



EUROPEAN COMMISSION  
DG Competition

***Case M.8738 - RHONE-  
ZODIAC / FLUIDRA***

Only the English text is available and authentic.

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

---

Decision on the implementation of the commitments -  
Purchaser approval  
Date: 24.1.2019



Brussels, 24.1.2019  
C(2019) 700 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

**To the notifying parties**

Dear Sir/Madam,

**Subject: Case M.8738 - RHONE-ZODIAC / FLUIDRA**  
**Approval of BWT as purchaser of Aquatron following your letter of 14 November 2018 and the Trustee's opinion of 21 November 2018**

## **I. FACTS AND PROCEDURE**

1. By decision of 27 June 2018 (“the Decision”), adopted in application of Article 6(2) of Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup>, the Commission declared the operation by which the Rhône Group and the Fluidra Founding Families (the “Parties”) acquire joint control of Zodiac and Fluidra compatible with the internal market subject to full compliance with the commitments annexed to the Decision and the conditions and obligations contained therein (the “Commitments”).
2. In particular, the Commitments provide that the Parties shall divest, or procure the divestiture of Aquatron, a wholly owned subsidiary of Fluidra, active in the development, manufacturing and sale of electric pool cleaners (the “Divestment Business”). The Divestment Business includes all tangible and intangible assets, including the IP required to manufacture the Divestment Business's products.

---

<sup>1</sup> OJ L 24 29.1.2004, p.1 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. Furthermore, the Commitments include:
  - a. at the option of the Purchaser, a certain volume commitment for a period of up to [...]. The quantity of pool cleaners acquired is set as [...] and follows a downward sloping scale, that varies on whether the products are acquired for the EEA market or for non-EEA market;
  - b. the commitment not to [...];
  - c. the commitment not to enter into a non-compete obligation with purchasers with respect to electric pool cleaners for a period of [...] (paragraph 6.i);
  - d. the commitment not to sell in the EEA for a period of [...] any electric pool cleaners unless manufactured by the Divestment Business (paragraph 13), subject to the circumstances and clarifications under paragraph 14;
  - e. the right for the Purchaser to offer employment to [...] staff employed by the Parties, which shall cooperate to make this possible;
  - f. transitional arrangements with respect to certain services, including after sales services.
4. Under Section B of the Commitments the Parties commit to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to the Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 20 of the Commitments.
5. By letter of 14 November 2018, the Parties proposed BWT Aktiengesellschaft (“BWT”) for approval by the Commission as purchaser of Aquatron and submitted the proposed Sale and Purchase Agreement (the “Initial Proposed Agreement”). Simultaneously, Grant Thornton (the “Trustee”) submitted a reasoned opinion as regards BWT’s suitability as a purchaser and, in particular, stated that BWT fulfils the criteria of the purchaser requirements set in section D of the Commitments. In its reasoned opinion, the Trustee also stated that, on the basis of the Initial Proposed Agreement, the Divestment Business would be sold in a manner consistent with the Commitments.
6. As further discussed in Section III of this Decision, the Commission noted that the Initial Proposed Agreement:
  - a. included an earn-out mechanism, whereby [...];
  - b. failed to include the obligation regarding non-compete arrangements under paragraph 6.1 of the Commitments;
  - c. included limitations to the non-compete obligation under paragraphs 13 not in line with paragraph 14 of the Commitments.
7. Following the Commission’s feedback on the assessment of the Initial Proposed Agreement, the Parties and BWT signed a revised version of the purchase agreement on [...], which was submitted to the Commission on 28 December 2018 (the “Proposed Agreement”). The Proposed Agreement did not provide for an earn-out and compensation mechanism and included obligations in line with the provisions under paragraphs 6, 13 and 14 of the Commitments.

## II. ASSESSMENT OF THE PROPOSAL

8. BWT is the holding company of the BWT Group and is active in providing water treatment systems and services for drinking and mineral water; pharmaceutical and biotech water; boiler water, cooling water and water for air-conditioning systems. BWT also develops innovative technologies to supply top quality swimming pool water for customers in private households, industry, business, hotels and local authorities. [...].
9. Pursuant to paragraph 19 of the Commitments, in order to be approved by the Commission, the Purchaser must fulfil the following criteria:
  - a. The Purchaser shall be independent of and unconnected to the Parties and their Affiliated Undertakings (this being assessed having regard to the situation following the divestiture);
  - b. The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
  - c. The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, prima facie competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
  - d. The Purchaser shall have an established presence in the European pool equipment market, including distribution channels in the EEA.

### (a) Independence from the Parties

10. The Parties submit that there are no structural links between them and BWT. Furthermore, they submit that BWT currently purchases robotic pool cleaners and other products from Fluidra, which amounted to [...].<sup>2</sup> These transactions are undertaken at subsidiary level, are on an ad-hoc basis and on an arm's length basis. Therefore, the Parties submit that BWT is independent of and unconnected to the Parties and their affiliates.
11. In its reasoned opinion, the Trustee agrees that BWT is independent from the Parties.
12. On the basis of the information made available to the Commission by the Parties and taking the reasoned opinion submitted by the Trustee into account, for the purposes of the assessment of its compliance with the purchaser requirements, the Commission finds that BWT is independent of, and unconnected to, the Parties and their affiliates.

---

<sup>2</sup> In addition, BWT is currently [...].

