Before the Canadian Competition Bureau: Comment of the Global Antitrust Institute on Draft Enforcement Guidance on Wage-Fixing and No-Poaching Agreements

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BEFORE THE CANADIAN COMPETITION BUREAU

COMMENT OF THE GLOBAL ANTITRUST INSTITUTE ON DRAFT ENFORCEMENT GUIDANCE ON WAGE-FIXING AND NO-POACHING AGREEMENTS

March 24, 2023

Introduction

The Global Antitrust Institute ("GAI") respectfully submits this Comment to the Canadian Competition Bureau ("Bureau") in response to its request for feedback on new guidance related to wage-fixing and no-poaching agreements ("Guidance").[1] Launched in 2014, the GAI was founded on the belief that when policy makers, judges, and those who enforce competition law around the world have a deeper understanding of economics, they are more likely to make decisions that enhance competition, economic performance, and innovation.[2] The GAI commends the Bureau for inviting public input and welcomes this opportunity to contribute to development of its enforcement policy. This Comment is based on the GAI's extensive experience and expertise in competition law and economics.

This Comment focuses on potential ambiguities contained in the Guidelines. Ambiguity may introduce difficulties for businesses trying to comply with, for instance, subsection 45(1.1). *Per se* liability rules – especially those like subsection 45(1.1), violations of which may be sanctioned with criminal penalties – while an effective deterrent, should be reserved for conduct that is always, or almost always, anticompetitive. Businesses are likely to avoid even procompetitive or competitively neutral conduct that might be alleged to fall within subsection 45(1.1), due to fear of serious liability or – even where proceedings fail to establish liability – due to concern about the significant expense, distraction and public opprobrium resulting from the legal process. Avoidance of lawful conduct by business firms due to uncertainty regarding applicable legal standards may inhibit competition and ultimately reduce economic performance and innovation. Accordingly, the GAI respectfully recommends that the Bureau take particular

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[1] Competition Bureau Canada, *Competition Bureau Seeks Feedback on New Guidance Related to Wage-Fixing and No-Poaching Agreements* (Jan. 18, 2023), https://www.canada.ca/en/competition-bureau/news/2023/01/competition-bureau-seeks-feedback-on-new-guidance-related-to-wage-fixing-and-no-poaching-agreements.html

[2] GAI is a division of George Mason University's Antonin Scalia Law School and reports to the Dean of the Law School. In support of its mission, GAI draws upon the independent expertise of the Law School faculty including Judge Douglas H. Ginsburg, Senior Judge of the U.S. Court of Appeals for the D.C. Circuit and former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice; Joshua D. Wright, University Professor and former Commissioner of the U.S. Federal Trade Commission (FTC); Dr. John M. Yun, Associate Professor and former Acting Deputy Assistant Director, Bureau of Economics, FTC; Dr. Bruce H. Kobayashi, Paige V. and Henry N. Butler Chair in Law and Economics and former Director of the Bureau of Economics, FTC; Abbott B. Lipsky, Jr., Adjunct Professor, Director of Competition Advocacy for GAI, former Acting Director of the Bureau of Competition, FTC, and former Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice; and Dr. Alexander Raskovich, GAI's Director of Research and former Research Economist at the Antitrust Division, U.S. Department of Justice. GAI is grateful for the generous contributions from the individuals, foundations, and corporations who enable GAI to carry out its mission. Its finances are managed through the George Mason University Foundation, Inc., which is a 501(c)(3) corporation established to support the activities of George Mason University. More information may be found at https://gai.gmu.edu/. GAI gratefully acknowledges substantial assistance in the preparation of this Comment by students at Scalia Law including Samuel Bellet, Sophia Cabana, Cory Jack, Segev Kanik, SeoYi Kim, Daniel Lynch, Andrew Schilling, Mark P. Smith, and Konnor Ternus.

care in defining the types of agreements that fall into the *per se* category defined by subsection 45(1.1).

