

tion. The federal competition authority says this led to a substantial enrichment at competitors' expense. Another abuse was identified by the court in the imposition by Europay Austria of a contractual non-compete obligation on all its partner banks. The decision on the fine is not yet final and binding, and an appeal is possible.

CANADA: SECTOR-SPECIFIC COMPETITION LEGISLATION FOR TELECOMS INDUSTRY

The Canadian government has proposed amendments to the Competition Act which will establish administrative monetary penalties for abuses of dominance in deregulated portions of the telecoms sector

Omar Wakil
McMillan Binch Mendelsohn LLP
Toronto

Proposed amendments, announced late last year, would allow for administrative monetary penalties of up to C\$15 million for abuses of dominance in the telecoms sector. The specific quantum is to be determined by factors such as:

- the gross revenue from sales affected by the practice;
- any actual or anticipated profits generated by the practice;
- the financial position of the entity against which the order is made; and
- the history of compliance with the act by the entity.

With one notable exception, the Competition Act's abuse of dominance provisions are presently of general application. Moreover, the specialised Competition Tribunal can only order that remedial action be taken, and not the imposition of fines or other penalties. The exception was introduced into the act by a controversial amendment in 2000 that added examples of abusive conduct which were specific to the airline industry. The amendment also allowed the tribunal to impose administrative monetary penalties of up to C\$15 million in addition to any other remedy, if the order was being made against a dominant domestic air carrier.

As a complement to the proposed telecoms amendments, the Competition Bureau has also recently supplemented its general abuse of dominance enforcement guidelines with a draft information bulletin on abuse of dominance in the telecoms industry. The draft sets out specific types of conduct that the bureau believes could result in enforcement action under the act. Stakeholder consultations have been completed and the bulletin should be released this spring in its final form.

Against this backdrop, the competition commissioner recently addressed the industry committee of the Canadian House of Commons, which is holding hearings for telecoms deregulation. She reiterated the pro-market forces position of the bureau and emphasised that where there is deregulation the agency's role will be as it is with any industry – to intervene only in those specific circumstances where anti-competitive conduct threatens the proper functioning of the market – and will not consist of continuous regulatory oversight.

Although the bureau's general policy approach to competition enforcement in the telecoms sector is sound, questions remain about the appropriateness of administrative monetary penalties. When the previous Liberal government attempted to introduce fines of up to C\$15 million for any abuse of dominance, numerous stakeholders, including leading academics, pointed out that they were likely to

be unconstitutional. The concern is that 'administrative monetary penalties' of such magnitude are tantamount to criminal sanctions, but without the safeguard of the criminal process, such as a beyond reasonable doubt standard of proof. Indeed, the C\$15 million fine cap is higher than the maximum possible price fixing fine. This point is not lost on the government, which may increase the maximum cartel fine to compensate.

The legislation has had its first reading in the House of Commons, but has yet to proceed to a detailed industry committee review, where some commentators are expecting it to receive vocal criticism.

DENMARK: CVC'S TAKEOVER OF MATAS CLEARED WITH COMMITMENTS

On 31 January 2007, Denmark's Competition Authority approved capital group CVC's takeover of Matas following commitments undertaken by the parties

Jan-Erik Svensson
Gorrissen Federspiel Kierkegaard
Copenhagen

The transaction had been referred to Denmark's Competition Authority pursuant to article 4(4) of the EC Merger Regulation. Matas, previously a voluntary retail chain, consists of 294 shops owned by 108 individuals. Each shop owner has one share per shop in the joint purchasing company Matas A/S. CVC acquired 208 shops and approximately 97 per cent of the share capital in Matas A/S. CVC also has an option to acquire an additional 45 shops. Following the merger, the Matas group will become a combined capital and franchise chain.

The authority identified five relevant markets: high-end cosmetics; low-end cosmetics; food supplements and natural remedies; over-the-counter drugs; and drugstore products. The parties had contended that no distinction should be made between high-end and low-end cosmetics. The authority did not decide whether bridge products constituted a separate market or was part of the market for low-end cosmetics.

The geographical market was identified as Denmark. But with respect to high-end cosmetics, contrary to the parties' position, it excluded the tax-free sale. The rationale was that substitution was weakened considerably because the consumer had to obtain an airline ticket, for example, and that competition was not sufficiently substantial and constant across the year to warrant another delimitation.

The authority found that Matas was dominant in the market for high-end cosmetics, but not in other markets. It had two concerns in respect of the merger. First, that the merger would affect Matas's ability to influence prices. The authority considered it a risk that prices could increase due to centralisation of control, owing to Matas being likely to follow recommended prices and to independent shop owners being less inclined to sell below recommended prices. Additionally, the authority saw a risk in Matas having the power to influence suppliers to increase their recommended prices.

Second, the authority was concerned that the merger could render it less attractive for competitors to enter the market or try to gain market shares from Matas. This was, inter alia, because Matas had exclusivity clauses in some of its leases preventing rent to competitors. Furthermore, the authority considered it a risk that Matas might demand exclusivity from its suppliers of high-end cosmetics, and that Matas would sign non-competition agreements with sev-