UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

COMMENTS OF THE
AMERICAN ANTITRUST INSTITUTE,
PUBLIC WORKSHOP ON COMPETITION IN LABOR MARKETS
SEPTEMBER 23, 2019

The American Antitrust Institute (AAI)[1] applauds the Antitrust Division of the Department of Justice (DOJ) for hosting a public workshop on the role of antitrust in promoting robust competition for the American worker. AAI also applauds the Federal Trade Commission (FTC) for agreeing to host a second workshop on a subsequent date.[2] In July 2018, AAI encouraged federal antitrust enforcers to host such workshops, and to devote additional resources to examining the institutional steps necessary to quickly and effectively ramp up enforcement to protect labor-market competition.[3]

AAI submits these comments to summarize the views expressed by Randy Stutz, AAI's Vice President of Legal Advocacy, during Panel 2 of the workshop, which addressed harm to labor-market competition in complex business settings involving ancillary restraints, competitor collaborations, and franchise systems. The application of antitrust law in such settings involves a variety of intricacies, including the relationship of upstream harm to downstream harm, the balancing of potential benefits and harms in different markets, and the treatment of anticompetitive restraints that are intertwined with otherwise procompetitive, integrative business activity.

AAI emphasizes five key points in considering the application of antitrust law in this context.

***First*, there is no doubt that the antitrust laws protect against competitive harm in upstream input markets, without regard to competitive effects in downstream output markets.** Although consumer welfare has served as the lodestar for antitrust enforcement policy for the better part of the last several decades, antitrust law has never concerned itself solely or exclusively with the welfare of end-purchaser consumers. Rather, it has always protected against harm to competition throughout the supply chain, including in mid-stream and upstream segments.

***Second*, it should be beyond debate that the antitrust laws apply in upstream input markets in the same manner in which they apply in downstream output markets.** That is, anticompetitive harm in upstream markets is punishable for its own sake, not because it

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[1] AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see http://www.antitrustinstitute.org.

[2] Press Release, Dep't of Just., Department of Justice Antitrust Division Announces Agenda and Panelists for Joint Agency Workshop on Competition in Labor Markets with the U.S. Federal Trade Commission (Sept. 20, 2019).

[3] Randy M. Stutz, The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice 20, Am. Antitrust Inst. (July 31, 2018).

translates to traceable anticompetitive effects in output markets. To be sure, anticompetitive harm in upstream markets often corresponds with anticompetitive harm in downstream markets. When output is reduced or prices are artificially depressed in upstream supply markets, fewer supply inputs are purchased, which often leads to reduced output, higher prices, or diminished quality or innovation in affected downstream markets. But the law is clear that this phenomenon is not a prerequisite for successfully prosecuting an antitrust case.

If there were any doubt of this conclusion, it is eliminated by the *Hanover Shoe* and *Illinois Brick* rules against offensive and defensive pass-on in private damages cases, which were re-affirmed by the Supreme Court earlier this year.[4] Whether upstream injury can be passed downstream is irrelevant to antitrust standing because it is irrelevant to antitrust liability. Indeed, when market power is exercised in an input or distribution market, but the corresponding downstream output market is competitive, end-consumers who purchase in the downstream market may not, in fact, suffer any measurable harm. Yet, antitrust law as applied still protects against the upstream anticompetitive effect and punishes the illicit wealth transfer, for their own sake. By prohibiting both a pass-on defense and an indirect purchaser claim even when 100% of overcharge damages to the first purchaser in a supply chain are passed on to end consumers, the indirect purchaser rule goes so far as to remedy anticompetitive harm in the middle of the supply chain *at the expense* of end consumers.

In supply markets, the prohibition on upstream anticompetitive conduct without regard to corresponding output-market effects is plainly evident in Supreme Court cases like *Mandeville Island Farms* and *Weyerhauser*.[5] In *Mandeville Island Farms*, the Court explained that "[i]t is clear" that a buyer's cartel in the sugar refining industry "is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."[6] It added that "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers," but rather "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[7] The modern Court, in *Weyerhauser*, unanimously recognized that predatory bidding violates Section 2 of the Sherman Act if it satisfies the *Brooke Group* test, even if the predatory firm lacks monopoly power in the output market and cannot recoup its losses there.[8]

There is no reason the same principle would not apply when labor is the relevant supply input, and indeed, it does apply. Were it otherwise, naked wage-fixing and no-poaching

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[4] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

[5] *Mandeville Island Farms, Inc. v. American Crystal Sugar Co*., 334 U.S. 219 (1948); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *see also* C. Scott Hemphill & Nancy L. Rose., *Mergers that Harm Sellers*, 127 Yale L.J. 2078, 2087-92 (2018) (citing and discussing "numerous cases [that] are premised on input market effects alone, particularly when output market harms may be comparatively difficult to measure or demonstrate," but also where "immediate harm to the output market may be attenuated or absent")

[6] *Mandeville Island Farms*, 334 U.S. at 235.

