

***Case No COMP/M.5724 -
SUEZ ENVIRONNEMENT/
AGBAR***

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**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 27/04/2010

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EUROPEAN COMMISSION

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying Party

Dear Sir/Madam,

**Subject: Case No COMP/M.5724 – SUEZ ENVIRONNEMENT/ AGBAR
Notification of 18 March 2010 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 18/03/2010, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (the "Merger Regulation") by which Suez Environnement Company S.A. ("SE", France) (the "notifying Party"), ultimately controlled by Gaz de France/Suez Group ("GDF/Suez", France) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of Sociedad General De Aguas De Barcelona S.A. ("Agbar", Spain) (the "Parties"), jointly controlled by SE and Criteria CaixaCorp S.A. ("Criteria", Spain), by way of purchase of shares (the "proposed transaction").

I. THE PARTIES AND THE OPERATION

2. SE is a listed company on Euronext Paris and Brussels. SE is the holding company of a group active worldwide in the water and wastewater services. SE's capital is owned up to 35.41% by the GDF/Suez group, which has signed a shareholders' agreement with five other shareholders which in total represent 48.03% of the capital of SE. SE is also active in Spain in the market for water and wastewater services through Degrémont, a subsidiary of SE.

¹ OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

3. Agbar provides water and wastewater services in Spain and in a number of Latin American countries, namely, Mexico, Cuba, Colombia and Chile, and also in China and Algeria. Further, Agbar owns the UK Company Bristol Water. Agbar is also active in the health insurance sector in Spain through its controlling stake in the Spanish insurance company Compañía de Seguros Adeslas, S.A. ("Adeslas").
4. SE and Criteria have joint control over Agbar. These two companies together hold 90% of the issued share capital of Agbar, directly and through the holding company Holding de Infraestructuras y Servicios Urbanos, S.A. ("Hisusa"). On 21 October 2009, SE and its subsidiaries and, on the other part, Criteria signed a binding Memorandum of Understanding ("MoU"), whereby they agreed to unbundle the Agbar water management business and Adeslas in a manner that SE will acquire the majority of the share capital and voting rights of Agbar, while Agbar will transfer its stake in Adeslas to Criteria. As a result, SE will take sole control over Agbar, but will no longer have any direct or indirect shareholding in Adeslas².
5. In light of the above, the proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

II. UNION DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (GDF/Suez EUR 78,210 million, Agbar EUR 3,297 million). Each of them has a Community-wide turnover in excess of EUR 250 million (GDF/Suez EUR 67,171 million, Agbar EUR 2,838 million) and they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension in the meaning of article 1(2) of the Merger Regulation and falls into its scope.

III. COMPETITIVE ASSESSMENT

A. PRODUCT AND GEOGRAPHIC MARKET DEFINITIONS

7. The proposed transaction gives rise to a horizontal overlap in the market for Operation and Maintenance (O&M) of water and wastewater treatment facilities to municipalities in Spain. The Parties' activities also overlap in a number of other markets; nevertheless their combined market shares do not exceed 15% under any alternative product or geographic market delineation.

(i) Market for operation and maintenance (O&M) of water and wastewater treatment facilities.

Relevant product market

8. The notifying Party submits that O&M of water and wastewater treatment facilities refers to the operation and maintenance of water treatment plants. This activity could be

² The acquisition of control of Adeslas by Criteria (99.79% of the issued capital of Adeslas) has been cleared unconditionally by the Spanish Competition Authority on 3 February 2010.

either done by the holder of the facility (municipalities or industrials), or outsourced to third Parties. In respect of the proposed transaction, only the outsourcing market would be considered, as the Parties do not own any water and wastewater facility. Both SE and Agbar merely provide O&M services for water and wastewater treatment facilities to public authorities (municipalities) and industrial customers.

