Expanded Definition of “Affiliate” Under the Competition Act Becomes Law

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On May 1, 2018, Bill C-25, *An Act to amend the Canada Business Corporations Act,* the *Canada Cooperatives Act,* the *Canada Not-for-profit Corporations Act* and the *Competition Act*, received Royal Assent. Among other legislative changes, the enactment of Bill C-25 amended the definition of “affiliates” under the *Competition Act* (the “Act”). The long-anticipated changes addressed a quirk in the Act’s application that could affect different businesses based on their corporate structure.

The definition of “affiliate” in the Act is important for several reasons, including:

- companies that are “affiliates” of one another cannot, on their own, enter into agreements that violate the Act’s criminal conspiracy provision or be reviewed under the Act’s civil competitor collaboration provision;
- transactions among “affiliates”, such as internal reorganizations, are exempt from the Act’s pre-merger notification regime; and
- the thresholds for determining whether parties to a transaction must file pre-merger notifications are based on revenues and assets of merging parties and their “affiliates”.

As explained by William Wu in an earlier post, the previous definition of affiliates had different rules for corporations than for partnerships. Pursuant to that definition, a corporation was an “affiliate” of a subsidiary corporation if the parent controlled the subsidiary (i.e., owned more than 50% of its voting shares, directly or indirectly); and two corporations controlled, directly or indirectly, by the same partnership through voting shares were “affiliates” of each other; however, the partnership itself was affiliated with “another partnership, sole proprietorship or a company if both [were] controlled by the same person”.

In the mergers context, the definition of affiliates had particular consequences for transactions involving private equity firms, given the common use of partnership structures for private equity funds. As a result of the previous definition of affiliates, the assets and revenues of a private equity fund effecting a transaction through one of its majority held portfolio companies would typically be excluded from the pre-merger notification thresholds on the basis that the fund (assuming it is a limited partnership) was not an affiliate of the portfolio company.

Other examples of transactions that were affected by the quirk in the former definition of “affiliate” are spin-offs and re-organizations involving partnerships. Whereas spin-offs or re-organizations involving corporate entities could be exempt from pre-merger notification if they were transactions between or among affiliates, such spin-offs or re-organizations involving a partnership could trigger obligations to file

pre-merger notifications notwithstanding the fact that the transaction did not result in a change of control (or ultimate control) of any entity.

The definition of affiliates is also relevant to criminal and civil provisions of the Act relating to agreements among competitors. Exemptions in the Act generally shield such agreements where they are made among affiliates, however, the Competition Bureau has noted in its *Competitor Collaboration Guidelines* that "this exception applies only to companies, and not partnerships ... or other non-corporate entities". While the Bureau's *Guidelines* stated that they would "consider the nature of common control" among parties when determining whether to refer a matter to prosecution, the specific language of the former definition could provide less than ideal comfort for parties, particularly in the case of the Act's criminal conspiracy provisions given the serious consequences of a criminal violation.

Bill C-25 addresses these quirks by replacing prior references to "corporation" and "partnership" in the definition of affiliates with "entity", defined to mean "a corporation or a partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business".