

Completed acquisition by Augean plc of Atlantic Waste Holdings Limited and Waste Holding Limited

The OFT's decision on reference under section 22 given on 9 May 2005. Full text of decision published 11 May 2005.

PARTIES

1. **Augean plc (Augean)** is a cash shell company formed in 2004 to acquire businesses in the UK water and UK waste markets. Pre-acquisition it did not carry out any activities in waste management.
2. **Atlantic Waste Holdings Limited (Atlantic)** and **Zero Waste Holding Limited (Zero)** are both active in waste disposal, in particular the ownership and management of landfill sites with a particular emphasis on hazardous waste. Zero's UK turnover for the year ending 30 September 2004 was £5,623,000 and Atlantic's UK turnover for the year ending 31 December 2003 was £10,452,000.

TRANSACTION

3. The acquisitions by Augean of both Atlantic and Zero were completed simultaneously on 15 December 2004. The extended statutory deadline is 19 May 2005. The administrative timetable expires on 8 June 2005.

JURISDICTION

4. As a result of this transaction Augean, Atlantic and Zero have ceased to be distinct. The parties overlap in the operation of landfill sites for the disposal of hazardous and non-hazardous waste. Given the parties' share of approximately 33 per cent of those sites capable of taking the full range of hazardous waste in the UK, the share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

RELEVANT MARKET

5. The parties overlap in the disposal of both hazardous and non-hazardous waste via landfill in the UK. The Landfill (England and Wales) Regulations 2002¹ dictate the types of waste that a site may accept. Hazardous waste may only be accepted by sites that meet stringent regulations.
6. The European Commission (the Commission) has, in a previous decision, found that the disposal of hazardous waste constitutes a sector separate from non-hazardous waste due to the more burdensome regulatory framework and the high costs of treatment and disposal incurred by the former.² The OFT has reached the same conclusion in its recent Cholet/Shanks decision.³ The OFT's investigation in this case has not suggested a contrary view. Hazardous and non-hazardous waste disposal will therefore be considered separately below.

Product market

Hazardous waste

7. Atlantic and Zero each operate one hazardous waste landfill site. Atlantic's site is located at King's Cliffe (near Stamford, Lincs) and Zero's site is at Port Clarence (near Stockton-on-Tees).
8. The parties submitted that hazardous waste disposal by landfill was part of a wider product scope including other methods of hazardous waste disposal, such as bioremediation and stabilisation to render hazardous waste non-hazardous, together with incineration and in-house hazardous landfill.
9. Hazardous waste customers contacted by the OFT held mixed views on the substitutability of other forms of hazardous waste disposal vis-à-vis landfill. The majority stated that there were no alternatives to landfill that met their hazardous waste disposal requirements. Competitors, however, did generally believe that other forms of hazardous waste disposal, including incineration, bioremediation and treatment to render waste non-hazardous, were all substitutes. One competitor suggested that the competitive constraint was sufficiently strong to prevent any price differentials between the forms of hazardous waste disposal from emerging. The parties have provided current price data that appears to support this view. However, some competitors have indicated that incineration could be a more expensive disposal method than landfill. Whilst it may be the

¹ SI 2002 No.1559

² Case No IV/M.283: *Waste Management International/SAE*

³ CR/125/04, Completed Acquisition by Cholet Acquisitions 2 Limited of the UK Landfill and Energy Business of Shanks Group plc, 17 September 2004.

case that some competitive constraint is placed upon certain landfill sites by other forms of hazardous waste disposal, a cautious view is taken and the product scope is therefore considered as no wider than hazardous waste landfill disposal.

10. It should further be noted that many hazardous waste landfill sites are not capable of taking a full range of hazardous waste.⁴ The OFT's investigation has revealed that there appears to be no demand side substitutability between different categories of sites for certain customers, i.e. some customers will require a hazardous waste landfill site which accepts the *full range* of hazardous waste. On that basis, the OFT considers landfill sites capable of receiving all categories of hazardous waste separately.