9. SE submits that O&M of water and wastewater treatment facilities should be regarded as the narrowest market definition based upon the Commission decision making practice. Indeed, in a previous decision³ the Commission concluded on the existence of a specific market for operation and maintenance (O&M) of water treatment plants.
10. According to the notifying Party, the water treatment facilities include both "potabilization" and desalinizing plants (to treat water before it is distributed to the customers), and waste water treatment plants (to treat water after having been used by the customers). The market investigation showed a broad consensus on the potabilization and desalinisation facilities. An overwhelming majority of the respondents considered that both facilities perform the same activity (to turn non-drinkable water into drinkable water) and, thus, potabilization and desalinising facilities should belong to the same relevant product market.
11. However, the market investigation has not been conclusive on whether both types of processes, water (i.e. potabilization and desalinizing plants) and waste water treatments, should be considered as belonging to the same relevant market. Some respondents submitted that water and waste water treatments are different processes that must be done in a segregated manner in order to avoid retro-contamination, whilst others considered that both processes are similar and that both services are provided simultaneously.
12. As regards the recipient of the O&M service, the Commission has previously defined⁴ the O&M market with no further differentiation between the recipient of the service (i.e. industrial customers and municipalities/public entities). Yet, SE considers that a distinction between O&M service provision to public authorities and industrial customers could be considered.
13. According to the notifying Party, industrial customers, in comparison with municipalities, often (i) need more customized services (ii) require more specialised technicians, and (iii) treat less volume of water in their facilities. Further, the notifying Party underlines that the market for O&M services to municipalities is a public procurement market subject to the relevant EU public procurement rules⁵, where the service provider is selected after a bidding process open to all interested parties⁶,

³ Case COMP/M.1631 - *Suez Lyonnaise/Nalco*, of 20 August 1999 para 35.

⁴ Case COMP/M.1631 - *Suez Lyonnaise/Nalco*, of 20 August 1999 para 35.

⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 30.04.2004, L134, p 1.

⁶ The service contract will be always awarded through a tender process either if (i) the O&M will be done under a specific O&M contract, (ii) under the scope of a concession contract awarded to provide water distribution and/or wastewater managements services, or (iii) under a public works contract for the design, construction and engineering of water and wastewater treatment plants.

whereas the market for O&M services for industrial customers does not have to follow the same rules.

14. With respect to this sub-segmentation, the vast majority of the competitors that replied to the market investigation carried out by the European Commission considered that industrial and public entities should belong to different product markets. According to them, industrial customers are bounded by civil and commercial regulation, whereas public entities are bounded by public procurement rules. Moreover, some respondents indicated that industrial customers require more complex treatment processes and operation, and they usually treat a smaller amount of water.
15. However, the customers' perspective did not corroborate the competitors' view. Half of the customers estimated that the market should be further segmented by the recipient of the service, since the needs and regulation applied are different. Nevertheless, the remaining half considered that there is only one O&M market, mostly because the technical needs are similar.
16. In any case, to conclude whether the O&M market should include both water and waste water facilities, or whether it should be further segmented according to the recipient of the service, is not necessary in respect of the proposed transaction since under any alternative product market definition effective competition would not be significantly impeded in the EEA or any substantial part of that area.

Relevant geographic market

17. In a previous decision⁷, the Commission left the geographic market definition of the O&M market of water and wastewater treatment facilities open.
18. The notifying Party submits that the relevant geographic market should be EEA-wide, since in the market for O&M of water and wastewater treatment facilities there is a number of well established international players active EEA wide, which compete with small national players in Spain.
19. Furthermore, SE underlines that the Directive 2004/17/EC⁸ grants all EU based companies to be placed on an equal footing when bidding for a given contract in any Member State, as (i) the criteria for awarding contracts are harmonised in all the Member States, and (ii) authorities cannot discriminate between operators on the basis of the nationality of the bidding companies. Moreover, SE submits that, in the market for O&M of water and wastewater treatment facilities, the customers' needs are homogeneous throughout the EEA, barriers to entry are very low, and there are no switching costs.
20. Also, the notifying Party points out that several EEA-companies have been awarded contracts after a bidding procedure in Spain in this market⁹.

⁷ Case COMP/M.1631 – *Suez Lyonnaise/Nalco* of 20 August 1999, para 35.

⁸ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 30.04.2004, L134, p 1.

