



MOFCOM lifts merger control conditions on 2012 Walmart acquisition

On 8 June 2016, the Chinese Ministry of Commerce ("**MOFCOM**") released [its decision](#) to lift the conditions it had imposed on Walmart's acquisition of 33.6% of the shares in Newheight Holdings. This acquisition in 2012 gave Walmart corresponding rights over Yihaodian, one of China's best-known e-commerce supermarkets, through a reported "variable interest entity" ("**VIE**") structure (see our alert [here](#)).

This decision is the logical outcome of two separate sets of developments.

MOFCOM's 2012 remedy decision

MOFCOM's [2012 decision](#) seemed to rely on a complicated theory whereby, through the indirect acquisition of a majority shareholding in Yihaodian, Walmart would somehow leverage its position as a major bricks-and-mortar supermarket worldwide and increasingly in China into the online retail space, and from there into the area of certain value-added telecommunications services ("**VATS**").

As a result, MOFCOM imposed a number of conditions to its merger control clearance:

- Newheight Shanghai (a Newheight Holdings subsidiary) is only entitled to use its online platform for its own sales (i.e., not for sales of third-party goods)
- Newheight Shanghai is prohibited from allowing its online platform to be used by other vendors without a VATS business permit, and
- Walmart shall not use a VIE structure to engage in VATS through Yihaodian.

Under MOFCOM's *Relevant Issues concerning the Examination, Approval and Administration of Foreign Investment Project in Internet and Vending Machine Sale*, providing an online platform through which third parties can trade their goods would be deemed an activity requiring a VATS business permit (it was widely thought to be an "Internet content provider service" at the time) with a cap on foreign investment of 50%. Through the acquisition, Walmart would have indirectly acquired a majority in Yihaodian, thereby exceeding the cap.

New 2016 decision

In its decision from 30 May 2016 – made public on 8 June – MOFCOM decided to lift the conditions imposed in its 2012 decision. MOFCOM's reasoning was as follows. First, MOFCOM found that Walmart had been in full compliance with the remedies imposed in the 2012 decision.

Second, MOFCOM surveyed the current competitive situation in the market. It held that new policies since 2014 have liberalized certain VATS markets, and that this would attract new entrants into the market. This refers to the decision by the telecoms and Internet regulator, the Ministry of Industry and Information Technology ("**MIIT**"), in June 2015 to open up operational e-commerce to foreign investment, such that it is now permitted for foreign investors to own 100% of an operational e-commerce entity (see our alert [here](#)).

Given that regulatory change, it would have seemed somewhat incongruous to have contrived to apply restrictions that effectively denied Walmart the benefit of the liberalization.

Third, MOFCOM found that Yihaodian's market position had not grown as fast as the overall market.

Takeaways

MOFCOM's decision to lift the remedies imposed in the *Walmart/Newheight* case did not come as a surprise. In the past few months, MOFCOM issued a number of decisions where it has lifted remedies from past conditional merger clearance decisions, or agreed to change them to the parties' benefit.

Some of the decisions to lift or alter remedies were made public, for example the decisions on the remedies in *Google/Motorola Mobility*, *Western Digital/Hitachi Storage* and *Seagate/Samsung Hard Disk*. Other decisions do not appear to have been published as such, reportedly for example a remedy from the *Mitsubishi Rayon/Lucite International* transaction.

The importance of this set of decisions lifting or changing past remedies goes beyond the particular companies involved. It can also be interpreted as a learning process by MOFCOM – either as a recognition that the remedies were effective and indeed removed the concern the authority had when issuing conditional clearance or, perhaps more likely, as an indirect admission that some of the remedies were not particularly necessary or effective and – having allowed the "dust to settle" – it is now time to lift those conditions.

Back in 2012, the *Walmart/Newheight* remedies in particular seemed to have been driven by a last minute regulatory intervention based on policy/strategy considerations, beyond pure antitrust concerns. Looking at this from a positive perspective, the fact that MOFCOM lifted these conditions arguably shows that the authority is willing to have a fresh look at, and to make necessary adjustments to, previous decisions.