

## CZECH REPUBLIC

Arthur Braun

bpv Braun Partners,  
Praguearthur.braun@  
bpv-bp.com

# The jury is still out: 2001/2002 violations will not be settled for many years

**T**he time it takes in the Czech Republic to finally reach non-appealable verdicts is still astonishing to the outsider and annoying to the ones who have to deal with such a legal environment. In October 2012, the Czech Antitrust Office (the 'Office') levied in its first degree-decision a fine of CZK 93m (about €3.75m) on Telefonica Czech Republic. This incumbent still has the (disputed) position as being the largest telecoms provider in the country and it is in the undisputed position as the competitor, across all business sectors, likely to receive the most fines from the Office.

The background to the case is certain behaviour in 2001 and 2002 by the then-dominant Czech Telecom, which since 2005 has been majority-owned by Spanish Telefonica, constituted an abuse of its then-dominant position. The material cause has in the meantime lost its meaning.

Cesky Telecom (the prior name) entered into some 3,000 agreements with enterprises for so-called price plans binding these clients for a certain time. No additional voice telecom operators were to be used by clients for the fixed lines under these agreements. Clients undertook these agreements to spend a certain amount for telephone calls each month that had to be paid, even if the amount was not used up – by today's measures a standard flat fee agreement in a liberalised market that most readers will know from their own contracts. The main problem the Office saw with these programmes was that different (better) conditions were offered for those customers who were already with a competitor.

Materially, most readers would agree on first sight that we actually have a case of abuse of a dominant position; but what makes one think is that ten years after the abusive behaviour, we are back to step one. Sanctions that take too long lose their effect.

What gives more reason for concern, however, is that after five court decisions,

it may be deemed to be established that the agreements were indeed an abuse of a dominant position. Telefonica Czech Republic argued in the last court proceedings that the decision did not contain enough reasoning as to how the fine was calculated. The last court decision did indeed send the case back to the case handler for this reason.

What happened, however, was that not only was the reasoning given, but the fine was increased from CZK 81m to CZK 93m, arguing that:

- Telefonica Czech Republic was a repeat offender (obviously taking into account the years since the beginning of the proceedings and the issuing of the first fine in 2004);
- both in 2002 as well as in 2012, the Office received turnover figures that were lower than the real figures; and
- the time span of the anti-competitive behaviour was longer than assessed in 2004.

One may ask, of course, whether this is a *reformatio in peus*, which is generally prohibited in Czech administrative law and as such is certainly an issue that will be subject to further court proceedings. Supposedly having received wrong turnover numbers from a state-owned and stock-listed company that filed all of its accounts online and on time also does not shed a good light on the original case handlers. Following the change of ownership, is the new owner expected to pay for that mistake?

There are certainly plenty of grounds for another appeal to the president of the Office and further court proceedings. One may estimate that we will have a decision sometime around 2016.

The jury will have been changed several times in the meantime and the sense of the sanction will be lost by then. Telecom infrastructure providers have, within a few years, gone from being the bullies that abused their dominant position, to a species in need of protection.