⁹ For instance, Veolia won one of the largest important contracts awarded in Spain regarding the O&M of eight wastewater treatment plants located in Madrid for a total value over €11 million. In addition, SE, through its subsidiary Degrémont, is also active on the Spanish market, as well as the French based

21. The market investigation did not corroborate, neither dispute, the Parties' arguments. Some respondents estimated that there are no major entry barriers in the Spanish O&M market, while others believed it is difficult to enter the Spanish market, mainly due to the following barriers to entry: language, lack of reputation and knowledge of the market, as well as the need to obtain the fitness certificate in order to operate in Spain. However, a broad majority stated that there are no special requirements that would limit the ability of a foreign company to enter the Spanish market for O&M. As well, the market investigation confirmed that the services provided in the EEA are homogenous and the Directive 2004/17/EC¹⁰ grants foreign companies to compete on equal terms in all procurement tenders all over the EU.
22. In addition, the market investigation confirmed that several foreign companies established on an EEA level are currently operating in the Spanish O&M market.
23. In light of the aforementioned, it is understandable that big multinational groups which are able to provide an offer across the entire EEA consider that the market for O&M of water and waste water treatment facilities would coincide with their area of activity. However, there are strong elements pointing to a national definition of the market. In particular, most of the operators in the relevant O&M market are Spanish based companies. Furthermore, the market investigation showed that there are several entry barriers to the Spanish O&M market, in particular language barrier and the necessity to be present in Spain through a subsidiary. Thus, the market O&M of water and waste water treatment facilities should be considered as, at least, national in scope.

(ii) Market for design, engineering, and construction of water and wastewater treatment systems.

Relevant product market

24. The notifying Party claims that the market for O&M services could belong to a wider market, encompassing the upstream market for design, engineering and construction of water and wastewater treatment plants.
25. The design, engineering and construction of water and wastewater treatment systems are installations capable of delivering the required quantity, and quality, of water in accordance with the customer's specifications for the provision of process water, potable water or treatment of wastewater.
26. In a previous decision¹¹, the Commission considered that this market should be segmented in two relevant product markets, i.e. systems for industrial purposes and systems for municipalities. Systems for industrial purposes encompass systems to treat and purify water before it can be used in the industry's processes, (e.g. pharmaceuticals, pulp and paper, rinse water, boiler-feed water for steam production etc.), whereas systems for local authorities cover systems used to treat "raw" water from natural

international water company Saur (through its Spanish subsidiary Gestagua) and the German based water operator Remondis (through the acquisition of the Spanish company OMS-Saccede SA).

¹⁰ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 30.04.2004, L134, p 1.

¹¹ Case COMP/M.1514 – *Vivendi / US Filter*, dated 2 April 1999, para 9.

sources in order to make it suitable for human consumption, as well as to treat sewage water to remove physical and organic contaminants¹².

27. The Parties believe that the distinction between systems for industrial purposes and systems for municipalities is appropriate. However, the Parties consider that the market for design, engineering and construction of water and wastewater treatment systems could not be distinguished from the market for O&M of water and wastewater treatment facilities, given that both activities are part of the same product market. In fact, some public contracts for the design, engineering and construction of water facilities include O&M services as a condition to the tender in Spain or in other Member States. In addition, the O&M services linked to the public contract are for a period up to two years.
28. No conclusive answer emerged from the market investigation at this regard. Half of the respondents estimated that the two markets should be divided, especially due to the different type of contracts concluded, and to the different skills required by the companies in each market. The other half considered both activities as belonging to the same market, based on the fact that the contracts often include both activities, and that most of the operators active upstream are also active in the downstream market for O&M. They also emphasised the fact that both activities are often provided together.
29. Given the above, to conclude on whether the market for design, engineering and construction of water and wastewater treatment systems should encompass the O&M activities is not necessary with regard to the proposed transaction since effective competition would not be significantly impeded in the EEA or any substantial part of that area, whatever delineation is made.

Relevant geographic market

30. In a previous decision, the Commission considered that the geographic scope for design, engineering and construction of water and wastewater treatment systems should be, at least, EEA-wide¹³. The Commission based this conclusion on (i) the existence of cross-boarder sales between EU Member States, (ii) the inexistence of major geographic differences in specifications of water and wastewater treatment between EU states, and on the fact that (iii) the process of competitive tendering for local public authorities is well established and contractors from throughout the European market make offers in all EU Member States. Finally, the transportation costs are very low (below 5%).
31. The Parties, in accordance with the Commission's decision making practice, estimate that the relevant geographic market should be defined as, at least, being EEA-wide. However, the market investigation was not conclusive on this point.
32. In any case, and for the purposes of the proposed transaction, the exact delimitation of the geographic market could be left open, as effective competition would not be significantly impeded in the EEA or any substantial part of that area.

