



The Czech Office for Protection of Competition again fines telecoms operator for abuse of dominance on the market for telecom services for business customers

The Czech Office for the Protection of Competition has fined Telefónica for offering customers discounts and other benefits in exchange for entering into a contract with a limited possibility to terminate. According to the Office, the practice constituted an abuse of a dominant position on the market for public telecom services for businesses provided via public fixed telecom networks. The Office increased a fine imposed in its original decision which was later annulled by a court of appeal.

Subject matter of the case and a first decision of the Office

The Office for the Protection of Competition (“Office”) imposed a fine of CZK 93,109,000 (approximately EUR 3,724,000) on Telefónica Czech Republic, a.s. (“Telefónica”) for abuse of dominance on the market for public telecom services for businesses provided via public fixed telecom networks.

The former Český Telecom, a.s. (now Telefónica) had already once been fined for the same instance of breach of antitrust rules – back in 2003.¹ According to the Office, in the period between the years 2001 and 2002, Český Telecom entered into contracts with almost 3,000 business customers under which (i) the customers were obliged to pay a minimum monthly fee, regardless of whether their monthly use of services was worth this amount; (ii) it was not possible to terminate such contracts prior to a date determined in the contract; and (iii) the customers were not allowed to use services from other providers. Further, for some customers, Český Telecom applied conditions that were different from the standard ones and it also used special programmes for gaining or retaining customers.

According to the Office, Český Telecom was a dominant market player at that time, and offered customers discounts and other benefits in exchange for entering into a contract with limited possibility to terminate. In the view of the Office, this constituted prohibited fidelity rebates.

Moreover, the above practice occurred when the telecom market in the Czech Republic was undergoing liberalisation and new market players – alternative operators – were trying to penetrate the market. According to the reasoning of the Office, the above practice significantly increased the barriers for entry for other competitors, and led to the distortion of effective competition on the Czech market. Accordingly, the Office imposed a fine of CZK 81,700,000 (approximately EUR 3,268,000) on Český Telecom.

Judicial review

Since the Office handed down its decision, the case has undergone a lengthy journey between competent courts. The case landed three times before the Regional Court in Brno (the “**Regional Court**”) and three times before the Supreme Administrative Court. The Supreme Administrative Court decided two times on petitions for extraordinary relief (one filed by Telefónica and one filed by the Regional Court) and once on a procedural matter. In the decision on the procedural matter, a judge of the Regional Court was ruled ineligible to decide on this case because he had been involved in the case before as an official at the Office. Apart from this procedural issue, there were strong

¹ See decision of the Office of 30 June 2003 no. S 1/03-3250/03-ORP.



discrepancies between the legal assessments of the case made by the Regional Court and by the Supreme Administrative Court. The Regional Court argued that the initial decision of the Office was insufficiently reasoned as regards the effect of the practices of Český Telecom on the market. Further, the Regional Court was of the view that the above-described rebates system was in reality closer to a system of bulk discounts (which does not necessarily constitute a prohibited practice).

By contrast, the Supreme Administrative Court concurred with the argumentation presented by the Office and concluded that the behaviour of Český Telecom was not based on reasonable economical grounds but rather, aimed at preventing its customers from switching to other operators. Further, in the view of the Supreme Administrative Court, this practice prevented customers from using the services of other providers. This resulted in an increase of the barriers to entry into the market by potential competitors; this enabled Český Telecom to maintain, or possibly increase, its dominant position. Therefore, the Supreme Administrative Court confirmed the findings of the Office and concluded that such behaviour could represent abuse of dominance.²

Under the latest decision of the Supreme Administrative Court, the Regional Court was bound by the above-mentioned reasoning of the Supreme Administrative Court. Therefore, in April 2011, the Regional Court confirmed the finding of the Office regarding the antitrust infringement and concluded that Český Telecom did indeed abuse its dominant position. However, the Regional Court annulled the part of the Office's decision regarding the imposition of a fine, because the fine was found to have been insufficiently justified.

Second decision of the Office

On 17 October 2012, the Office decided again on the case. The Office re-assessed the calculation of the fine and, interestingly, imposed a fine of CZK 93,109,000 (approximately EUR 3,724,000), which is approximately 14 per cent higher than the fine initially imposed. In calculating the fine, the Office took into account in particular the duration of the antitrust infringement and the fact that Český Telecom has breached competition rules repeatedly. In its re-assessment, the Office found out that during the initial procedure in the year 2002 and again in the year 2012, Telefónica submitted inaccurate turnover figures. According to the Office, the turnover for the year 2002 was CZK 5 billion (approximately EUR 154 million) higher than stated by Telefónica. As a result, the fact that Telefónica submitted inaccurate data served as aggravating circumstances.

Conclusion

It is widely expected that Telefónica will appeal against this decision and that, ten years after the original infringement, the case will continue.

This case is another example of breaches of antitrust rules in this sector in the region.³ As regards the Czech Republic, Telefónica has also been investigated for further infringements - in particular for alleged margin squeeze in the market of access to Internet services through broadband ADSL technologies.⁴ In connection with this alleged margin squeeze, two former competitors of Telefónica have claimed damages totalling CZK 7 billion (approximately EUR 280 Million) from Telefónica.

From a broader regulatory perspective, it could be argued that through this case, the Office is sending a clear message that it is going to monitor behavioural infringements in the telecoms market. It could

² See Decision of the Supreme Administrative Court of 30 August 2011, no 8 Afs 35/2011-537.

³ See for example the Slovak Telekom case (COMP/39523 — Slovak Telekom).

⁴ See notice on opening the administrative proceedings, ref. no. ÚOHS-S109/2011/DP-4675/2011/820/JKo, dated 25 March 2011.



be argued that this sharply contrasts with the attitude of another regulator in this sector – the Czech Telecommunication Office – which is often criticised for not putting enough effort in the supervision of the telecom sector.

Source: *Karel Svoboda*, The Czech Office for Protection of Competition again fines telecoms operator for abuse of dominance on the market for telecom services for business customers (Telefónica Czech Republic), 17 October 2012, e-Competitions, N°49234, www.concurrences.com.

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