



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.12.1992

PUBLIC VERSION

**MERGER PROCEDURE
ARTICLE 6(1) (b) DECISION**

Registered with advice of delivery

To the notifying parties

Dear Sirs,

Subject: Case No IV/M.283-Waste Management International plc./S.A.E.
Notification of 18.11.1992 pursuant to Article 4 of Council Regulation No. 4064/89

1. On 18.11.1992, Waste Management International plc. (WMI) and Société Auxiliaire d'Entreprise S.A. (SAE) notified a "Protocole d'Accord" (The Agreement) by which they create a 50:50 joint venture, Auxiwaste (WAS) which will be active in the waste management field in France.

I. THE PARTIES

2. WMI is the British subsidiary of its US parent, Waste Management Inc. The Waste Management group provides a wide range of waste management and related services for both hazardous and non-hazardous waste world-wide. Within Europe, WMI is

active in Denmark, Finland, France, Germany, Italy, Spain, Sweden, the Netherlands and the U.K.

3. SAE, a French Société Anonyme, is the wholly-owned (96%) subsidiary of Fogerolles S.A. The operations of both SAE and Fogerolles are concentrated in construction, civil engineering and related services. Other than in France, SAE is also active in Portugal, Spain, Italy, Belgium and the U.K.

Neither SAE nor Fogerolles is active in the waste management business.

II. THE OPERATION

4. The agreement provides for the formation of WAS as a French Société Anonyme (SA) whose activity will be limited to the provision of non-hazardous solid waste management services in France.
5. WAS will conduct its business either directly or through subsidiaries. Under the terms of The Agreement WAS will manage the existing WMI subsidiaries presently engaged in the business of solid waste management services in France (the SPAT group of companies and Environnement Service SA (ESSA)) though WMI will retain a 90% stake in SPAT and a majority stake in ESSA.

III. COMMUNITY DIMENSION

6. The aggregate worldwide turnover of the Waste Management group and the SAE group amounts in their last financial year to more than ECU 5.000 million. Their Community wide turnover exceeds ECU 250 million.

The undertakings involved do not achieve more that two-thirds of their aggregate Community-wide turnover within one and the same Member State.

IV. CONCENTRATION

Joint Control

7. Each of WMI and SAE will hold a 49.9.% Stake in WAS, the remainder being held by six individuals, each owning one share. Three of these individuals will be nominated by WMI and the other three by SAE. This particular structure is necessary to meet the requirements of the French law on "Sociétés Anonymes".

The Conseil d'Administration of WAS will comprise of eight members, four appointed by WMI and four by SAE. Decisions of the Conseil d'Administration will normally be taken by a simple majority. Major commercial and strategic decisions including, notably the adoption of the operating budget, investment programme and annual financing plan of WAS, will require a two-thirds majority.

Each of WMI and SAE thus exercises joint control with the other over WAS, with neither party being able to take decisions unilaterally.

Joint venture performing on a lasting basis all the functions of an autonomous economic entity

8. Under the terms of the agreement, WAS will assume, for the duration of the JV by way of contract, control and management of all of WMI's existing activities as well as any company in which WAS takes a majority stake either alone or in conjunction with one or more of the parents, in the French non-hazardous solid waste management field. The Agreement provides that all such companies will report exclusively to WAS which will manage their commercial and competitive policy and determine their investment programme, annual financing plan and operating budget.

Thus the retention by one or the other of the parents of a majority interest in such companies will not prejudice WAS's autonomy given the contractual terms affording WAS management control. The parents have agreed to provide WAS, if needed, with any patents, licences or know-how necessary for it fully to develop its business. WAS will be endowed with capital of 80 million FF to enable it to fund future acquisitions or creations of new subsidiaries autonomously. Moreover, the parties have agreed in advance that WAS be free to use up to 50% debt financing in funding such acquisitions.

The duration of the Agreement is indefinite. The new company is thus a joint venture which will perform all the functions of an autonomous entity on a lasting basis.

Absence of risk of coordination

9. SAE has no activities in the field of solid waste management in France and there is thus no overlap between the parents of the joint venture. WMI is to cede to WAS control of its subsidiaries in this sector. A potential for coordination could only arise, therefore, were one or both parents to enter the solid waste management field in France independently of the joint venture. This, however, would not appear a commercially reasonable step for either parent to take. Having made a sizeable investment in the joint venture, there would appear to be little motivation for either parent to establish an independent rival to the joint venture. Such independent entry would thus seem neither reasonable nor likely.
10. The Protocole d'Accord signed by the parties, includes a de minimis provision in respect of acquisitions. Where the acquired company earns less than 20% of its French turnover in solid waste management, and where this turnover is below FF 10 million, the parents are under no obligation to include the waste management activities in the joint venture. The parties argue that it is common for many industrial and construction companies to have small in-house waste management activities. These tend to comprise of minor collection and/or transport operations which would not present any genuine competitive presence in the joint venture's market, particularly as such operations are likely not to include the provision of these services to third parties. For this reason the de minimis clause is judged not to give rise to any meaningful possibility of coordination between the parents and the joint venture.

11. While WMI is active in neighbouring EC countries in the same business as WAS, the market or markets concerned are geographically distinct. As is argued below the relevant geographic market(s) are national, if not regional or even local, for reasons of regulation, local custom and knowledge, transport costs and the particular legal regime pertaining to third party liability in the case of waste. There is thus no possibility of coordination between WMI's activities outside France and those of WAS.

