March 16, 2023

Submitted via the Online Feedback Form

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Consultation of the Competition Bureau on its new guidelines related to wage-fixing and no-poaching agreements (the Consultation)

Introduction

This letter is submitted in response to the Consultation. It reflects the views of a working group made up of publicly listed companies having a combined market capitalization of close to $90 billions (the **Working Group** or **we**). We thank you for affording us an opportunity to comment on the draft enforcement guidelines (the **Guidelines**) to address wage-fixing and no-poaching agreements published by the Competition Bureau (the **Bureau**) following recent amendments to the *Competition Act* (the **Act**).

The members of the Working Group hereby provide general comments, which are followed by specific views on the draft Guidelines.

General Comments

Members of the Working Group acknowledge the efforts made by the Bureau to implement best practices regarding employees' mobility in a competitive market and target "naked restraints" which do not carry a legitimate purpose. However, the Working Group is of the view that the new wage-fixing and no-poach offence is overbroad and criminalizes a wide range of legitimate no-poach and non-solicit arrangements entered into in the context of other commercial agreements. As drafted, it is a blunt tool that creates criminal risk for companies that have no criminal intent.

In introducing this broad new criminal provision, Canada has taken a different approach than the U.S., where only "naked" wage-fixing or no-poach agreements are *per se* illegal. The Working Group believes that only "naked" wage-fixing and no-poach agreements should be criminalized. Other potentially legitimate no-poach agreements should be carved out of the criminal provision and dealt with under the civil provisions of the Act to bring the Canadian approach in line with that of the U.S.

Furthermore, the draft Guidelines should balance the Bureau's concerns about "naked" wage-fixing and no-poaching agreements with employers' commercial need for certainty and predictability. While the Bureau has provided some guidance on the application of the ancillary restraints defence (**ARD**), it has reserved itself broad enforcement discretion, creating significant risk for companies.

Moreover, the implementation date for the new wage-fixing and no-poach offence is quickly approaching. A clearer statement from the Bureau that the new provisions do not apply to existing agreements or arrangements entered into before June 2023 is required. We would appreciate clearer guidance on the applicability of the offence to previously existing agreements and arrangements and reassurance that it has no retroactive effect.

Application of the new offences to existing agreements

As mentioned above, the draft Guidelines need clarification as to the treatment of legitimate agreements between employers that were entered into before the new legislation comes into force. In our view, the new provision should not have any retroactive effect. There is a general presumption that laws do not have retroactive application, and in the criminal law context, section 11(g) of the Canadian *Charter of Rights and Freedoms* prevents Canada from imposing criminal sanctions on any act or omission that occurred prior to the offence coming into force.

The Bureau should clearly state in its Guidelines that the new provision will not have any retroactive effect on existing agreements entered into by employers before June 23, 2023. While the draft Guidelines state that subsection 45(1.1) "*will apply only to new agreements entered into by employers on or after June 23, 2023*", the use of the following qualifying language raises significant practical uncertainties: "*as well as to conduct that reaffirms or implements older agreements*". Rather than including this unclear qualifying language, the Bureau should explicitly state that it will **not** take enforcement action against agreements entered into prior to June 23, 2023, unless, on or after June 23, 2023, the wage fixing or no-poach agreement is explicitly: renewed, amended, or enforced, in a manner that violates the subsection 45(1.1) prohibition and is inconsistent with the ancillary restraints defence.

This issue is significant as there are potentially millions of agreements that would need to be reviewed and potentially renegotiated. The Working Group believes that no-poach provisions entered into before June 23, 2023 should still be enforceable after this date. The Bureau should clearly state that it will not take enforcement action against anyone for a provision that predates the coming into force of subsection 45 (1.1). To expect that parties will be able to go back and simply renegotiate existing commercial agreements ignores basic commercial reality. Indeed, this would create commercial uncertainty and impose a cost on businesses that is entirely disproportionate to the hypothetical harm that these types of ancillary provisions may cause.

Application of the new offences to independent contractors

The draft Guidelines suggest that an employer-employee relationship must exist for the new offence to be applicable. However, they do not explicitly state that agreements relating to the terms of independent contractor agreements will not be subject to criminal enforcement action. As a guidance document, the Guidelines should clearly state that agreements relating to the terms of independent contractor agreements are not targeted by the provision. The Guidelines should also make it clear, to be consistent with the language of the new offence, that non-solicit and no-poach agreements between employers and their employees are not captured by the provision.