[7] *Id*. at 236.

[8] *See Weyerhaeuser*, 549 U.S. at 321 n.2 (applying *Brooke Group* test notwithstanding that "monopoly power in the output market . . . does not appear to be present here"); *id.* at 324-25 (2007) ("Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits.").

agreements could not be per se illegal. Yet, such agreements can be and routinely are treated as such, and appropriately so.[9]

***Third*, when otherwise harmful labor-market restraints are evaluated for offsetting benefits, the "out-of-market benefits rule" applies with equal force.** Under both the Sherman Act and the Clayton Act, the Supreme Court has made clear that anticompetitive injury in one market will not be tolerated or justified on the basis of claimed benefits to competition in a different market. The reasons for the out-of-market benefits rule are both practical and normative. Courts are not well equipped to make the value judgments that inhere in choosing whether one group of U.S. citizens should suffer competitive injury in order to make another group of citizens better off. And it would be inappropriate for courts to do so in our federal system.

In the Sherman Act context, the Court explained this rationale in *Topco*: "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or the courts."[10] In the Clayton Act context, the Court said the same in *Philadelphia National Bank*: "[A] merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and, in any event, has been made for us already, by Congress[.]"[11]

Today, modern agency practice adheres to this precedent. The agencies' Competitor Collaboration Guidelines explain that "The Agencies typically identify and assess competitive effects in *all* of the relevant product and geographic markets in which competition may be affected by a competitor collaboration."[12] And the 2010 Horizontal Merger Guidelines provide that "The Agencies normally assess competition in each relevant market affected by a merger *independently* and normally will challenge the merger if it is likely to be anticompetitive in *any* relevant market."[13]

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[9] *See, e.g., Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se."); *see also In re Ry. Indus. Emple. No-Poach Antitrust Litig.*, No. 18-798, 2019 U.S. Dist. LEXIS 102906, *37-38 (W.D. Pa. June 20, 2019); Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260, *18 (N.D. Ill. June 25, 2018); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1213 (N.D. Cal. 2015); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 157 (N.D.N.Y. 2010); Fed. Trade Comm'n & Dep't of Just., Antitrust Div., Antitrust Guidance for Human Resource Professionals 3 (Oct. 2016).

[10] *United States v. Topco Assocs*., 405 U.S. 596, 611 (1972); *see also Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 34-35 (1979) [hereinafter "*BMI*"] ("a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a defense to a violation of the Sherman Act").

[11] *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963); *see also* Fed. Trade Comm'n & U.S. Dep't of Just., Antitrust Guidelines for Collaborations Among Competitors § 3.32, at 16 (2000) [hereinafter "Competitor Collaboration Guidelines"]; *id*. § 2.3, at 6-7.

[12] *Id*. § 3.37, at 25 (emphasis added).

[13] U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10, at 30 n.14 (2010) [hereinafter ["Horizontal Merger Guidelines"] (emphasis added). Importantly, to whatever extent the agencies depart from "normal" practice, they do so through an exercise of prosecutorial discretion to forego a challenge rather than through an interpretation of law. *See id*.

Buy-side restraints, and mergers that create or enhance buyer power, may present different trade-off questions than sell-side restraints, and mergers that create or enhance seller power. But the logic of the out-of-market benefits rule continues to apply. In a seller power case, the trade-off question is typically whether to tolerate competitive harm that makes buyers in one market worse off on grounds that it makes *other* buyers in a *different* market better off. Antitrust law answers 'no.'

In a buyer power case, the question may be whether to tolerate competitive harm to *sellers* on grounds that it makes buyers better off. The answer is the same, for all the same reasons. Sellers are entitled to competitive markets just like buyers. And courts (as opposed to Congress) are no better positioned to approve an anticompetitive "tax" on a group of sellers to "subsidize" a group of buyers than to do so as between two different groups of buyers.