¹² Case COMP/M.1514 – *Vivendi / US Filter*, dated 2 April 1999, para 9.

¹³ Case COMP/M.1514 – *Vivendi / US Filter*, dated 2 April 1999, para 15 .

(iii) Market for water management (distribution, sewerage and wastewater treatment)

Relevant product market

33. The market O&M of water and waste water treatment facilities could, alternatively, belong to a wider market, including the downstream market for water management for distribution, sewerage and wastewater treatment.
34. This market would include all services linked to the different stages of the water cycle, from its obtaining from the sources to its distribution to the consumer, as well as the maintenance of the sewerage network and the wastewater treatment market.
35. In previous decisions¹⁴, the Commission distinguished two relevant markets in the water management sector in France and Germany: on one hand, the distribution market and, on the other hand, the wastewater treatment market, which would include sewerage.
36. At this regard, the Parties define a broader market which includes drinking water distribution activities, sewerage, and wastewater management services. However, they consider this market as separate from the market of O&M of water and wastewater treatment facilities.
37. In the market investigation, the vast majority of the respondents considered that the water management market is separate from the O&M market. Most of the respondents indicated that the O&M market is totally disconnected from the activities of water distribution, waste water treatment and sewerage. Only a few respondents believed that the O&M market also includes the water management market.
38. Nevertheless, it is not necessary to come to a conclusion as whether the water management and O&M markets belong to the same product market, since effective competition would not be significantly impeded in the EEA or any substantial part of that area under any product market definition.

Relevant geographic market

39. The Commission¹⁵ has previously defined the relevant geographic market for the water management (distribution, sewerage and wastewater treatment) as national in scope. In turn, the Parties consider the geographic scope of the relevant market as being, at least, national. At this regard, it should be noted that the major companies tendering for water concessions are the same throughout Spain and that the rules applied are also the same, even though the concession is granted by a municipality. Additionally, the Parties state that from a strict legal point of view the scope could be considered European-wide, since all companies established in the EU can compete on equal terms in all EU bidding processes (the directive 2004/17/EC forbids the contractor to favour a national company).

¹⁴ Case COMP/M.916 – *Lyonnaise des Eaux/Suez*, dated 5 June 1997, para 16; Case COMP/M.1633 – *RWE Umwelt/Vivendi/Berliner Wasserbetriebe*, dated 13 September 1999, para 22..

¹⁵ Case COMP/M.5461 – *Société Lyonnaise des Eaux / Sociétés de Distribution d'Eau et d'Assainissement*, dated 5 August 2009, para 17, and Case COMP/M.5812 - *Société Lyonnaise des Eaux /Sociétés de Distribution d'Eau et d'Assainissement (II)*, dated 18 March 2010, para 20.

40. In any case, it is not necessary to conclude on the geographic scope on the water management market, or its further delineations, as effective competition would not be significantly impeded in the EEA or any substantial part of that area under any product market definition.

B. COMPETITIVE ASSESSMENT

41. The proposed transaction gives rise to an overlap above 15% in the market for O&M of water and wastewater treatment facilities to municipalities in Spain. Under any other alternative product and geographic market definition, the proposed transaction will not give rise to any affected market (the Parties' combined market shares would be < 15%).

Market for operation and maintenance (O&M) of water and wastewater treatment facilities to municipalities in Spain