We have organized this Comment in the following manner. First, we identify terms used in the Guidance that may introduce material ambiguity, specifically in the Preface and Sections 1.2.1 (Affiliation), 1.2.3 (Employment relationship), 1.2.4 (Information sharing), and 3.1 (Ancillary restraints defense – hereinafter "ARD"). This Comment provides examples of the potential chilling effects that these ambiguities may introduce. Second, we recommend that the Bureau provide additional clarity on how the Guidance will apply to circumstances in which no-poaching agreements may have procompetitive benefits. Finally, we highlight language in the Guidance that appears to exempt agreements within complex hub-and-spoke arrangements. We respectfully suggest that the Bureau consider providing further explanation and/or analysis of additional concrete examples regarding application of the Guidance to such arrangements.

Preface/ "Older Agreements"

The Preface of the Guidance provides a transition principle: subsection 45(1.1) will apply to new agreements made following its effective date, "as well as to conduct that reaffirms or implements older agreements." We respectfully suggest that the Guidance should clarify what the Bureau envisions as "conduct that reaffirms or implements older agreements." Providing one or more examples of such conduct would alert employers to situations involving possible application of subsection 45(1.1). For example, an employee falling within the scope of a no-poaching agreement signed before the effective date of subsection 45(1.1) may change position or job function, receive additional compensation, or experience a variation in other terms of employment. It would be helpful to know whether, in the Bureau's view, this would "reaffirm" or "implement" the preexisting no-poaching agreement, rendering that agreement subject to subsection 45(1.1). Clarification of this point in the Guidance would avoid unfair surprise for businesses seeking to comply, simplify and thereby encourage compliance, and reduce demands on public resources needed for enforcement.

Section 1.2.1/ "Affiliation"

The Guidance states that subsection 45(1.1) applies only to agreements between unaffiliated employers. Criminality will not attach to wage-fixing or no-poaching agreements among affiliated employers. According to subsection 2(2) of the Competition Act, affiliated employers include an entity and its subsidiary, two subsidiaries of the same entity, or two entities controlled by the same entity or individual.[3] Likewise, entities affiliated with the same entity are themselves affiliated, and an individual is affiliated with an entity he or she controls, as defined in subsection 2(4).[4]

By conditioning the criminality of agreements on whether parties to an agreement are affiliated, the Guidance risks punishing a corporate structuring decision rather than an

[3] Competition Act, R.S.C., 1985, c C-34, § 2(2) (Can.), https://laws-lois.justice.gc.ca/eng/acts/c-34/page-1.html#h-87835.
[4] *Id*. § 2(4).

anticompetitive restraint of trade. Liability should be based on economic substance rather than formalistic line-drawing.[5] We suggest that the Guidance provide a defense to entities that may be deemed statutorily unaffiliated, but may nonetheless be affiliated in economic substance. In those instances where ownership of entities is complex, *i.e.*, where entities are subject to partial common ownership or where the extent of legal control is subject to interpretation, the question of affiliation can be ambiguous. From *Copperweld Corp. v. Independence Tube Corp.* to *Williams v. I.B. Fischer Nevada* and *Arrington v. Burger King Worldwide, Inc.*, United States courts have wrestled with the antitrust implications of close economic relationships among legally distinct corporate entities.[6] As the U.S. Supreme Court stated in *American Needle, Inc. v. National Football League*:

> [T]he question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . , or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . , or conspiracy" amongst "separate economic actors pursuing separate economic interests," [*Copperweld, supra* note 4], at 769, such that the agreement "deprives the marketplace of independent centers of decisionmaking," *ibid*., and therefore of "diversity of entrepreneurial interests," *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 ([1st Cir.] 2002) . . . .[7]

The ambiguous consequences of affiliation in corporate form may create situations where corporate entities are not affiliated under subsection 2(2), but remain sufficiently interdependent to be regarded as incapable of engaging in an anticompetitive conspiracy.[8] *Per se* violations potentially subject to criminal liability ought to be reserved for conduct that experience has shown to always or nearly always result in a reduction in competition, without any plausible procompetitive justification. In instances where "affiliation" is subject to multiple reasonable interpretations, the Bureau should not seek criminal liability. Otherwise, businesses may unnecessarily opt for less efficient corporate structures merely to avoid any possibility of criminal liability.