Meaning of fixing "terms and conditions of employment"

New Subsection 45(1.1)(a) will prohibit not only agreements that fix employee salaries and wages, but those that fix the "terms and conditions of employment." The draft Guidelines define this broadly to mean "the responsibilities, benefits and policies associated with a job" such as job descriptions, allowances and reimbursements, non-monetary compensation, working hours, location and directives (including non-compete clauses) that may restrict an individual's job opportunities.

We respectfully submit that this proposed definition is overly broad and is not supported by the language of the Act. The proposed definition encompasses elements of the employment relationship that have no potential anti-competitive effect and could inadvertently capture terms and conditions set by licensing bodies and other professional organizations that employers may be subject to. As a criminal offence, this provision must be narrowly construed, and the draft Guidelines inappropriately seek to expand its scope. Given that this constitutes anti-wage-fixing legislation, the meaning of "terms and conditions of employment" should be limited to financial terms.

The draft Guidelines also state that the Bureau's enforcement will generally be limited to those "terms and conditions" that could affect a person's decision to enter into or remain in an employment contract. While intended to provide clarity, this is a broad and ambiguous statement which creates unnecessary uncertainty. This offence

is aimed at wage-fixing and, thus, the Bureau's enforcement action should be focused on agreements that fix financial terms of employment.

Only reciprocal no-poach agreements will be criminalized

The draft Guidelines clarify that no-poach agreements are only illegal where two or more employers agree not to solicit or hire "*each other's*" employees. Situations where only one party has agreed not to poach another party's employee, and where there is no reciprocal agreement not to poach the first party's employees, will not be captured by the new criminal provision.

While this guidance provides comfort in limited cases, the reality is that a multitude of no-poach and non-solicit agreements are legitimately reciprocal (e.g., in joint venture, client-supplier relationship or other collaboration agreements), and as such this guidance will be of little assistance. By using reciprocity to trigger section 45(1.1)(b) of the Act, suppliers and their customers may not be able to come to an understanding as to who should benefit from the allowed unilateral non-solicit clause. Service providers may end up giving this protection in order to obtain the contract, leaving them without a much needed protection.

Furthermore, the fact that the two parties to an agreement are competitors does not take-away from our position. Sometimes clients are competitors, and sometimes, competitors can be clients. For example, in the context of a subcontracting relationship, competitors may need each other's resources for an engagement. The resulting no-poach agreement would not be concluded without purpose, but would rather be entered into in the broader context of a client-service provider relationship. Hence, client - service provider relationships should be given the same status as joint ventures and strategic alliances, and generally not be assessed under the criminal track.

Finally, the fact that numerous no-poach and no-solicit agreements are legitimately reciprocal, sometimes even containing exceptions to ensure they are not naked restraints, and yet are potentially captured by the new provision, underscores the need to clarify the ARD as well as other points raised in this letter.

Application of the ancillary restraints defence (ARD)

The ARD is available where the parties can demonstrate that an otherwise illegal agreement is ancillary to a broader agreement between the same parties and is "directly related and reasonably necessary" to achieve the objective of that broader agreement. To our knowledge, this defence has never been tested before the Competition Tribunal or the Courts, and thus, it is important that the Bureau's guidance be clear and comprehensive. When invoked, the ARD only needs to be proved on the civil balance of probabilities standard, which should be expressly acknowledged by the Guidelines.

According to the draft Guidelines, the Bureau will generally not challenge wage-fixing or no-poach clauses in merger agreements, joint ventures or strategic alliances under the new criminal provision, except where the clauses are (i) "clearly broader than necessary" in terms of covered employees, territories or duration, or (ii) where the merger, joint venture or strategic alliance is a sham. While the guidance is intended to be helpful on this issue, the Bureau is affording broad discretion to second-guess and potentially take criminal enforcement action in circumstances where the parties had no intent to act unlawfully.

Given the criminal nature of the offence, the Bureau should provide clearer guidance as to when it will deem a provision to be "clearly broader than necessary" or a "sham". Clear guidance is necessary so that companies can: (i) know with certainty when they can avail themselves of this defence; (ii) properly scope legitimate provisions going forward, and (iii) assess current compliance risk for existing agreements (assuming the Bureau declines to provide further practical guidance on retroactivity, as discussed above). For example, and to the extent they are not granted a status similar to joint ventures and strategic alliances, the Bureau should specify that no-poach clauses limited to employees involved in a specific project or business service, in the context of a client - service provider relationship, are permissible through the ARD.