42. In the market for O&M of wastewater treatment facilities to municipalities in Spain, the merged entity will have a market share in terms of number of inhabitants of ca. 22.81% ([10-20]% Agbar and [0-5]% SE, through its subsidiary Degrémont), in 2009. If a longer period of time (i.e. three years) were to be considered, the market shares would not vary. In turn, if the O&M market were to include water treatment facilities¹⁶, the Parties' combined market shares would be, to some extent, diluted, but over 15%. Under any other alternative product or geographic market definition, the Parties' combined market shares would be lower than 15%.
43. Post-transaction, the merged entity will face competition from several significant players in the market for O&M of wastewater treatment facilities to municipalities, such as Aqualia ([10-20]%), DAM ([10-20]%), Acciona Agua ([5-10]%), Drace Medioambiente ([5-10]%), Cadagua, Veolia and Isolux-Corsan ([0-5]%, each), and from numerous small players mostly active at a local level¹⁷. While it is true that post-transaction the merged entity will be the market leader, it has already been the case pre-merger, since SE had joint control over Agbar prior to the proposed transaction.
44. In terms of sales, the notifying Party has not provided figures. SE claims that there is no reliable information available in the Spanish market for O&M of water and wastewater treatment facilities to municipalities to provide market shares based on sales. As well, the Parties believe that the most reliable and accurate criterion to measure the market shares in the Spanish market for O&M is in terms of number of inhabitants. First, it is widely used in the water industry. Second, this criterion has been used by the Commission in a previous decision concerning the Spanish water market¹⁸.
45. The market investigation did not dispute the validity of these arguments. However, it is not necessary to conclude whether the most reliable criterion to measure the market shares in the relevant market in Spain is (i) the number of inhabitants, or (ii) the annual

¹⁶ Potabilization and desalinating plants.

¹⁷ This category includes a number of Public-Private Partnerships (PPPs) that implement the municipalities' strategic decisions regarding how the services should be provided. As a result, they do not have control over the business or over the strategic commercial decisions to be taken. PPPs account for ca. [10-20]% of the O/M market. Agbar only participates in some PPPs.

¹⁸ Case COMP No IV/M.1365 – FCC/Vivendi, of 4 March 1999.

sales, since the market investigation vastly confirmed that the market shares would not significantly differ under any measuring method.

46. The notifying Party also submits that no competition concerns could arise from the proposed transaction due to the following elements: (i) the O&M market for municipalities in Spain is characterized by the existence of a significant number of competitors; (ii) the increment due to the proposed transaction is negligible (around [0-5]%), (iii) the merged entity will compete in the market with international companies that have the same capabilities, financial resources and expertise as SE¹⁹; and finally (iv) in a bidding market, such as the one concerned by the proposed transaction, small players could effectively constrain the main players. Moreover, the public bids in this market take place frequently (every 2 years on average).
47. The market investigation corroborated the above arguments. The majority of the customers considered that a large number of players will remain in the market of O&M in Spain after the proposed transaction. Also, the vast majority of the competitors estimated that the number of competitors in this market is sufficient. In addition, most of the respondents considered that the proposed transaction will have no or very limited impact on their own businesses.
48. Some respondents also pointed out that municipalities have bargaining power vis-à-vis their service providers, since all the contracts are awarded through bidding processes, the number of candidates per bidding process is very high (on average, from 20 to 30), and the contracts are not usually re-negotiated after awarding the tender. As well, it appears that the bidding contracts are re-tendered every 3-4 years, and there are not significant switching costs associated to switching from one O&M service provider to another.
49. Moreover, the majority of the competitors indicated that they do not have any bargaining power, notably because the procurement law provisions impose to treat all competitors equally and also because the market is very competitive.
50. Regarding the capacity of a foreign company to enter or to expand into the Spanish market for O&M, most of the respondents know, or have contracted with, companies established in the EEA that are also active in Spain. Albeit some respondents estimated that there exist some entry barriers to the O&M Spanish market, such as language, reputation, knowledge of the market or the obtaining of the fitness certificate, a broad majority stated that there are no special requirements that would limit the ability of a foreign company to submit a credible bid in the Spanish market. In fact, the majority of the respondents believed that EEA based companies have enough expertise and capability to enter or expand their activities in the Spanish O&M market.
51. Given the facts above mentioned, the moderate combined market shares of the Parties and the insignificant increment due to the proposed transaction, the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market as regards the market for O&M of waste water treatment facilities to municipalities in Spain, or as any other delineation of the relevant market.

¹⁹ As Veolia, an International operator of water services, Saur, a French based water company, and Remondis, a German operator that recently entered the Spanish market.

IV. CONCLUSION

52. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
(signed)
Neelie Kroes
Vice-President of the Commission