Such problems of ambiguity are particularly salient in the case of the franchise. Canadian franchises can differ in both structure and regulatory requirements.[9] In footnote 2 to subsection 1.2.1, the Guidance states: "Ordinarily, franchisors and franchisees are not affiliated and employers in franchise relationships cannot rely on the affiliation exception in subsection 45(1.1)." We respectfully propose the Bureau reconsider this stance and clarify the applicability of antitrust to no-poaching agreements involving franchisors and franchisees.

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[5] *See* Judd E. Stone & Joshua D. Wright, *Antitrust Formalism is Dead! Long Live Antitrust Formalism: Some Implications of* American Needle v. NFL, 2009–10 CATO SUP. CT. REV. 369, 370.

[6] *See, e.g.*, Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); Williams v. I.B. Fischer Nevada, 999 F.2d 445 (9th Cir. 1993); Arrington v. Burger King Worldwide, Inc., 448 F.Supp.3d 1322 (S.D. Fla. 2020), *rev'd and remanded*, 47 F.4th 1247 (11th Cir. 2022).

[7] American Needle, Inc. v. National Football League, 560 U.S. 183, 195 (2010).

[8] *See* American Bar Association Section of Antitrust Law, 2020 Annual Review of Antitrust Law Developments 8 (2021).

[9] *See* FASKEN, *Chapter 15 - Franchising*, *in* DOING BUSINESS IN CANADA 2022 (Oct. 15, 2021), https://www.fasken.com/en/knowledge/doing-business-canada/2021/10/15-franchising.

For nearly fifty years, a bedrock principle of U.S. antitrust, based on extensive and well-supported economic and legal scholarship, has been that vertical restraints that limit intrabrand competition can actually increase interbrand competition.[10] For example, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, a manufacturer included market allocation provisions in agreements for sales to retailers.[11] While retailers did not compete with each other in the sale of the manufacturer's products, the agreements did promote competition among retailers selling competing products provided by other manufacturers.[12] Likewise, in Europe, companies restrict the sale of products on third-party platforms such as Amazon to maintain a luxury image.[13] Thus, vertical restraints on intrabrand competition may be defended on the basis that they can be procompetitive, sharpening interbrand competition to the benefit of consumers.

The benefits of vertical restraints are applicable to no-poaching provisions in franchisor-franchisee agreements. For example, franchising is considered an effective means of competition in the hospitality industry.[14] Hospitality markets display strong interbrand competition among franchises. A hospitality franchisor's no-poaching agreement with a franchisee may allow the franchise system as a whole to focus on its product, rather than on soliciting employees from other members of the franchise system. Training, expertise, and resources provided by a franchisor may provide important benefits to a franchisee, which may explain why such agreements are widely applied by franchises.[15] Condemning no-poach agreements may lessen the value of the franchise arrangement, decreasing the frequency of its use, and thereby decreasing competition as parties are dissuaded from entering markets where the franchise arrangement would have otherwise assisted them in doing so.

