

Final decisions on three Enterprise Act 2002 merger remedies concerning regulated water companies and Notice of Release of Undertakings

6 December 2017

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Introduction

1. The Competition and Markets Authority (CMA) committed in its Annual Plan in 2015/16 to commence a programme of work to review its existing remedies systematically with a view to removing measures that are no longer necessary. In 2016/17 the CMA carried out further reviews and in its 2017/18 Annual Plan it committed to continue this work, launching further reviews either on its own initiative or in response to submissions from affected parties. As part of this ongoing commitment, the CMA has reviewed five merger remedies put in place between 1990 and 2007 and which involved regulated water companies in England and Wales.
2. This notice concerns undertakings given under the Enterprise Act 2002 from three mergers involving regulated water companies between 1990 and 2007.
3. On 30 October 2017, and following its review of five undertakings concerning mergers involving regulated water companies, the CMA found two undertakings had lapsed, and reached provisional decisions to release the undertakings in the remaining three reviews.

4. The CMA consulted on these three provisional decisions from 30 October 2017 until 17 November 2017, and received no responses.

Legal framework

5. The CMA has a statutory duty, under Schedule 24 to the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013, to keep under review undertakings and orders. From time to time, the CMA must consider whether, by reason of a change in circumstances:
- (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
 - (b) an order is no longer appropriate and needs to be varied or revoked.
6. Responsibility for deciding on variation or termination of the undertakings or orders lies with the CMA. The CMA carries out assessments of mergers concerning the water sector under a separate regime to other mergers across the rest of the UK. At present, these transactions are examined under the Water Act 2014, where the CMA's role requires it to consider whether the merger has or is likely to prejudice Ofwat's ability to make comparisons of costs and service standards between water enterprises. The CMA is the sole decision maker in phase 2 water merger cases and works closely with Ofwat.¹

Final decisions

7. The CMA's final decisions in relation to each of the three undertakings are set out in the annexes described in Table 1 below. In all three cases, our final decision is to release the undertakings.

Table 1: Undertakings which the CMA has decided to release

<i>Purchaser</i>	<i>Target business</i>	<i>Annex</i>
General Utilities plc	The Mid Kent Water Company	1
General Utilities plc and SAUR Water Services plc	Mid Kent Holdings plc	2
Vivendi Water UK plc	First Aqua (JVCo) Limited	3

¹ The CMA's guidance on water mergers can be found [here](#), while Ofwat's guidance on its role in these investigations can be found [here](#). Paragraph 1.2 of Ofwat's guidance covers details of its role in water mergers.

Notice of release of undertakings

8. As envisaged in paragraph 3.35 of the relevant guidance document CMA11, the CMA hereby gives notice of release of the undertakings in the three cases listed above. The reasons are set out in each annex.

Annex 1: General Utilities plc/The Mid Kent Water Company (Mid Kent Water Limited)

Jurisdiction

9. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/355).

Details of the transaction

10. General Utilities plc bought 15 per cent of the share capital of Mid Kent Water Limited in June 1988. It bought further shares on 8 March 1989, taking its holding to just under 30 per cent. From March to May 1989, shareholders of Mid Kent Water Limited exchanged their shares for equivalent holdings in Mid Kent Holdings plc, and as a result of this, Mid Kent Holdings plc acquired 99 per cent of the shares of the Mid Kent Water Limited. General Utilities plc then had 29 per cent of the share capital of Mid Kent Holdings plc and was the largest shareholder.

Investigation details

11. The Monopolies and Mergers Commission (MMC) determined that a relevant merger situation had been created on 11 January 1989, as General Utilities plc already controlled four water companies, and had shareholdings in a further four water companies in addition to the Mid Kent Water Limited. The MMC's report was published on 31 May 1990.²

The market concerned

12. Water supply in England and Wales. At the time of the transaction, General Utilities had control of Lee Valley Water, North Surrey Water, Tendring Hundred Waterworks Company and Folkestone and District Water Company, while having shareholdings in Bristol Waterworks Company, Colne Valley Water Company, Rickmansworth Water Company, South Staffordshire Water Company, and Mid Kent Holdings plc.

Theory of harm

13. As part of the merger process for transactions involving water companies under the Water Act 1989, the MMC needed to have regard to the principle that the number of water enterprises under independent control should not be

² [MMC report on General Utilities plc and the Mid Kent Water Company](#).

reduced so as to prejudice the ability of the Director General of Water Services (DGWS) to make comparisons between water enterprises. The MMC noted that, as a result of various mergers that had already occurred, some 15 of the 29 statutory water companies were under the control of four major groups, which also had major shareholdings in five other statutory water companies. Only about eight appeared to be independent of control or major influence by other water enterprises.

