

## Competition/Antitrust and Foreign Investment

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### Avoiding Anti-competitive Employee Recruitment Arrangements: The United States Department of Justice Challenges eBay and the Canadian Implications

by

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In 2010, the government of Canada amended the *Competition Act*,<sup>1</sup> making anti-competitive conspiracies between competitors or potential competitors a *per se* criminal offence, requiring no evidence of an adverse impact on competition.<sup>2</sup> In so doing, the Canadian approach to cartel enforcement, which had previously required evidence of an 'undue' lessening of competition, was largely harmonized with the practice in the United States. US antitrust law had long treated price fixing, bid rigging, allocation of customers and territories, and output restriction to a *per se* standard.

Given this relatively recent regulatory harmonization, it is not surprising that businesses with Canadian operations and sales look to US antitrust enforcement practice to avoid problematic pricing and distribution arrangements. It should also be noted that the new Canadian cartel law can have significant implications for arrangements with competitors regarding other areas, including employee recruitment practices. In that regard, senior executives, human resource departments, and legal departments of businesses with Canadian operations should take careful note of a recent challenge by the US Department of Justice (the "**DOJ**") to an alleged no solicitation / no-hiring agreement between eBay, Inc. ("**eBay**") and Intuit, Inc. ("**Intuit**"). This US case highlights conduct that could attract significant criminal and civil enforcement measures in Canada.<sup>3</sup>

<sup>1</sup>R.S.C. 1985, c. C-34.

<sup>2</sup>In particular, s. 45(1) of the *Competition Act* contains the following offence: "Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges  
(a) to fix, maintain, increase or control the price for the supply of the product;  
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or  
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product."

<sup>3</sup>The maximum penalties for a violation of s. 45(1) are set out in s. 45(2): "Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both."

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## THE US DOJ'S CHALLENGE TO EBAY

On November 16, 2012, the US DOJ filed a complaint<sup>4</sup> in the US District Court for the Northern District of California in San Jose alleging that eBay and Intuit entered into an illegal agreement not to recruit or hire each other's employees. According to the complaint, the no solicitation / no hire agreement constituted a *per se* violation of section 1 of the *Sherman Act*<sup>5</sup> that nonetheless had the anti-competitive effect of harming employees by, "lowering the salaries and benefits they might otherwise have commanded, and deprived these employees of better job opportunities at the other company."

The alleged agreement was entered into, according to the US DOJ, no later than 2006 and based on a handshake. Pursuant to the alleged agreement's terms, each company was prohibited from soliciting the other's employees for employment opportunities and, for a period of over a year, eBay was prohibited from hiring any employees from Intuit at all.

According to the complaint, the alleged agreement was preceded by communications between high level executives at both companies. The US DOJ alleged that eBay's Chief Operating Officer wrote to Intuit's Founder and Executive Committee Chairman, for permission to hire an Intuit employee and to suggest that the two companies, "establish some guidelines" on the issue. The complaint highlights that Intuit's Founder was an eBay board member and, as a result, he resolved to deny Intuit employees, "a chance to work for eBay." The complaint goes on to quote key personnel, presumably from seized emails, involved in implementing and policing the alleged agreement. The result of the alleged agreement, according to the US DOJ, was that both companies passed on talented applicants, "den[ying] employees the opportunity to compete for better job opportunities."

As remedy for the offending conduct, the US DOJ requests that the court prohibit eBay<sup>6</sup> from enforcing or adhering to the alleged agreement. It is interesting to note that the US DOJ's complaint is a civil action. No criminal charges, no fines or imprisonment are being sought.

In its press release announcing the action against eBay, the US DOJ explained that it did not have to name Intuit as defendant because Intuit had already settled a similar 2010 lawsuit brought by the US DOJ concerning six high tech businesses – Adobe Systems, Apple, Google, Intel, Intuit and Pixar. All six companies involved in the 2010 case entered into a settlement that prohibited them from agreeing to restrict their own solicitation and recruitment of or competition for another business' employees. A second action in 2010 was brought by the US DOJ against Lucasfilm for allegedly entering into a similar agreement with Pixar. The action against Lucasfilm also settled under a similar prohibition arrangement.

## IMPLICATIONS

As a matter of compliance, businesses with Canadian operations should be mindful that even "gentlemen's agreements" based on a "handshake" with competing employers that restrict the business' ability to solicit, recruit or otherwise compete for talent may be subject to challenge under competition law. Although prosecuted by the US DOJ as a civil action, in Canada, such conduct carries criminal risk, including the risk of significant fines and imprisonment for implicated individuals. In addition to the criminal risk, such conduct could be the subject of private actions (including class actions) by employees or others who suffered losses or damages as a result of the conduct. In the event such conduct is discovered, it is important to bring it to the attention of in-house counsel or external counsel as soon as possible.

<sup>4</sup>Complaint, *United States of America v. eBay, Inc.*, (U.S. Dist. Ct., N.D. Cal., 2012), online: <http://www.justice.gov/atr/cases/f288900/288918.pdf>

<sup>5</sup>15 U.S.C. §1.

<sup>6</sup>United States Department of Justice, Antitrust Division, Press Release, "Justice Department Files Lawsuit Against eBay Inc. over Agreement Not to Hire Intuit Inc. Employees" (16 November 2012), online: [http://www.justice.gov/atr/public/press\\_releases/2012/288865.pdf](http://www.justice.gov/atr/public/press_releases/2012/288865.pdf)

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