A company considering the benefits of a franchise structure may instead opt for more direct ownership to avoid the potential for criminal liability for no-poaching agreements. The effect of the current guidelines' disparate treatment of no-poaching agreements between parent-subsidiary and franchisor-franchisee is to penalize a company for choosing a franchising-based corporate model. When used for procompetitive ends, franchisor-franchisee no-poaching agreements are analogous to vertical agreements in their promotion of interbrand competition. It certainly cannot be said that there is any consensus based on long experience and a convergence of economic scholars that no-poaching agreements in a franchise context are always or almost always anticompetitive. One paper finds 58 percent of major franchisers in their sample employ no-poaching clauses.[16] Criminal sanctions for no-poaching agreements in a franchise context risks either widespread re-shuffling of corporate form with no benefits to workers or thwarting

[10] Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67, 68 (1991).
[11] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
[12] *Id.* at 54–55.
[13] Adrian Magnus & Emmanuelle van den Broucke, *The Coty Case – The CJEU Rules in Favour of Selective Distribution Networks Against Third-party Online Platforms*, JDSUPRA (Jun. 24, 2019), https://www.jdsupra.com/legalnews/the-coty-case-the-cjeu-rules-in-favour-96216/.
[14] *See* Kyung-A Sun & Seoki Lee, *How Does Franchising Alter Competition in the Restaurant Industry?*, 46 J. HOSP. AND TOURISM MGMT. 468 (2021), https://www.sciencedirect.com/science/article/abs/pii/S1447677021000206.
[15] *See* Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 4 (IZA Inst. Of Lab. Econ., Discussion Paper No. 11672, 2018) (noting 58 percent of franchises in the U.S. have no-poaching agreements) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3217489.
[16] *Id.*

interbrand competition. Accordingly, designating no-poaching agreements between franchisors and franchisees as per se illegal lacks sufficient justification. At a minimum, a franchisor or franchisee should be permitted to rebut the Bureau's claim of illegality by demonstrating that a no-poaching agreement can enhance, *inter alia*, interbrand competition.

Section 1.2.3/Employment Relationship

A. Employees, Independent Contractors and Adverse Employment Incentives

Limiting the prohibition on wage-fixing and no-poaching agreements to those involving employees may discourage firms from hiring employees relative to relying on independent contractors. The Guidance states that "Whether an employer-employee relationship exists between parties will depend on the laws and circumstances under which the relationship was entered into." In many industries, such as ride-sharing, the line between employee and independent contractor can be indistinct. Consequently, the Bureau may want to consider providing additional descriptions of (1) how it will make the distinction between employees and others who provide significant labor in the process of creating goods and services but are not subject to subsection 45(1.1), and (2) of its intended enforcement approach in the case of wage-fixing and no-poaching agreements involving non-employees (*e.g.,* when the Bureau might proceed under Section 90 in circumstances where subsection 45(1.1) is inapplicable). The Guidance should seek to minimize – insofar as is possible given the terms of subsection 45(1.1) – the substantive consequences of the formal distinction between employees and non-employees.

While determining whether an employee-employer relationship exists depends upon specific facts and circumstances, an explanation of how the Bureau will assess this question will assist businesses in determining their compliance obligations and minimize the demands on public resources for enforcement. For instance, some "gig workers" may share common traits with certain low-skill workers. For some occupations, the turnover rate is high, the relevant market is regional or local, no sophisticated skills are required, and/or such workers are hired to exercise skills that they already have (*e.g.*, vehicle operation). Such workers require little investment in training or in the provision of specialized knowledge by the firm.[17] Absent other procompetitive rationales for wage-fixing or no-poaching agreements (*e.g.,* the need to safeguard proprietary information), in such circumstances, wage-fixing or no-poaching agreements may have the same competitive consequences where non-employees are concerned as arrangements subject to subsection 45(1.1). For agreements involving non-employees, worker mobility and wages might be reduced where the employers wield monopsony power in the relevant input markets. This may reduce employment and output—giving rise to inefficient restrictions in output, reduced innovation and other classic consequences of anticompetitive monopsony conduct. Many gig economy platforms such as Lyft and DoorDash are already present in Canada.[18] Accordingly, the Bureau may wish to consider how these aspects could be taken into account in applying the definition of "employee" or adopting

[17] *See* Andrea Broughton et al., *The Experiences of Individuals in the Gig Economy*, 1, 13, Dept for Bus., Energy and Ind'l Strat. (U.K.), Institute for Employment Studies (BIES), https://apo.org.au/node/220126.