Where labor-market cases are concerned, the out-of-market benefits rule applies in the same way it applies to other buy-side cases. All else equal, efficiencies can potentially rescue an otherwise anticompetitive labor-market restraint, but only if they offset the anticompetitive harm *in the labor market*. If a defendant's only means of justifying a labor-market restraint is to point to cost savings in an output market, it runs headlong into the axiom that it would be a "frontal assault on the basic policy of the Sherman Act" to tolerate harm to competition in the claimed service of a "greater good."[14] The Supreme Court has reaffirmed this principle when confronted with arguments that suppressing competition can help promote public health,[15] public safety[16] or the integrity of amateur athletics,[17] but also specifically when the argument is that suppressing competition can help promote the welfare of end-consumers (by lowering prices).[18] The federal antitrust agencies have reached the same conclusion.[19] To embark on an inquiry into "how much restraint of competition is in the public interest, and how much is not,"[20] is to impermissibly "set sail on a sea of doubt."[21]

***Fourth*, when a labor-market restraint is included as part of a broader, integrative business activity, application of the "ancillary restraints doctrine" should be informed by the out-of-market benefits rule.** Some anticompetitive restraints, including labor-market restraints, may be inextricably intertwined with procompetitive, integrative business activity, such as a partnership or lawful joint venture. As a matter of social policy, the question may arise as to whether it is ever necessary or desirable to sacrifice the beneficial effects of the integration in order to condemn the harmful effects of the restraint. Antitrust law addresses this challenge using the "ancillary restraints" concept.

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[14] *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986); *Topco Assocs.*, 405 U.S. at 610.

[15] *Ind. Fed'n of Dentists*, 476 U.S. at 462-63.

[16] *Nat'l Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978).

[17] *NCAA v. Bd. of Regents*, 468 U.S. 85, 102, 116 (1984).

[18] *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 339, 41-42 (1982) (rejecting claim that price fixing by doctors can be justified on grounds that it would ultimately lower insurance premiums to consumers); *Topco*, 405 U.S. at 610-11 (private firm had "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy"); *see also United States v. Anthem, Inc.*, 855 F.3d 345, 369-71 (2017) (Millet, J. concurring).

[19] Horizontal Merger Guidelines § 12 (example 24); Competitor Collaboration Guidelines § 3.36(a), at 24 (efficiency claims "arising from anticompetitive output or service reductions" are "insufficient as a matter of law").

[20] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.).

[21] *Id*.

The ancillary restraints doctrine is premised on the observation that otherwise flagrantly anticompetitive agreements sometimes can be "subordinate and collateral to a separate, legitimate transaction."[22] Under the doctrine, as applied, courts consider restraints that are "an integral part of an arrangement with redeeming competitive virtues" under the full-blown rule of reason, notwithstanding that the restraint otherwise would be evaluated under a per se or quick look standard.[23] To satisfy the ancillary restraints test, the restraint must be "reasonably necessary to achieve any of the efficiency-enhancing benefits" of the procompetitive integration.[24]

In applying the ancillary restraints test, courts first consider "whether any aspect of the defendants' association contains a significant promise of integration or cooperation yielding an increase in output."[25] If the claimed broader integrative activity is itself anticompetitive, or if the collaboration entails only cost savings without meaningful integration, the ancillary restraints doctrine is irrelevant and does not apply. If the court is satisfied that the collaboration does hold the promise of procompetitive integration, it then focuses on "whether the challenged agreement is an essential part of [the integration], whether it is important but perhaps not essential, or whether it is completely unnecessary."[26]

"Reasonable necessity" is the touchstone of ancillarity for two important reasons. First, the per se rule "would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category."[27] Before the ancillary-restraints defense can be invoked, there must be a "plausible connection between the specific restriction and the essential character of the [main transaction]."[28] The ancillary restraints doctrine does not apply if "the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing."[29]

Second, reasonable necessity helps ensure that "[t]wo or more agreements are assessed together" *only* when their benefits and harms are "so intertwined that they cannot meaningfully

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[22] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.)

[23] *In re Insurance Brokerage Antitrust Litig*., 618 F.3d 300, 345 (2010).

[24] *Major League Baseball Props., Inc. v. Salvino, Inc.,* 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J.).; *see Addyston Pipe*, 85 F. at 281-82 (restraint is ancillary if it is "reasonably necessary" to protect "the legitimate fruits" of a lawful contract); Competitor Collaboration Guidelines § 3.2, at 8 (agencies look to whether challenged restraint is "reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits").

[25] XI Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1908b, at 227 (2d. ed. 2000) [hereinafter "Areeda & Hovenkamp"].