V. COMPATIBILITY WITH THE COMMON MARKET

Affected product market

12. The joint venture's activities may potentially embrace any of the following: collection, transport, recycling, reuse, incineration, treatment and disposal of non-hazardous waste, i.e. household, commercial, industrial and construction waste not falling into the waste categories of the relevant hazardous waste legislation, and municipal, commercial and industrial cleaning services. In this context, "recycling" is taken to mean the collection and separation of materials for recycling. These materials are then sold to independent brokers specialising in a particular waste material (eg glass, paper, plastic) from whom the mills and factories manufacturing the recycled final product source their raw materials.
13. Hazardous waste requires complex disposal, treatment and recycling facilities; a different and more burdensome regulatory framework applies than for non-hazardous waste; and the costs involved in treatment and disposal are thus substantially higher. For these reasons, services provided in respect of hazardous waste can be excluded in this assessment of the relevant product market.
14. The parties state that the market for non-hazardous waste services cannot further be divided according to the sort of non-hazardous waste (industrial household or construction) dealt with. The same types of collection, treatment and disposal services are frequently offered for household waste and certain types of non-hazardous industrial waste.
15. It is possible, however, that certain services in the non-hazardous waste management sector may constitute distinct markets as can be seen by the number of smaller niche operators whose activities are limited to one or a small number of related waste management services.
16. For the purpose of this case, however, the precise delimitation of the relevant product market can be left open, since even on the basis of the narrowest possible definition of markets, (e.g. a separate market for the landfill of household waste), in the absence of any overlap, the operation does not raise serious doubts.

Relevant geographic market

17. The market for treatment of non-hazardous waste appears to be national or even local in character.

18. Movement and disposal of waste in the EC are subject to a complex framework of rules and regulations both at the Community and national level. EC Directive 91/156 establishes the "proximity principle", which requires Member States to take appropriate measures to establish an integrated network of disposal facilities to enable them to become self sufficient with respect to the disposal of their own waste and to enable waste to be disposed of in the nearest appropriate facility. Member States are also permitted to prevent movements of waste which are not in accordance with waste management plans adopted in accordance with the Directive.
19. The national legislation applicable to waste management varies within the Member States and even from region to region. In France, national legislation regulates the collection, transport and disposal of waste. Local legislation regulates inter alia the rates charged for services, environmental protection and landfills and land-use planning.
20. Management of waste also involves exposure to substantial third party liability. Under EC and national legislation, the costs of disposing of waste must be borne in accordance with the "polluter pays" principle, which provides that costs must be allocated among or borne entirely by each of the holder or previous holder of the waste, an undertaking conducting waste disposal operations, or the producer of the product from which the waste came.
21. Transport costs are an important element in the price charged to customers given the bulky nature of solid non-hazardous waste. Furthermore, these costs are increased by regulatory requirements as to security in transit of waste.
22. As a result of these legal constraints, high transport costs and liability for any mishap involving even non-hazardous waste, there is an overriding preference for the local treatment and disposal of waste in order to minimise its movement on the part of all parties involved.
23. The total quantity of industrial and household waste, including both hazardous and non-hazardous waste, imported to France represented respectively less than 0,5% (1990) and 4% (1989) of French national production, and is, according to a report from the French parliament in 1991¹⁾, decreasing. To further limit imports of waste, the French government has adopted a decree banning imports of household waste and industrial waste capable of assimilation into household waste unless the imports are subject to an agreement between France and the exporting state or a specific plan for the elimination of waste. There is no export of household waste from France, and the export of non-hazardous industrial waste is insignificant.
24. The national or local character of the market is further demonstrated by significant price differences between the Member States. The average price for recycling a ton of waste in Germany is FF 474 while in France it is only FF 102.

¹⁾ Rapport d'informations déposé par la Commission de la Production et des Echanges de l'Assemblée Nationale le 16 octobre 1991 "Rapport Bockel".

25. It is clear from the above that the relevant geographic market is no more than national in size, and may in fact be regional or local in nature. Nevertheless, since the operation does not raise serious doubts as to the compatibility with the common market even on the basis of the narrowest market definition the precise relevant geographic market can be left open.

Assessment

26. The joint venture will have an overall market share of less than 15% in France for the management of non-hazardous waste. Since prior to the operation, SAE has no assets or operations in the non-hazardous waste management business and WMI is active in this sector in France through the SPAT and ESSA groups of companies, there is no overlap between the operations of SAE and WMI. Furthermore, the proposed concentration does not create any significant vertical or conglomerate links between the parents and the joint venture.
27. The concentration will not therefore create or strengthen a dominant position as a result of which effective competition will be significantly impeded in the common market or in a substantial part of it.

VI. ANCILLARY RESTRAINTS

28. The Protocole d'Accord includes an exclusivity clause under which both SAE and WMI agree that all their projects, activities or investments in the solid waste management business in France will be undertaken through WAS. This undertaking is a non-competition clause. To the extent that it aims to express the reality of the lasting withdrawal of the parents from the market assigned to the joint venture, this clause can be regarded as directly related and necessary to the concentration.

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For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)(b) of Council Regulation No. 4064/89.

For the Commission

Please note that third parties showing a sufficient interest can obtain a copy of this decision. You are therefore invited to inform the Commission, within 7 days following notification of this decision, whether you consider that this decision contains business secrets which you wish to have deleted before distribution to third parties. You should give reasons for any such request which the Commission will evaluate before distributing copies of the decision to third parties. If the Commission does not receive a reasoned request within the stipulated period, it will consider that you agree to the distribution of the full text of the decision. Your request should be sent by registered letter or telefax to:

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