction stable supply.

IV. CONCLUSIVE REMARKS AND FUTURE TRENDS

The number of conditional approvals in 2022, 5 in total, was not surprising when comparing with such number in 2021 and 2020. Nevertheless, SAMR's average reviewing time for such cases reached approx. 14.2 months, which was longer than that in both 2021 (11.5 months) and 2020 (9.75 months) and all 5 cases experienced "pull and refile." Longer reviewing time may be relevant to the sensitiveness around the industry concerned in these cases – semiconductor. It expects that the introduction of "stop the clock" mechanism in the new AML may reduce the use of "pull and refile" given that it confers on the competition authority the rights to stop the reviewing clock when it needs necessary.

Like the EC and competition authorities in the US, structural remedies were used by SAMR to address concerns brought about by horizontal overlaps. As to the behavioral remedies, it is interesting to notice that "continue to supply under FRAND principles" were increasingly used. The percentage of such use was as high as 81.8 percent during 2018 to 2022, while such percentage for the years from 2008 to 2017 was only 31.4 percent.

The prevalence of "continue to supply under FRAND principles" can resulted from the need to provide extra protection for contract performance, given the possible long time and significant cost involved in solving contract breach through litigations or mediation. Such remedies may also serve as an option to address both competition concerns and industry concerns in light of the AML's multi-dimensional goals, which may to some extent result in the trade-off between different goals. The negotiation of merger remedies and the reference made by both the parties (and their counsels) and SAMR case team can also explain the prevalence of the mentioned remedies, which provides both sides the foreseeability and predictability to a large extent.

The mentioned percentage of 81.8 percent clearly demonstrates SAMR's high acceptance of the remedies "continue to supply under FRAND principles" to address concern about post-transaction stable supply of relevant products/services. Considering the effectiveness of such remedies to satisfy the requirements of providing extra protection of contract performance and addressing both competition and industry concerns, we believe these remedies are likely to be used and accepted by both the parties and SAMR.



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