Non-hazardous waste

11. Atlantic operates one non-hazardous landfill site, Thornhaugh which is very close to its hazardous waste site in King's Cliffe. Zero also operates one non-hazardous landfill site (Marks Quarry) at West Rainton, within ten miles of Durham. In the Cholet/Shanks decision, the OFT had taken the view 'that around 90 per cent of non-hazardous waste customers were located within a 10 mile radius of the site being used.'⁵ Following this approach, the OFT considers that, the parties' two non-hazardous waste sites would not compete pre-merger, given the distance between them of over 180 miles. Furthermore, no concerns have been raised by third parties relating to non-hazardous waste disposal. Given that the parties operate only 2 out of at least 500 non-hazardous waste landfill sites in Great Britain, this overlap will not be considered any further.

Geographic market

12. Customers contacted by the OFT stated that they would aim to use their closest hazardous waste landfill site. While none transported waste more than 65 miles, some stated that it would be theoretically possible to transport further. However, this would only be viable if the gate price at the destination site was much cheaper. The parties submit that 30 per cent of hazardous waste is received from local producers, 30 per cent regionally and 40 per cent nationally.
13. Some competitors confirmed the views of a customer of the market being regional, although two noted that hazardous waste could travel up to 300 miles (or potentially the length of Great Britain) by road or rail. In some cases, hazardous waste would have to be transported long distances for landfill, for

⁴ Additionally, those non-hazardous sites which have received their hazardous waste disposal licence on the basis of installing a stable, non-reactive hazardous waste (SNHWR) cell are not able to take a wide range of hazardous wastes.

⁵ Cholet/Shanks, at paragraph 17.

example, there are no hazardous landfill sites in Scotland and no hazardous landfill site in Wales is capable of taking a full range of hazardous waste.

14. Third parties have also noted that the parties' hazardous waste landfill sites are not directly rail connected. However, it has been submitted by third parties that hazardous waste could easily be delivered close to the parties' sites by rail and then transported by road for the remaining part of the journey.
15. On the balance of the available evidence, it appears that the geographic frame of reference for hazardous waste disposal could be considered as regional. Some hazardous waste may, however, need to travel further. Given that even considering the geographic frame of reference as national, this merger would not result in a significant lessening of competition, there is no need to conclude on this question.

HORIZONTAL ISSUES

16. The majority of third parties contacted considered that Atlantic and Zero pre-merger did not compete to an appreciable extent, because of the considerable distance of approximately 180 miles between their respective sites. However, the parties, together with one customer, noted that some hazardous waste is transported the length of the country – raising the prospect that the sites might be alternatives for some customers. However, the OFT considers that even on that basis, the cost of transport (estimated at about 15 per cent of the total disposal cost) and the location of the other full range hazardous waste landfill sites, would render the sites, at best, limited alternatives to each other.

Hazardous waste sites accepting a limited range of hazardous waste

17. As mentioned above, the parties operate two hazardous waste landfill sites at King's Cliffe and at Port Clarence. There are another ten hazardous waste sites in the UK which accept a limited range of hazardous waste and another 18 sites can take hazardous waste through stable, non-reactive hazardous waste (SNHRW) cells. On this basis, the parties calculate their combined share of supply in terms of volume as 26.3 per cent (increment 8.75 per cent). The OFT therefore believes that customers with more general hazardous waste disposal needs, i.e. those who do not require a site to accept the full range of hazardous waste, will have a choice of at least ten alternative sites post-merger.

Hazardous waste sites accepting the full range of hazardous waste

18. Considering only landfill sites which admit the full range of hazardous waste, the parties own two out of the five of these sites in the UK. As mentioned above, the

parties operate the hazardous waste sites at King's Cliffe (near Stamford, Lincs) and at Port Clarence (near Stockton-on-Tees). Three more sites are located in Teeside (Stockton-on-Tees, run by Impetus Waste Management Ltd), Winterton (North Lincolnshire, operated by WRG) and Beenham in Berkshire (Grundon) respectively. One third party estimated the parties' combined UK share of supply by volume at 33-37 per cent and suggested that prices had increased since the merger.