14. Against this background, the MMC accepted that it was important that Mid Kent Water Limited should remain independent for the purposes of the DGWS's ability to make comparisons. It expected that General Utilities plc would, in due course, become more directly involved in the management of Mid Kent Water Limited. This would reduce the independence of the information it supplied to the DGWS. It concluded that the merger would reduce the number of water enterprises under independent control and consequently would prejudice the DGWS's ability to make comparisons between different such water enterprises.

Undertakings given by

15. General Utilities plc on 21 March 1991.

Description of the undertakings

16. The undertakings required General Utilities plc to reduce its holding in Mid Kent Holdings plc to not more than 19.5% of the share capital and not to make arrangements that might result in its shareholding exceeding that level. General Utilities plc was also required not to obtain financial information about Mid Kent Holdings plc that was not also available to others with an interest in Mid Kent Holdings plc, and not to nominate any person to serve as a director of Mid Kent Holdings plc or Mid Kent Water Limited.

History of the companies since the undertakings were given

17. Mid Kent Water Limited (company number 02559449) experienced changes in ownership in the years following this transaction, but the change of most relevance to this review was the purchase in 2006 of South East Water Limited by the owners of Mid Kent Water Limited, Hastings Diversified Utilities Fund Limited and Utilities Trust of Australia.³ After the acquisition was completed, Mid Kent Water Limited and South East Water Limited were

³ See paragraph 6 above.

combined into one company with a single Water Industry Act licence from Ofwat. Mid Kent Water Limited was dissolved in 2010.

18. On 30 June 1992, General Utilities plc reduced its holding in compliance with these undertakings.
19. Mid Kent Holdings plc (company number 02288754) changed its name to Swan Group in 2001 and is currently owned by HDF UK (Holdings) Limited.
20. General Utilities plc (company number 02127283) changed its name to Vivendi Water UK plc in 2000. In 2003 it changed its name to Veolia Water UK plc and subsequently became Veolia Water UK Limited in December 2012. It is active and is ultimately owned by a French company, Veolia Environnement. In 2012, Veolia sold its water companies to Rift Acquisitions (HoldCo) Limited, retaining a 10% stake in the business which was re-branded as 'Affinity Water'. In May 2017, Veolia sold its stake in the Affinity Water businesses when it was bought by a consortium comprising Allianz Capital Partners, HICL Infrastructure Company Limited and DIF.

Change of circumstances

21. Following the 2006 acquisition that combined South East Water Limited and Mid Kent Water Limited, both the target business from this transaction and Mid Kent Holdings plc, which is the subject of the undertakings, are no longer distinct entities, having been combined with another water company in the same region of the UK.
22. The CMA considers that this represents a relevant change of circumstances and notes that the specific circumstances that led to the concern arising in this transaction would no longer apply to the current market structure. The CMA considers therefore that the undertakings put in place to reduce General Utilities plc's shareholding in Mid Kent Holdings plc and control of Mid Kent Water Limited are no longer appropriate.

Ofwat views

23. Ofwat has commented that there have been a number of changes in the ownership of the companies concerned. Most notably, the transaction in 2007 which led to Ofwat modifying water company licences to combine Mid Kent Water Limited and South East Water Limited into a single appointed water company, removing Mid Kent Water Limited as an independent comparator and which these undertakings were intended to preserve. Ofwat therefore takes the view that there has been a relevant change of circumstances and that these undertakings should be released.

Other stakeholder views

24. We received one further submission, from Veolia Water UK Ltd, which informed us that it no longer holds any significant interests in any UK regulated water entities.

Final decision

25. The CMA's final decision is to release the undertakings.

Annex 2: General Utilities plc and SAUR Water Services plc/Mid Kent Holdings plc

Jurisdiction

26. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/355).

Details of the transaction

27. In December 1995, General Utilities plc and SAUR Water Services plc formed a joint venture company to bid for Mid Kent Holdings plc. Under the terms of the Joint Venture Agreement, the bidders agreed that once the share capital of Mid Kent Holdings plc had been acquired, they would divide its principal operational area into two parts of approximately equal value. The western half would be merged with South East Water Limited and the eastern half would be merged with Folkestone and Dover Water Services. Certain of Mid Kent Water's water resource assets, chiefly abstraction licences and supply rights from third parties, would remain under the joint control of the enlarged South East Water and Folkestone and Dover Water Services. A joint resources company was set up for this purpose.

Investigation details

28. The MMC published its report on 21 January 1997.⁴

The market concerned

29. The supply of water services in England and Wales, with specific overlaps in South East England. While General Utilities plc had interests in a number of regulated water companies, the company of most relevance was Folkestone and Dover Water Services Limited. For SAUR Water Services, the most relevant company was South East Water Limited. These two water companies together with Mid Kent Water Limited served adjoining areas of the UK.

