

CFIUS STONEWALLS CHINESE INVESTOR, UNWINDS GAY DATING APP INVESTMENT

The Committee on Foreign Investment in the United States ("CFIUS") has reportedly told Beijing Kunlun Tech Co. Ltd. ("Kunlun") to sell Grindr, the world's largest gay dating app. CFIUS' post-closing action in this case shows that it is not afraid to disrupt a completed transaction if it perceives a national security risk. This action is the latest example of the U.S. government treating Chinese technology investments – particularly when big data is involved – as a national security risk.

A MATCH UN-MADE

Kunlun, a Chinese gaming company, acquired 60% of Grindr in 2016 for \$93 million before buying the rest of the company in 2018 for \$152 million. While the regulatory environment for Chinese technology investment in U.S. companies had begun to shift in 2016, the volume of China-related deals was still relatively high compared to current levels.

It appears that Kunlun did not notify CFIUS of the transaction pre-closing to avail itself of a potential safe harbor offered by CFIUS. CFIUS filing would have been voluntary for this transaction. In a voluntary filing Kunlun may have faced some mitigation measures to reduce the risk of Chinese government access to sensitive data and real-time geolocation information for U.S. citizens, but the likelihood that CFIUS would have blocked the transaction entirely would have been relatively low. Had the parties successfully completed such a voluntary filing, it would have prevented CFIUS from subsequently altering the deal. When parties do not file in a transaction subject to CFIUS jurisdiction, CFIUS has the ability to initiate a post-closing review, require mitigation measures, or even unwind the transaction.¹ In this case, CFIUS has reportedly initiated a post-closing review and is forcing Kunlun to sell Grindr – two years after closing.

GETTING PERSONAL

CFIUS' action not only shows the potential hazards of a post-closing review when transaction parties do not seek pre-closing protection, but also the

Key issues

- CFIUS determines Kunlun's ownership of Grindr is a national security risk two years after its initial acquisition of the company and requires Kunlun to sell.
- CFIUS' national security fears allegedly stemmed from potential blackmail and intelligence risk from Chinese government access to Grindr's user data
- CFIUS' action shows its willingness to engage in post-closing reviews and order divestments
- Companies holding sensitive data on U.S. citizens are within CFIUS' broad definition of national security.

¹ The Critical Technology Pilot Program announced last year has made some filings mandatory. Please see *CFIUS Broadens Jurisdiction and Institutes Mandatory Filing Under Interim Rule*, available at https://www.cliffordchance.com/briefings/2018/10/cfius_broadens_jurisdictionandinstitute.html

committee's increasingly expansive definition of national security. CFIUS has recently shown a heightened interest in transactions involving U.S. companies that hold data on U.S. citizens or projects. CFIUS' concerns are intensified the larger the volume of data and/or the inclusion of any sensitive data, particularly but not exclusively for U.S. military or intelligence personnel.

CFIUS' preoccupation with sensitive personal data falling into Chinese hands led it to block ANT Financial's 2018 attempt to buy MoneyGram – in part because ANT Financial would have gained access to the financial data of potentially millions of U.S. citizens. In 2016, Fosun International Ltd divested Wright & Co, a professional liability insurer of U.S. government employees, including those in law enforcement and national security agencies, following CFIUS scrutiny.

In this case, CFIUS was reportedly concerned that Kunlun would be required to share information on Grindr users if the Chinese government demanded – information that could be used to blackmail U.S. citizens or security clearance holders. Research also showed that Grindr's location data on users could be accessed for intelligence purposes.

Kunlun's experience holds a number of important lessons for non-U.S. parties contemplating an investment in a U.S. business. Social media, big data, location-based services, and other economic sectors that were not traditionally considered national security issues are now fair game for CFIUS action. Chinese investment remains a particular concern for CFIUS, especially in the technology space (although CFIUS' scope is in no way limited to China). Most importantly, CFIUS has shown an increased willingness to unwind transactions even years after the transaction has closed. If Grindr teaches us anything, it is that parties involved in cross-border matchmaking should consider these increased risks carefully and take appropriate precautions early on, even if the target investment looks benign.

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