[18] *Compare the Top Gig Economy Platforms in Canada of 2023*, SOURCEFORGE, https://sourceforge.net/software/gig-economy/canada/.

particular enforcement approaches to subsection 45(1.1).

B. Consequences of Differing Provincial Definitions of Employment

Each Canadian province defines employees independently. For instance, Canada has created a new definition of an employee as "the dependent contractor," which considers more substantive factors including economic dependence rather than merely relying on a traditional right-of-control standard.[19] The Canadian provinces of Ontario, British Columbia, and Newfoundland define "dependent contractor" as one type of employee.[20]

Differing definitions of "employee" may result in confusion as to which relationships qualify as the employment relationship referred to in the Guidance. There may also be situations in which a worker may constitute an employee in one or more provinces but not another. The Bureau may wish to consider how the Guidance would be applied to agreements operating multiple provinces with distinct "employee" definitions. Again, the policy objective should be to minimize any substantive differences in antitrust treatment that might result from formal distinctions applicable to the definition of "employee" under subsection 45(1.1) as interpreted and applied under the Guidance.

Section 1.2.4/Information Sharing

Section 1.2.4 addresses information-sharing practices. While the Bureau does not consider "conscious parallelism" a violation of section 45 of the Competition Act, "parallel conduct coupled with facilitating practices" could amount to an agreement in violation of subsection 45(1.1). Two examples of suspect practices are provided: (1) "sharing sensitive employment information" and (2) "taking steps to monitor each other's employment practices". These aspects of the Guidance properly focus on the interbrand aspects of information sharing – a key to an economically sound enforcement approach – and appropriately recognize that condemnation of "conscious parallelism" (especially via criminal remedies) unfairly penalizes individual firms responding unilaterally to marketplace developments. We believe this section could benefit, however, from greater clarity – *e.g.*, by including analysis of more specific examples – as to when "facilitating practices" risk challenge under subsection 45(1.1).

It is becoming common practice for employers to list salaries, benefits, and other compensation information in greater detail in a public job posting. Job seekers and employers alike have access to increasing information on positions and market conditions through internet search. Pay transparency legislation at both national and provincial levels has been introduced to address the growing demand for transparency by workers.[21] This transparency is necessary to overcome search frictions that arise when workers have limited information on job opportunities in light of

[19] Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for 'Dependent Contractors,'* 26 BERKELEY J. EMP. & LAB. L. 1, 101, 153 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745954.
[20] *Id*.
[21] *See* Employment Standards Act, RSPEI 1988, c E-6.2, s. 5.8 (Prince Edward's Island); Pay Transparency Act, 2018, S.O. 2018, c. 5 – Bill 3 (Ontario); Pay Equity Act, S.C. 2018, c. 27, s. 416 (Federal).

the differentiation that often exists between seemingly similar jobs.[22] Given the high stakes from liability, it is important that the Guidance be clear in identifying when "information sharing" will cross the line into a "facilitating practice." Well-intentioned firms that are under an obligation to share salary and compensation information would undoubtedly benefit from further specificity on how to meet their transparency obligations without offending subsection 45(1.1).

The aggregation of compensation information, colloquially referred to as salary benchmarking, is critical for pay setting strategies.[23] A survey of the U.S. Society for Human Resource Managers found that 87.6% of members used salary benchmarking to set pay, and interviews with HR executives indicated that salary benchmarking plays a prominent role in their pay setting practices.[24] Employers greatly benefit from salary benchmarking, allowing firms to compress compensation towards a mean.[25] In the Cullen *et al.* study, employers using salary benchmarking tools lowered the dispersion between salaries from 19.8 pp to 14.9 pp, which was both highly statistically significant (p-value<0.001) and large in magnitude.[26] Salary benchmarking is more informative for low-skill positions.[27]