Theory of harm

30. The MMC found that Mid Kent Water Limited was one of only five remaining independent water-only companies of a size that the DGWS found useful for comparative purposes at the time. The MMC concluded that the proposed

⁴ *Mid Kent Holdings plc and General Utilities plc and SAUR Water Services plc: A report on the proposed merger* (Cm 3514).

arrangements would prejudice the ability of the DGWS to make comparisons between different water enterprises.

Undertakings given by

31. General Utilities plc on 15 May 1998 and by SAUR Water Services plc on 18 May 1998.

Description of the undertakings

32. The undertakings each included the following obligations:
- (a) Not without the prior written consent of the Secretary of State be a party or give effect to any arrangement with SAUR Water Services plc or General Utilities plc, respectively with respect to the business of Mid Kent Holdings plc or any of its subsidiaries which would give rise to a compulsory reference to the MMC under sections 32 to 35 of the Water Industry Act 1991 or any statute substantially re-enacting those sections.
 - (b) To procure that each of its subsidiaries complies with these undertakings as if it had given them.
 - (c) To forthwith provide to the Director General such information as he may from time to time reasonably require for the purpose of monitoring compliance with these undertakings.

History of the companies since the undertakings were given

33. Mid Kent Holdings plc (company number 02288754) changed its name to Swan Group in 2001 and is currently owned by HDF UK (Holdings) Limited.
34. SAUR Water Services plc (company number 02049449) changed its name to Southern Utilities (Holdings) Limited in 2004. It is now dormant. It is owned by Hastings Water (UK) Limited which is owned by HDF (UK) Holdings Limited.
35. General Utilities plc (company number 02127283) changed its name to Vivendi Water UK plc in 2000. In 2003 it changed its name to Veolia Water UK plc and subsequently became Veolia Water UK Limited in December 2012. It is active and is ultimately owned by a French company, Veolia Environnement. In 2012, Veolia sold its water companies to Rift Acquisitions Limited, retaining a 10% stake in the business which was re-branded Affinity Water. In May 2017, Veolia sold its stake in the Affinity Water businesses when it was bought by a consortium comprising Allianz Capital Partners, HICL Infrastructure Company Limited and DIF.

Change of circumstances

36. Following the 2006 acquisition that combined South East Water and Mid Kent Water,⁵ the target business from this 1997 transaction is no longer a distinct entity, having been combined with another water company in the same region of the UK.
37. The CMA considers that this represents a relevant change of circumstance and notes that the specific circumstances that led to the concern arising in this transaction would no longer apply to the current market structure. The CMA considers therefore that the structural undertakings put in place to prevent the transaction from being repeated are no longer appropriate.

Ofwat views

38. Ofwat's view is that there has been a relevant change in circumstance resulting from the 2007 transaction in which Mid Kent Water Limited and South East water Limited were combined into a single appointed water company. South East Water Limited is no longer a distinct company and consequently Ofwat no longer considers that there is an ongoing impact on its ability to make comparisons between water companies. Ofwat therefore supports the CMA removing this undertaking.

Other stakeholder views

39. We received one further submission, from Veolia Water UK Ltd, which informed us that in general Veolia no longer holds interests in any UK regulated water entities.

Final decision

40. The CMA's final decision is to release the undertakings.

⁵ See paragraph 6 above.

Annex 3: Vivendi Water UK plc/First Aqua (JVCo) Limited

Jurisdiction

42. Enterprise Act 2002.

Details of the transaction

43. During 2002, Vivendi Water UK plc sought to purchase First Aqua Limited. At the time of the transaction, Vivendi Water UK plc, (previously General Utilities plc) had an interest in four water-only companies, while First Aqua Limited owned Southern Water Services Limited, a water and sewerage company.
44. Following investigation by the Competition Commission (CC), the CC majority concluded that the merger should be allowed subject to the divestment of Vivendi Water UK plc's 31.4% interest in South Staffordshire Water. The Competition Minister stated that, 'I have decided that the CC majority remedy is not an appropriate remedy and decided to ask the Director General of Water Services to discuss with Vivendi the terms of two other possible remedies. I have asked him to provide his views to the DGFT,⁶ who will then recommend to me which of these remedies, or another, such as the divestment of Three Valleys, should be required.'⁷
45. Following this decision, Vivendi proposed a revised form of the transaction. In this form, Vivendi Water UK plc would acquire a 19.9% interest in Southern Water Services Limited through a holding company, Southern Water Investments Limited. The Royal Bank of Scotland plc would initially own the remaining 80.1% through a second holding company, Southern Water Capital Limited.
46. Having reviewed the revised proposal and remedy, the Competition Minister accepted undertakings in 2003.

