17th July 2002 : Water market : the Conseil de la concurrence asks the Minister to raise questions over the joint subsidiaries of CGE and SLDE

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In a decision dated 11th July 2002, the *Conseil de la concurrence*, which had assumed jurisdiction at its own initiative, established that the companies Compagnie générale des eaux (CGE) and Lyonnaise des eaux (SLDE) hold a collective dominant position in the markets for water and purification, and that they have abused that position. For the first time, the *Conseil* applied article L. 430-9 of the French Code of Commercial Law, asking the Minister of Economy to conduct a review, if necessary dismantling the joint subsidiaries that the companies in question had set up together.

The markets for water distribution and purification are dominated by two major groups : CGE and SLDE

The markets for water distribution and purification are highly concentrated. CGE and SLDE together hold around 85% of these markets, and these two groups have set up joint ventures in several regions.

The *Conseil* took the view that CGE and SLDE hold a collective dominant position in the markets for water distribution and purification, based on the following factors :

- The size of their respective market shares ;
- The existence of structural links between them ;

- The very nature of the market (which is relatively closed to competition) and the characteristics of the product (homogeneity and weak price elasticity), which are likely to encourage collusive behaviour.

Competition distorted during public calls for tender

During several public calls for tender launched by local and regional administrations from June 1997 onwards, the parent companies abstained from making bids. By refraining from responding to the calls for tender, and thereby avoiding entering into competition with their joint subsidiaries, the companies CGE and SLDE restricted competition. The *Conseil* took the view that in doing so, they had abused their collective dominant position, since a company or group of companies in a dominant position has a "*special responsibility to avoid behaving in such a way as to harm effective competition in the market*".

Joint subsidiaries called into question

Invoking article L. 430-9 of the French Code of Commercial Law for the first time, the *Conseil* asked the Minister of Economy to order the companies Compagnie générale des eaux and Lyonnaise des eaux to "*modify, complete or cancel, within a stipulated period, all agreements and deeds by which these companies associated their resources in joint subsidiaries, which they set up together in the drinking water and purification sectors*". The Minister of Economy will thus have the task of conducting a case-by-case analysis, to determine whether there are grounds for dismantling these joint subsidiaries.

The *Conseil* decided that there were no grounds for imposing fines on the companies CGE and SLDE, taking into consideration the fact that the authorities responsible for monitoring mergers had not issued any prior reservations concerning the creation of the joint subsidiaries. The *Conseil* also took into consideration the fact that the said subsidiaries had often been created to satisfy demands by local and regional administrations, rather than at the behest of the parent companies.

In pronouncing this decision, the *Conseil* was seeking not to act in a repressive manner, but rather to act within its regulatory role with the aim of influencing the

market structure and thereby correcting the source of the observed dysfunctions.

> Decision n° 02-D-44 relative to the state of competition in the sectors for drinking water and purification, notably concerning the pooling of resources in order to respond to calls for tender

> See decision of the Paris Court of Appeal (18 February 2003)

> See decision of the Cour de cassation (Supreme Court of Appeals) - 12nd july 2004