Section 2.2/No-Poaching Agreements

The Guidance notes that there is no offence where "only one party agrees to not poach another's employees." However, it may be an offence where there are "separate arrangements that result in two or more employers agreeing to not poach each other's employees." We suggest that the Guidance clarify that distinct and independent arrangements cannot be deemed an "agreement"; it is only where separate arrangements are part of a common scheme that they are capable of liability as an illegal agreement. Second, it is not clear from this language how the Bureau would apply subsection 45(1.1) to "hub and spoke" arrangements, involving situations where each of the various firms ("spokes") makes a unilateral agreement with a specific firm ("the hub"), but the spokes make no agreements with each other.

A hub firm generally will have incentives to reduce costs for both its upstream suppliers and its downstream distributors, as that could allow the hub to reduce costs and increase output. A hub firm could coordinate agreements with individual suppliers or distributors barring them from poaching employees from other individual suppliers or distributors that compete for the hub's business. This networked arrangement would seem to meet the definition of "one party agree[ing] to not poach another's employees." The Bureau may wish to consider addressing how it would treat such a situation under subsection 45(1.1). It seems essential to differentiate between situations where the overall impact of such arrangements would have only (or primarily) intrabrand effects,

[22] Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUMAN RESOURCES S284, S289–90 (2022); Lauren Sillman, *Antitrust for Consumers and Workers: A Framework for Labor Market Analysis in Merger Review*, 30 KAN. J.L. & PUB. POL'Y 37, 50 (2020); ERIC POSNER, HOW ANTITRUST FAILED WORKERS 14-15 (2021).
[23] Zoe B. Cullen, Shengwu Li & Ricardo Perez-Truglia. *What's My Employee Worth? The Effects of Salary Benchmarking*, 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30570 2023).
[24] *Id.*
[25] *Id.* at 4-5, 33.
[26] *Id.* at 4-5.
[27] Id. at 5.

with the potential for improving interbrand competition. Where adverse interbrand effects predominate, sound policy supports challenging such arrangements. Where it is difficult to assess the ultimate effect on interbrand competition, however, application of a criminal approach may deter competitively benign arrangements.

Section 3.1/Ancillary Restraints Defense

Section 3.1 is perhaps the most pivotal section of the Guidance, because it identifies when criminality under subsection 45(1.1) attaches for two parties entering "wage-fixing" and "no-poaching" agreements meeting the elements of the subsection. Thus, clarity in Section 3.1 is paramount to smooth collaboration among impacted parties and to effectively implement the new statute. Unless the meaning of "ancillary" is clear, parties may refrain from procompetitive transactions for fear of attracting criminal proceedings and liability.

To evaluate whether a restraint is ancillary, the Guidance considers three characteristics. The first asks how related and necessary a restraint is to the transaction when considering "practical" and "less restrictive" alternatives "reasonably available to the parties." Given the limited enforcement experience with the type of restraints addressed by subsection 45(1.1), we respectfully suggest that the Bureau supplement the Guidance – through additional explanation or by providing analysis of specific examples – to clarify how it will determine whether a restraint is more or less practical, or more or less restrictive, than available alternatives. The Guidance should similarly clarify what constitutes an alternative "reasonably available to the parties." In judging the appropriateness of a restraint by the nature of its alternatives, the Guidance evaluates parties' criminal liability not based on their actions, but based on the possible alternatives to their actions. Lack of clarity will chill transactional activity among parties that fear (1) they may not be aware of potential alternatives or (2) the Bureau may refer conduct for prosecution based on speculative alternatives. Clarifying the scope of reasonable alternatives will avoid chilling transactional activity that benefits competition, including competition within the labor market.

