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## MEMORANDUM

**DATE:** January 30, 2023

**TO:** Competition Bureau of Canada

**RE:** Comments on draft supplements to Competitor Collaboration Guidelines (wage-fixing, no poach etc.)

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I am happy to provide some thoughts about the draft that has been put forward for public consultation. Nothing very dramatic here, but perhaps of some use. Happy to discuss further if that would be useful.

1. While I understand that it is important to point out that colluding employers do not need to be competitors in output markets, the point here is that they are competitors in labour markets – is that not worth a mention?
2. It seems to me that there is some confusion out there about how non-compete agreements (between employers and employees) might be caught by the new amendments. They are not, but some reference to them here might be helpful – perhaps in an example? And a related question: how would we view agreements between employers to sign all employees to non-compete agreements? This could be an end-around to achieve a no-poach agreement.
3. I wonder if a clear example in which the ARD might work would be useful. I suspect a lot of employers will appreciate guidance on the kinds of situations in which the Bureau would see ARD working. Suppose two firms form a joint venture to develop some new product. They each contribute employees to work together on this project and they agree: (i) to a standard set of wages for employees with the same skills (e.g. engineers) across the two employers (just as an employer might have internally to avoid wage discrimination); and (ii) not to try to steal employees on loan from the other joint venture partner. Without the agreements, firms may not be willing to contribute their best people to the JV.
4. Can anything more be said about when people are considered employees (e.g. are subcontractors?) – I can appreciate that this might depend on context (and even Provincial labour law?) but anything else you can say might be appreciated.
5. About the reference to “decrease” in 45(1.1): I wonder if some reference to the counterfactual might be useful. For example, suppose employers agree to limit wage increases to 1% when they might otherwise have been 5%. Hence, it is an increase

relative to pre-agreement wages, but a decrease relative to the “but-for” of no agreement. Surely the law should prevent that kind of agreement. The document’s Example 1 is exactly of this type, perhaps it can be tied to the appropriate definition of decrease. Just a thought. I can imagine it also being caught by “control salaries”.

6. In 3.1, the paragraph that starts: “The Bureau will examine the circumstances leading to the adoption of the restraint, including the submissions of the parties to the Bureau, evidence created during...” This makes it sound like the submissions of the parties came before the adoption of the restraint.
7. Example 2 seems to be letting them off because the restriction was one-sided, but there is clearly something bigger than a restriction of competition here – it is part of a larger arrangement that might not be possible without the restriction. So, the ARD might have also saved it, no?
8. I don’t find the analysis section of Example 4 to be as clear as it might be. What kind of agreement or understanding is there between franchisees – each of them has a contract only with the franchisor. Perhaps a sentence about how the web of contracts might be interpreted as an understanding between franchisees? Then there is the line “It seems less likely that the ARD in subsection 45(4) would apply to agreements between franchisees since it could be an unnecessary restraint on their employees’ job opportunities.” This correctly points out the cost of the agreement (to employees) but might there not be a benefit? What if each franchisee had to invest very considerable resources to train an employee (giving skills that would be useful for other franchise outlets in the same chain) and another franchisee wishing to avoid those costs poaches the employee. Maybe not so likely in fast food, but do we not have to at least admit the possibility that as part of a contract that includes expensive training, no-poaching agreements might fit the ARD?