**(b) Financial resources, proven expertise and incentive to maintain and develop the Divested Business as a viable and active competitor**

13. The Parties submit that BWT possesses the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitor. The Parties note BWT has access to sufficient funding to maintain the Divestment Business, which is also profit-making on a standalone basis. According to the Parties, BWT has substantive experience in the water treatment sector, including swimming pool water and pool equipment as well as proven expertise in integrating companies, and the acquisition of the Divestment Business fits with its on-going strategy to [details of BWT's future strategy].
14. In its reasoned opinion, the Trustee submits that BWT has the financial resources to acquire, maintain and develop the Divestment Business. The Trustee further observes that BWT already sells electric pool cleaners and has therefore a deep understanding and expertise in the Divestment Business and the relevant markets.
15. On the basis of the information made available to the Commission by the Parties and taking into account the reasoned opinion of the Trustee, the Commission concludes that BWT has the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable business and active competitor in competition with the Parties and other competitors, such as Maytronics and Hayward.

**(c) Absence of prima facie competition problems**

16. The Parties submit that the acquisition of the Divestment Business by BWT gives rise to no competition concerns. In particular, BWT's presence in the market for electric pool cleaners is minimal and, post-acquisition, BWT will face established competitors in the EEA such as Maytronics, Hayward and Pentair. Based on the information available to the Parties, the acquisition is not subject to merger control filings in any jurisdiction.
17. The Commission notes that there are no material overlaps between BWT and the Divestment Businesses. BWT already commercializes robotic cleaners manufactured by [...] and [...] and, through the acquisition of the Divestment Business, BWT will also become present in the manufacturing of robotic cleaners (upstream).
18. On the basis of the information made available to the Commission and taking into account the reasoned opinion of the Trustee, the Commission concludes that prima facie competition concerns are not likely to arise as a result of the acquisition of the Divestment Businesses by BWT.
19. This prima facie assessment is based on the information available for the purpose of this buyer approval and does not prejudice the competition assessment of the acquisition of the Divestment Business by BWT by a competent competition authority under applicable merger control rules.

**(d) Established presence in the European pool equipment market, including distribution channels in the EEA**

20. According to Section D of the Commitments, the purchaser shall have an established presence in the European pool equipment market, including distribution channels in the EEA.
21. BWT has an existing pool business with distribution capabilities in France, Germany, Austria and Spain. This business is carried through its specialised subsidiaries Procopi, Arcana Pool Systems and Hobby Pools, ATH and Bünger and Frese selling the full range of pool equipment products, including pool fittings, filters, pool pumps, covers, pool heating equipment and dehumidifiers, pool cleaning equipment, water treatment products, spas and saunas.
22. The Commission therefore concludes that the requirement of the purchaser being active in the European pool equipment market is fulfilled.

### **III. ASSESSMENT OF THE PROPOSED AGREEMENTS**

#### *Assessment of the Initial Proposed Agreement*

23. As mentioned above, the Initial Proposed Agreement included an earn-out mechanism, whereby BWT would be obliged to pay an earn-out if [...]. In turn, the Parties would have to [...].
24. In particular, under the Initial Proposed Agreement, the base purchase price was €26,190,476.20, to be adjusted by [...], as the case may be.
25. Clause 3.4 of the Initial Proposed Agreement included an earn-out provision whereby the Notifying Parties could receive up to an additional [...]. However, BWT [...].
26. The Commission also found that the earn-out mechanism could adversely impact on Aquatron's incentives to grow the business and would not be in line with paragraph 103 of the Remedies Notice, according to which “[t]he Commission will normally not accept any financing of the divestiture by the seller, and, in particular, any seller financing if this were to give the seller a share in the profits of the divested business in the future”<sup>3</sup>.
27. Moreover, in consultation with the Trustee, the Commission identified a number of discrepancies between the Initial Proposed Agreement and the Commitments relating to non-compete obligations in customer contracts under paragraphs 6, 13 and 14 of the Commitments.

#### *Assessment of the Proposed Agreement of 27 December 2018*

28. Following revision of their Initial Proposed Agreement, the Parties entered into the Proposed Agreement of 27 December 2018. The Commission notes that the

---

<sup>3</sup> Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22 October 2008, p.1.

Proposed Agreement made the following changes to the structure of the transaction:

- (a) the total consideration for the sale was changed to a base purchase price €24,047,619.05 plus a deferred payment of €4,285,714.29;
  - (b) the base purchase price is payable at Closing and the deferred payment is payable on the third anniversary of the Closing Date;
  - (c) the [...] (earn-out mechanism) has been deleted;
  - (d) in recognition for the higher purchase price, the Notifying Parties have committed that [...]. This order is over and above the Minimum Order Quantity in the Commitments;
  - (e) the maximum liability of the Notifying Parties will [...].
29. The Commission considers that the amendment to the Initial Proposed Agreement addresses the Commission's concerns about the structure of the transaction as it removes the risk that the earn-out mechanism could have an adverse impact on Aquatron's incentives to grow the business.
30. The Commission also considers that the amendment to the Initial Proposed Agreement addresses the discrepancies with the Commitments as to non-compete obligations, as they now include clauses compatible with the obligations under paragraphs 6, 13 and 14 of the Commitments.
31. In light of the above considerations and taking into account the reasoned opinion and the addendum thereto submitted by the Trustee, the Commission concludes that the Proposed Agreement is consistent with the Commitments and that, accordingly, the Divestment Business is being sold in a manner consistent with the Commitments.

#### **IV. CONCLUSION**

32. On the basis of the above assessment, the Commission approves BWT as a suitable purchaser of the Divestment Business.
33. Moreover, on the basis of the Proposed Agreement, the Commission also concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
34. This Decision only constitutes approval of the proposed purchaser identified herein and of the Proposed Agreement. This Decision does not constitute a confirmation that Fluidra has complied with its Commitments.
35. This Decision is based on paragraph 20 of the Commitments attached to the Decision of 27 June 2018.

*For the Commission*

*(Signed)*  
**Johannes LAITENBERGER**  
*Director-General*