A similar issue arises from the Section 3.1 distinction that "wage-fixing or no-poaching clauses . . . ancillary to . . . joint ventures" will not be pursued for criminality, unless the "clauses are clearly broader than necessary." Because naked wage-fixing and no-poaching clauses have been civil violations and will remain so until the effective date of subsection 45(1.1), there has been no enforcement experience directly relevant to when wage-fixing and no-poaching clauses become so overbroad as to attract criminal scrutiny. For reasons like those discussed regarding the meaning of "ancillary restraints" the Guidance should also clarify by use of some examples what makes clauses "clearly broader than necessary."

Section 3.2/Other Defenses and Exceptions

Finally, we propose consideration of an additional defense for employers seeking to use no-poaching agreements. Like non-compete agreements, no-poaching agreements may sometimes be necessary to ensure employers can recoup investment costs associated with apprenticing and

training employees. This incentive is especially important in industries where employers bear significant upfront costs to train employees in a particular trade or craft. For example, it was once a common practice in the tech industry for firms to use no-poaching agreements to ensure their initial investment in employees was protected. Inability to use no-poaching agreements in circumstances where they are essential to recovery of investments in employee training may lead to reduced employment, output and innovation. Therefore, if an employer can show that such investments cannot be recouped but for the no-poaching agreements, there should be a valid defense. Possibly such a defense is implicit in the ADR exception, but if so, this fact could benefit from clarification in the Guidance.

Example 4: No-poaching and franchise agreements

The Guidance designates no-poaching agreements as "*per se* illegal," yet exempts agreements between affiliated employers. In Example 4's analysis of a franchise no-poaching agreement, the Guidance explains "employers in franchise relationships cannot rely on the affiliation exception" because "*[o]rdinarily*, franchisors and franchisees are not affiliated[.]" (Emphasis added). The Guidance does not specify what *extraordinary* cases would result in an affiliation between franchisors and franchisees. Further adding to confusion, Example 4 states that, though it is unlikely, the ARD could apply to franchise relationships. Whether the ARD applies "will be case-specific[.]" Example 4 creates uncertainty of criminal liability for no-poaching agreements in a franchise context. This uncertainty seems to create a rule-of-reason analysis more than *per se* illegality for violations of subsection 45(1.1) in a franchise context. GAI respectfully suggests that the Guidance clarify when no-poaching agreements in a franchise context will result in a violation of subsection 45(1.1).

The Guidance leaves unclear whether no-poaching agreements in a franchise context will result in criminal sanctions if the defendant's ARD fails. Moreover, even if the Bureau does entertain an ARD, the ambiguity of a "case-specific" approach does not comport with principles of criminal law, which require that those subject to it be put on notice as to precisely what conduct is condemned.[28] GAI recommends that the agency reconsider criminal liability for intra-franchise no-poaching agreements. GAI further recommends that a franchisor or franchisee be permitted to rebut the Bureau's claim of illegality by demonstrating that a no-poaching agreement can enhance competition. In the latter approach, GAI recommends the Guidance enumerate what aspects of an intra-franchise no-poach agreement the Bureau would consider procompetitive. Such examples could include agreements that (1) merely bar solicitation that would ensure that the parties to a franchise agreement will not waste resources actively trying to take employees from one another; (2) are limited to a geographic area and labor market in which the parties have no market power over labor; or (3) are limited to a time sufficient to allow recoupment of training costs.

Conclusion

The GAI commends the Bureau for providing advance public notice and opportunity for comment on its proposed Guidance, prior to the effective date of subsection 45(1.1). In general,

[28] *See* Peter Westen, *Two Rules of Legality in Criminal Law*, 26 LAW AND PHILOSOPHY 229, 229 (2006).

the Guidance provides sound and useful clarification of the Bureau's intended enforcement approach. This Comment is offered in a constructive spirit in the hopes that it will improve the Bureau's ability to obtain compliance with the law, minimize the burden on public resources for enforcement, and promote the fundamental procompetitive objectives of the Competition Act. The GAI would be pleased to provide further assistance to the Bureau in any manner that the Bureau would consider helpful and appropriate.