[26] *Id*. ¶ 1908b, at 227.

[27] *General Leaseways, Inc. v. Nat'l Truck Leasing Assoc.*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.). The quick-look and "inherently suspect" framework, *see California Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 1612 (1999); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (2005) (Ginsburg, J.), similarly would collapse under those circumstances.

[28] *General Leaseways*, 744 F.2d at 595 (condemning a horizontal market division as per se illegal after taking a quick look, because "no reason has been suggested" why otherwise procompetitive agreement to provide reciprocal truck-leasing services required participants not to compete with each other in actual leasing of trucks).

[29] *Id*.; *cf. Addyston Pipe & Steel Co*., 85 F. at 282. (ancillary restraints protect only "the *legitimate* fruits" of the main transaction (emphasis added)).

be isolated and attributed to any individual agreement."[30] We know, from case law, that "clearly some restraints are 'part' of efficiency-creating joint ventures and yet not sufficiently integral to the venture so as to be classified as ancillary."[31] Such "naked" restraints must be assessed individually.

During the workshop, Panel 2 addressed several cases involving franchise arrangements that include allegedly vertical and ancillary no-poaching provisions that regulate no-hiring commitments among horizontal competitors for labor. These restraints allegedly threaten to harm competition in labor markets, but defendants have sometimes attempted to justify them by claiming efficiencies in the franchise's product market.[32] When confronted with such defenses, agencies and courts should be careful to identify and reject them for violating the out-of-market benefits rule.

Agencies and courts should consider first whether the broader franchise arrangement promises procompetitive benefits, and second, whether the organic connection between the no-poaching provision and the cooperative needs of the franchise arrangement is present. If the answer to either question is 'no,' the ancillary restraints doctrine is irrelevant and has no bearing on the proper liability standard to be applied.

If the answer is 'yes,' and the rule of reason applies, agencies and courts should next consider whether the defendant has shown that the franchise collaboration has offsetting procompetitive benefits *in the labor market*. In applying the rule of reason, agencies and courts are neither properly equipped nor properly tasked to weigh challenged harms in a labor market against claimed procompetitive benefits in a franchise's product market. To do so would be inappropriately and impermissibly set sail on Judge Taft's "sea of doubt."

***Fifth*, the policy underlying the out-of-market benefits rule is equally sound in the ancillary restraints context.** It is clear that the out-of-market benefits rule cannot be relaxed simply because a challenged restraint is ancillary. Courts are no more equipped to say "how much competition is in the public interest, and how much is not," when considering the combined effects of integrative business activity in different markets than when considering the individual effects of a challenged aspect of the integration in isolation. If integrative business activity, including a franchise arrangement, causes antitrust injury in a relevant market, the arrangement must provide benefits offsetting *that injury* or face liability.

However, policymakers may wonder whether proper application of the ancillary restraints doctrine and the out-of-market benefits threaten to cause socially undesirable results. Fact patterns can be imagined where an ancillary restraint causes exceedingly low levels of anticompetitive harm in one market, yet the broader integrative activity promises enormous competitive benefits in a different market. Policymakers may wonder whether the out-of-market

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[30] Competitor Collaboration Guidelines § 2.3, at 7; *see also* Horizontal Merger Guidelines § 10, at 30 n.14 (discussing merger harms and efficiencies that are "so inextricably linked" that the former cannot be cured without sacrificing the latter).

[31] Areeda & Hovenkamp, *supra* note 25, ¶ 1908b, at 232; *see, e.g.*, *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (treating agreement among NCAA teams limiting broadcasting rights of their games as "naked restraint").

[32] *See*, *e.g.*, Defendant's Memorandum in Support of Their Motion to Dismiss 1, Butler v. Jimmy Johns Franchise, LLC, No. 3:18-cv-00133 (S.D. Ill filed Mar. 21, 2018) (characterizing no-poaching agreements as "promot[ing] Jimmy John's products, thereby fostering interbrand competition with Wendy's, Chipotle, and the like"), *denied*, 331 F. Supp. 3d 786 (S.D. Ill. 2018).

benefits rule would allow antitrust challenges based on the small amount of harm without adequately accounting for the potential loss of large benefits.