Investigation details

47. A reference to the CC was made by the Office of Fair Trading (OFT) on 23 May 2002 concerning the acquisition under the Water Industry Act 1991 and the CC's final report was published on 8 November 2002.⁸

⁶ Director General of Fair Trading.

⁷ See [DTI Press Release of 8 November 2002](#).

⁸ [Vivendi Water UK plc and First Aqua \(JVCo\) Limited](#) (Cm 5681).

The market concerned

48. The supply of water services in England and Wales. While Vivendi Water UK plc had an interest in 4 water-only companies, two of these, Southern Water and Folkestone and District Water Company were in the South East of England.

Theory of harm

49. The CC found that the merger was expected to operate against the public interest because the loss of Southern Water as an independent comparator would prejudice the DGWS' ability to make comparisons between different water companies. However, the CC, did not consider this detriment to be great enough to justify prohibiting the merger.

Undertakings given by

50. Southern Water Capital Limited and by Vivendi Water UK plc on 23 April 2003.

Description of the undertakings

51. The undertakings given by Vivendi Water UK plc required it, among other matters, to dilute its interest in Southern Water Investments Limited to no more than 25% of the votes exercisable at general meetings of the company, and to enable Southern Water Capital Limited to exercise not less than 75% of the votes. The Vivendi Water UK plc undertakings included a continued separation requirement which reflected the short-term actions required and also put in place other limitations on the extent of commercial influence Vivendi Water UK plc could have over companies in the Southern Water Services Group, in particular prohibiting Vivendi from:
- (a) acquiring any assets of companies in the Southern Water Services Group;
 - (b) appointing more than two directors to any company in the Southern Water Services Group, except Southern Water Services Limited, and that those directors be non-executive; or
 - (c) appointing more than three directors to the board of Southern Water Services Limited, and that those directors be non-executive.
52. Southern Water Capital Limited, which was owned by the Royal Bank of Scotland plc also gave undertakings requiring it to maintain an active presence on the Board of Southern Water Investments Limited and Southern Water Services Limited.

History of the companies since the undertakings were given

53. Vivendi Water UK plc changed its name to Veolia Water UK plc in May 2003, and subsequently became Veolia Water UK Limited in December 2012. It is active and is ultimately owned by a French company, Veolia Environnement. In 2006 its interest in Southern Water Services Limited decreased and in 2012 it sold its water companies to Rift Acquisitions Limited, retaining a 10% stake in the business which was re-branded 'Affinity Water'. In May 2017, it sold its stake in the Affinity Water businesses when it was bought by a consortium comprising Allianz Capital Partners, HICL Infrastructure Company Limited and DIF.
54. First Aqua Limited (company number 04374956) changed its name to Southern Water Services Group Limited in June 2003. It is currently dormant. It remains owned by Southern Water Capital Limited which has been owned by a consortium, Greensands Holdings Limited, since October 2007.
55. Southern Water Capital Limited (company number 04608528) increased its interest in Southern Water Services Limited in April 2006. Southern Water Capital Limited and Southern Water Investments Limited were acquired by Greensands Holdings Limited in October 2007. They are now dormant.
56. Southern Water Services Limited (company number 02366670) is active. It is owned by Greensands Holdings Limited.

Change of circumstances

57. There has been significant structural change in terms of the companies which gave or were subject to the undertakings. In particular:
 - (a) Vivendi now no longer has any interest in Southern Water Investments Limited and has reduced its investments in the water sector in recent years;
 - (b) Southern Water Services Limited is now owned by Greensands Holdings Limited;
 - (c) Southern Water Capital Limited, subject of the undertakings parallel to Vivendi and a subject of the Vivendi undertakings, is now dormant (although it remains part of the Greensands Holdings Limited corporate group); and
 - (d) Southern Water Investments Limited, subject of the undertakings, is now dormant (although remains part of the Greensands Holdings Limited corporate group).

58. The CMA considers that these changes collectively represent a relevant change of circumstances and notes that the specific circumstances that led to the concern arising in this transaction would no longer apply to the current market structure given the changes in the industry and ownership of relevant water companies. The CMA considers therefore that the undertakings are no longer appropriate.

Ofwat views

59. Ofwat considers that the changes to the water market outlined above represent a relevant change of circumstance and, therefore, that the undertakings are no longer appropriate.

Other stakeholder views

60. We received one further submission, from Veolia Water UK Ltd, which informed us that it no longer holds any significant interests in any UK regulated water entities.

Final decision

61. The CMA's final decision is to release the undertakings.