

Czech Republic: Czech Supreme Administrative Court cancelled the decision of the Regional Court which had refused Litvínovská uhelná access to the file of a competitor in a merger control case (Litvínovská Uhelná)

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Subject matter of the case

On 3 August 2008, Litvínovská uhelná a.s. (“**Litvínovská uhelná**”), a producer of lignite and at that time a part of the Czech Coal Group (one of the major players in the Czech energy sector) filed a complaint to the Czech Office for Protection of Competition (the “**Office**”) against a proposed merger of LIBUTE INVESTMENTS Ltd. and International Power Opatovice, a.s. (the “**Merger**”)¹. Through the Merger, J&T group, one of important players in the Czech energy sector, aimed to acquire control over International Power Opatovice nad Labem, a.s., which is active in the following business fields: (i) the centralised supply of heat, (ii) the production of electricity, (iii) the provision of supplementary energy services, (iv) the maintenance of technological devices.

In the complaint, Litvínovská uhelná applied to the Office for access to Merger file (the “**Application**”) and claimed that competition on the market might be impeded and that its market position might be negatively impacted by the Merger. Litvínovská uhelná further claimed that the information from the Merger file would enable it to file a more detailed complaint against the Merger and also to file a submission to the European Commission (the “**Commission**”), claiming that the Merger should have been notified to the Commission (and not the Office)².

The Application was based on the Czech Administrative Code, under which (apart from the parties to any proceedings) access to file in administrative proceedings is also granted to other persons, provided that (i) these persons prove their legal interest or legitimate reason in accessing the file, and (ii) no rights of the parties or other persons or the general interest are negatively impacted.

Decisions of the Office and review by the Regional Court

In its decisions of 4 September 2009³ and 9 July 2010⁴, the Office refused the Application. The Office argued that an interested party can file a complaint against a proposed merger without the need to access the file and that access to the Merger file was not necessary in order for Litvínovská uhelná to be able to file the above submission to the Commission. In the meantime the Merger was cleared⁵.

Litvínovská uhelná disagreed with the decision of the Office denying its access to the file and filed a petition to the Regional Administrative Court in Brno (“**Regional Court**”), claiming that due to its inability to access the Merger file, it could not claim compensation for any damage caused by the Larger Transaction. However, by its decision of 28 March 2013 the Regional Court dismissed the petition. The Regional Court confirmed the above

¹ See decision of the Office of 5 November 2009 no S 189/2008/KS-14222/2009/840, *Libute Investments Ltd./International Power Opatovice, a.s.* (“**IPO Decision of the Office**”)

² Litvínovská uhelná claimed that the Merger is a part of a larger transaction (“**Larger Transaction**”) and therefore turnovers of further companies (i.e. ČEZ and EnBW) are to be added in the calculation of turnover. This would result in the thresholds for merger notification to the Commission being met. IPO Decision of the Office, point 9 and following.

³ See decision of the Office of 4 September 2009 no S189/2009/KS-11352/2009/840.

⁴ See decision of the Office of 9 July 2009 no R 140/2009/HS-10085/2010/310/Mvr.

⁵ The clearance decision became effective on 10 November 2009.

findings and further stated that in relation to access to the information that it wanted in order to bolster its submission to the Commission, Litvínovská uhelná failed to indicate which particular information from the file it needed.

Subsequently, Litvínovská uhelná filed for extraordinary relief to the Czech Supreme Administrative Court (the “**Supreme Administrative Court**”).

Review by the Supreme Administrative Court

In its review of the findings of the Regional Court, the Supreme Administrative Court rejected the argument that due to its lack of access to the Merger file, Litvínovská uhelná could not claim compensation for damage caused by the Larger Transaction. The Supreme Administrative Court noted that Litvínovská uhelná (i) had already failed to present this argument in the initial administrative proceedings at the Office, (ii) only made a claim, without providing any reasoning for it.

The Supreme Administrative Court also refused the claim of Litvínovská uhelná that due to its lack of access to the Merger file, it could not make a submission to the Commission. In the view of the Supreme Administrative Court, there is no formal framework for the content of such submissions; therefore, Litvínovská uhelná was not obliged to include particular information in the submission which could only be obtained by accessing the Merger file. The Supreme Administrative Court noted that after receiving the submission, the Commission could request any relevant information from the entities involved.

Further, the Supreme Administrative Court reviewed the argument of Litvínovská uhelná that access to the Merger file was in its legal interest due to the assumption of Litvínovská uhelná that the Merger could lead to the deterioration of its position on the market for the supply of lignite. The Supreme Administrative Court noted that in its reasoning for the Application, Litvínovská uhelná stated that due to (i) the high concentration on the seller-side of the market for the supply of lignite, and (ii) the fact that the merging parties belonged to Litvínovská uhelná’s major customers, the Merger might lead to a significant deterioration in the market conditions, which might result in the exit of suppliers of lignite from the market.

Therefore, unlike the Regional Court, the Supreme Administrative Court acknowledged that Litvínovská uhelná had sufficiently proved its legal interest in the access to the Merger file. Therefore, given that the first condition for access to the file had been met, the Regional Court should have assessed the second question (i.e. whether by the granting of access to file, no rights of the parties or other persons or the general interest would have been negatively impacted).

In view of the above argument, the Supreme Administrative Court annulled the decision of the Regional Court and sent the case back to the Regional Court, which is now bound by the conclusions made by the Supreme Administrative Court.

Conclusion

As a result of the decision of the Supreme Administrative Court – more than three years from the effectiveness of the Merger clearance decision – it remains open whether Litvínovská uhelná was entitled to access the merger file. It could take a further significant period of time before Litvínovská uhelná receives a final answer.

Even if the final outcome of the proceedings is positive for Litvínovská uhelná, given the lengthy time that has elapsed since its original application to access the Merger file, it is questionable whether any information it gained would be of any use for Litvínovská uhelná.

However, the decision on this case might provide an important guidance for future cases. In recent years, the Czech energy market has seen frequent acquisitions and reorganisations which were subject to merger proceedings at the Office. Moreover, the Office has dealt with several antitrust cases concerning the energy



sector. It even appears that competition law has been used as a tool in business disputes between some key players in the sector. Given the fact that merger files often contain highly confidential information which could be of interest to competitors, the decision in the above case might have implications for the involvement of interested parties in future merger proceedings.

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