As a policy matter, the risk of lopsided effects in different markets does not support a relaxation of the out-of-market benefits rule, for several reasons. First, when the "intertwined effects" standard is properly and rigorously applied to determine ancillarity, restraints claimed to be ancillary often turn out to be capable of being meaningfully evaluated in isolation. Very often, defendants are motivated to argue that a restraint is integral to a broader business collaboration simply because ancillary restraints are reviewed under the rule of reason, and rule of reason cases are far easier for defendants to win. Yet, when defendants are confronted with being held responsible for the anticompetitive aspects of collaborative business activity, they often quickly discover that the anticompetitive aspects are not necessary for the collaboration to succeed after all.

For example, several franchises have argued at early stages of private litigation that their no-poaching provisions included in franchise contracts are ancillary.[33] But when threatened with government enforcement, the same franchises have voluntarily eliminated the no-poaching provisions from their agreements.[34] Logically, these two developments should be mutually exclusive. If a no-poaching provision is not so intertwined with a broader franchise agreement as to be incapable of being meaningfully evaluated in isolation, then it is not ancillary. And if the provision has *already* been excised from the overall franchise contract and eliminated voluntarily, then it *is* capable of being meaningfully evaluated in isolation. So long as hindsight is 20/20, we *know* that these no-poaching provisions are not ancillary.

Second, collaborations that have procompetitive benefits in output markets sometimes may be rescued because they *also* have procompetitive benefits in input markets, including labor input markets. In the seminal case announcing the ancillary restraints doctrine, Judge Taft cited a labor restraint as an example of an ancillary restraint, noting that agreements "by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service" had been upheld at common law.[35] Judge Taft identified reasons why the restraint can be procompetitive in the downstream market,[36] but he also identified reasons the restraint can be procompetitive *in the labor market*.[37] If the labor-market benefits outweigh the labor-market harms under a rule-of-reason balancing, the ancillary restraint necessarily survives an antitrust challenge.

Third, even assuming, hypothetically, that a no-poaching provision really were integral to the successful operation of a franchise, and the provision's anticompetitive harms outweighed

[33] *See, e.g.*, *Ogden v. Little Caesar Enters.*, 2019 U.S. Dist. LEXIS 126248, *20 (E.D. Mich. July 29, 2019); *Deslandes v. McDonald's USA*, 2018 U.S. Dist. LEXIS 105260, *19 (N.D. Ill. June 25, 2018).

[34] Press Release, Washington State Off. of the Att'y Gen., AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018) (identifying McDonald's); Press Release, Washington State Off. of the Att'y Gen., AG Ferguson: Eight More Restaurant Chains Will End No-Poach Practices Nationwide (Aug. 20, 2018) (identifying Little Caesars).

[35] *Addyston Pipe & Steel Co.*, 85 F. at 281.

[36] *Id*. ("the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants").

[37] *See id*. ("the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience").

the overall franchise arrangement's procompetitive benefits in the labor market, it is not a foregone conclusion that society would be deprived of the benefits that the franchise arrangement creates in the product market. Particularly when the anticompetitive harm in one market is very small and the procompetitive benefits in a different market are very large, the overall collaborative activity may well remain very profitable, in which case it behooves the franchise to simply negotiate and compensate its victims for their anticipated injuries.[38]

Finally, to consider relaxing the out-of-market benefits rule when ancillary restraints have lopsided effects in different markets is to realize that this is no alternative at all. How, for example, would courts appropriately weigh harm to competition that is very small quantitatively, but that has life-or-death consequences because it occurs in sectors that are vital to human health and well being, like healthcare and pharmaceuticals or food and agriculture? How would courts weigh benefits that are very large quantitatively, but that occur in leisure goods markets, like motor yacht sales or beachfront real estate? Without the out-of-market benefits rule, courts are invariably still at sea because they remain ill-equipped to pick winners and losers in this fashion.

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Labor-market restraints in complex business settings pose many analytical challenges, but they are navigable if agencies and courts properly adhere to enduring, well established principles. All input restraints, including labor-market restraints, are actionable notwithstanding the absence of end-consumer injury. Harm to competition in a labor market is not tolerable on grounds that it benefits competition in a product market. Franchise no-poach provisions are not ancillary unless they are functionally related to the procompetitive benefits of the franchise arrangement, and the harms they cause are so intertwined with such benefits that the two are incapable of being meaningfully evaluated in isolation. And even if a franchise no-poach provision is ancillary, proper application of the rule of reason requires continued adherence to the out-of-market benefits rule.

Thank you for considering the views of the American Antitrust Institute. Questions or comments regarding these comments may be addressed to:

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[38] Of course, bargaining dynamics pose unique challenges in the labor context.