19. However, competitors generally considered that the parties' sites did not compete pre-merger. Given that the sites were so far apart and given the additional cost of transport that might be involved customers were generally unconcerned. Zero's customers submit that the Impetus site at Teeside competes with the Zero site at Port Clarence and would appear to constrain this site post-merger.
20. A significant price differential between the sites would have to emerge in order for any switching between sites to become profitable. Moreover, third party comments suggest that recent price increases might be due to new waste regulations extending the definition of hazardous waste to types of waste that were not covered previously. This seems to have led to an increase in volume of hazardous waste which may, in turn, have resulted in price increases.⁶ The new legal framework was introduced in 2004 as a result of European regulations.
21. Whilst other hazardous waste disposal options have not been included within the product scope, the parties have submitted and some competitors have confirmed that a certain degree of constraint would be exerted on the parties post-merger from incineration, bioremediation and treatment.
22. Overall, the evidence available to the OFT suggests that pre-merger the parties did not share a customer base and were not seen as alternatives. The OFT has not received any compelling evidence that would convincingly link the merger to recent price increases. The OFT therefore does not believe that, even on the narrowest possible frame of reference, considering only hazardous waste sites accepting the full range of waste, this transaction has resulted or may be expected to result in a significant lessening of competition.

Barriers to entry and expansion

23. As a result of the regulatory requirements and the need to obtain planning permission, barriers to entry are considered to be significant. An applicant must demonstrate that the site would satisfy the required environmental and operational

⁶ Third parties have reported price increases of up to 225 per cent.

standards, which can be a costly and time consuming process. One competitor states that costs could be as high as £1m for a site accepting a wide range of waste. In addition, the costs associated with closing the landfill site when capacity is reached may be a burden for more than sixty years, because of the need to provide for future environmental liabilities.

24. However, the Department for Environment, Food and Rural Affairs (DEFRA) and the Environment Agency note that three permits for handling hazardous waste (which are required to operate hazardous waste landfill sites) are currently under consideration. One third party expects new entry to the sector in order to meet current demand, given that a period of uncertainty regarding the implementation of new legislation is over. It should be noted that Atlantic and Zero themselves were relatively new entrants. Further entry into more limited hazardous waste disposal is possible through SNRHW cells. Several permits for SNRHW cells have been issued to date and around 30 more applications are pending.

Buyer power

25. Customers held mixed views as to whether they had the ability to negotiate discounts. They considered that large customers would be able to achieve volume discounts, although most customers believed that the limited number of alternative sites would severely limit any buyer power.⁷ Furthermore, customers have been unable to resist recent price increases. Overall, it is therefore considered improbable that customers possess countervailing buyer power.

THIRD PARTY VIEWS

26. The OFT has received comments from government bodies, competitors and customers. All third parties except one were unconcerned. Some competitors also submitted that they currently have spare capacity.

ASSESSMENT

27. The parties overlap in the operation of both hazardous and non-hazardous landfill sites.
28. In the non-hazardous waste disposal sector, the parties operate two sites out of a total of over five hundred sites in the UK. The two sites are located approximately 180 miles apart and are not considered to have competed pre-merger to any appreciable extent. The OFT does not believe that the transaction affects competition in the disposal of non-hazardous waste via landfill.

⁷ Any buyer power is most unlikely in relation to King's Cliffe, as there does not appear any alternative site within reasonable distance.

29. Post-merger the merged entity runs two hazardous waste landfill sites, located 180 miles apart. Most customers did not consider them to be viable alternatives. To the extent that some customers were prepared to transport waste the additional distance to another site, this would not generally be viable unless a large gate price differential existed to cover the additional transport costs. While it has been submitted to the OFT that most customers only supply hazardous waste on a regional basis, in any event, on a national basis three alternative sites accepting the full range of hazardous waste will remain post-merger, together with at least ten other sites accepting a more restricted range of hazardous waste.
30. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

31. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.