As a defence, the ARD assumes the agreement in question is otherwise unlawful, and places the burden on the employer to prove the ARD on a balance of probabilities. Considering the broad scope of the new offence, this places an unfair and disproportionate burden on companies to demonstrate that legitimate provisions are "saved" by this defence.

In the alternative, the Bureau could consider requesting an amendment or specific exclusion to the application of the new offence instead of requiring parties to rely on the ARD, which would at least put the burden on the Crown to establish that the agreement is a "naked" wage-fixing or no poach agreement.

We believe that the Guidelines should clearly set out the Bureau's enforcement approach. For example, where a party has inadvertently entered into an agreement that is clearly broader than necessary (i.e., used a standard form of agreement including a no-poach clause), the Guidelines should indicate that the Bureau will not seek to bring criminal proceeding and will instead require the companies to renegotiate the agreement in a manner that complies with the law. The Working Group acknowledges that some examples on the applicability of the ARD were provided, but these are too clear-cut and the Bureau should provide examples which are more likely to happen.

No-poach clauses in franchise agreements

The draft guidance suggests that Bureau will generally treat no-poach clauses in franchise agreements as prohibited under the new offence, unless the parties can demonstrate the no-poach clause is related and necessary to the broader franchise agreement. The draft guidance identifies two potentially problematic agreements in the franchise context: (i) agreements between the franchisor and its franchisees, and (ii) agreements/understanding between franchisees.

As relating to agreements between franchisors and franchisees, the Bureau's position is inconsistent with the language of the provision. No-poach clauses in franchise agreements are typically unilateral, as only the franchisee agrees to not solicit employees of the franchisor or of other franchisees. As a result, they do not form an agreement not to hire or solicit "each other's" employees, and should not be captured by the new offence.

With respect to horizontal agreements between franchisees, it is not appropriate for the Bureau's guidance to pre-determine that these sorts of agreements are illegal. Each arrangement must be assessed according to its own facts. Also, the guidance should clarify that any enforcement action with respect to agreements or arrangements between franchisees is subject to proving that there is an agreement between franchisees not to solicit each other's employees. Given that the franchise agreement only binds the franchisor and franchisee, it should not constitute proof of an agreement between franchisees. Thus, the Bureau needs to be clear as to what the language implies.

Finally, we note that the approach taken with respect to franchise agreements (and dual distribution agreements generally) is not aligned with the Bureau's approach in the *Competitor Collaboration Guidelines*. The Bureau's *Competitor Collaboration Guidelines* clarify that these sorts of agreements are not *per se* anticompetitive, and the Bureau will typically assess these types of arrangements under the civil provisions of the Act, not the criminal conspiracy provision. The draft Guidelines provide that in the event of any inconsistency with the Bureau's *Competitor Collaboration Guidelines*, only the information found in the draft Guidelines applies to the new offence. We submit that there is no reason why the Bureau should take a more stringent approach to franchise agreements under the new offence, especially given the significant investment in training employees. The wage-fixing guidance should instead strive to be consistent with the approach taken in the *Competitor Collaboration Guidelines*.

Other issues

The Working Group would also like to raise the issue the new offence may create for service providers located outside of Canada, which may be less inclined to provide service to Canadian companies if they can't prevent their employees from potentially being poached when working on a mandate for a Canadian customer. By virtue of being in a relatively small market, Canadian companies often are required to use foreign service providers for

specific services. The offence creates additional uncertainty in terms of being able to access these service providers.

Furthermore, the language in the draft Guidelines around information sharing should be clarified. When the Bureau states that "parallel conduct coupled with facilitating practices, such as sharing sensitive employment information or taking steps to monitor each other's employment practices, may be sufficient to prove that an agreement was concluded" (section 1.2.4), it describes in part practices that are definitely appropriate and legal. It is common practice to observe what competitors are doing and compare with one's own practice. The Bureau should clarify what is meant by monitoring a competitor's employment practices.

Conclusion

In short, members of the Working Group believe that the current scope of the draft Guidelines is too broad and not focussed enough on the precise behaviours the Bureau aims to eradicate. The Bureau should remain mindful of not reserving too broad enforcement discretion that would increase uncertainty and risks for Canadian companies with no corresponding benefit to competition.

Finally, the Working Group acknowledges that the draft guidance needs to be finalized quickly to meet the June 2023 entry into effect of the no-poaching and wage-fixing amendments. We would nonetheless welcome any additional consultations on a revised version of the Guidelines.

Thank you for allowing us to comment on this subject.

Yours very truly,

(signed) Norton Rose Fulbright Canada LLP