TO THE ANTICORRUPTION PROSECUTOR'S OFFICE OF CATALUNYA

The undersigned organizations,

STATE:

That they are ecologist and social organizations and, acting according to their responsabilities, they asked for information to the Barcelona Metropolitan Area (*AMB*) and to the Barcelona City Council about the contract for the provision of public services between the company AGBAR and the Barcelona City Council for the water service supply.

We notice a set of facts to the Anticorruption Prosecutor's Office in order to let it investigate the potential responsabilities of the corresponding Administrations and the water operators.

In addition to that, given the lack of official information, we suspect that several misappropiations have been done, based on the following facts:

FACTS

FIRST.- The 31st of march of 1966 the City Council of Barcelona passed the rules to establish the arrangement with the *Societat General d'Aigües de Barcelona* (AGBAR) for the organization of the water supply services, in order to give the service of water to this company. However, this agreement is not a concession of a public service but a declaration of intent, since it was an award project that never materialised.

SECOND.- The 3rd of July of 1980 the Permanent Commission of the *Corporació Metropolitana de Barcelona – CMB* (today *AMB*) set the water supply of the metropolitan cities as a service of metropolitan interest, starting the proceeding to assume the provision of the service. This is how the 18th of April of 1983 a contract between *CMB* and AGBAR was signed, aiming to set the concession of the home water service to AGBAR for 50 years "whenever it becomes appropriate". Again, this concession was not settled down because there is not any further documentation specifying the key issues of the public contracting: period of the concession, royalty to be paid, terms and conditions of the parties, reasons for the cancellation of the contract, etc. It is noticeable that not defining the duration of the contract is an infringement of the public administration contracts law (article 278 RDL 3/2011).

THIRD.- In 2010, the Administrative *Dispute* Court nº 12 of Barcelona pronounced the sentence nº 298/2010, where he said clearly that there was no concession contract between AGBAR and the Barcelona City Council for the water service provision in the city. It says expressly that "*it turns out that there is no* concession *contract (...) Therefore, there is no adjudication of the service nor contract (...) Certainly this fact has major material consequences, since today the*

management of the water services in the city of Barcelona and the performance of AGBAR as licensed for the service are illegitimate actions".

FOURTH.- Since the sentence was released, several organizations of the civil society have called for the publication of the concession contract, being among them the undersigned, asking via several ways for a solution of what is considered a "*legal vacuum"* in the supply of a basic service, as well as trying to check which is the current legal situation of the water service in Barcelona and getting the documentation associated to it. Petitions have been made to the officials of the City Council of Barcelona, to the *AMB* and to the rest of the cities of the region, and either no answer has been given, either it has been given without consistent documentation showing the legality of the water provision service.

FIFTH.- The 8th of August of 2012, the *Diari Oficial de la Generalitat de Catalunya*[1] (DOGC Nº 6188) released the following announcement:

"*The AMB Metropolitan Council, met the 24th of July of 2012, agreed on: Initially approve the establishment and provision of the whole water cycle service, which (...) integrates the current services of water provision or home water supply, the public sanitation in 'alta'*[2] *and the waste water purification and also includes the regeneration service of waste water for other uses.*

Thus, it is agreed to initially approve the establishment of the management system of this public service by means of a mixed social capital company, under the form of arrangement with existing society [AGBAR] (...) integrating the bonds derivative from the current sort of water managements, from the date of the effective start of the management modality and to begin the dissolution proceeding of the trading society (...) Empresa Metropolitana de Sanejament Societat Anònima – EMSSA. This dissolution implies the continuity of the service provision under the management modality described above, given the patrimonial transfer to the AMB as unique shareholder, and its contribution to the new mixed social capital company of the activity, affected staff and patrimony."

SIXTH.- The 6th of November of 2012 the AMB Metropolitan Council approved for all the agreements of the DOGC of 8th August 2012, which was replied with 5 administrative disputes.. Thus, the *AMB* created a new public service called whole water cycle which unifies the water and sanitation services, being the home water service so far managed by several companies with administrative concession, and the sanitation managed by the public company EMMSA, with metropolitan performance.

SEVENTH.- The performance of the *AMB* Metropolitan Council, according to the facts already exposed, poses a set of presumably irregular situations based on the following:

Possible Field invasion. The contract dated the 18th of April 1983 between the Permanent Comission of the *CMB* (today (*AMB*) and AGBAR, as stated in the second point, also pursued to transfer to the *CMB* the AGBAR's rights and infrastructures in *alta1* (ETAP [Drink Water Treatment Station] Sant Joan Despí and hidraulic concessions of 1953 and their followers, from

1 Generalitat de Catalunya, or Generalitat, is the Catalan government. *Diari Oficial* is the official communication channel of the Catalan government

2 *Alta*, which could be translated as 'high', is the part of the water cycle going from the water *captation*, i.e. In the river, to the city *tank*. Therefore, *baixa*, or 'low', is the part of the water cycle going from the city *tank* to the home supply.

1957 and 1960). These infrastrucures could not indeed be transferred because the Law 4/1990 set such service as of interest of the *Generalitat*2. The later law 12/2000 confirmed that the *Generalitat* was in charge of the service, as well as the Decree Law 3/2003. These facts demonstrate that the administration responsible of the supply in '*alta*' is the *Generalitat* and not the *AMB*, so the *AMB* would not be let to supply this service. In addition to that the cities are in charge of the "*water supply and public enlightenment, cleaning services, waste management, sanitation and waste water treatments*" (art. 66.3.I RDL 2/2003, Refós Text Municipal and Local Regime Law of Catalunya). And one of the minimum services that each town is obliged to deliver is the water supply (art 67.a of the same text). Therefore the *AMB* could be invading the fields from both the *Generalitat* and the cities. Moreover, it is forecasted that the mixed social capital company will become automatically responsible of the water supply as long as the administrative water concessions of the different cities end, violating again the public contracting rules. The vice of incompetence implies the full nullity of the dictated acts, according to the art. 62.1.b) Law 30/1992, according to Law 4/1999 redaction.

Lack of concession proved according to the sentence if the Administrative Dispute Court num. 12 of Barcelona. The election of AGBAR as the only operator is based on the titles recognized in the '*Metropolitanization'* Agreement of 28th of January 1982 and the contract of the 18th of April 1983, *referred* to several cities of the metropolitan area. As it has been explained and seen in the sentence num. 298/2010, of 5th of October 2010, from the Administrative Dispute Court num. 12 of Barcelona, these titles never formalised and mean to be an anomalous situation in which AGBAR is giving services without a consistent legal basis. To match this situation with the existence of a valid concession is in contradiction with the basic principles of Administrative Law and the Administrative Contracting Law, as stated in the Blended Text of the Public Sector Contracts Law (RDL 3/2011). 21 cities are thought to be in this situation of irregularity: Badalona, Barcelona, Castelldefels, Cerdanyola del Vallès, Cornellà de Llobregat, Esplugues de Llobregat, Gavà, l'Hospitalet de Llobregat, Montcada i Reixac, Montgat, Sant Adrià de Besòs, San Boi de Llobregat, Sant Climent de Llobregat, Sant Feliu de Llobregat, Sant Just Desvern, Sant Joan Despí, Santa Coloma de Gramenet and Viladecans. Should be added to this list the cites of Ripollet, Tiana, Sant Cugat del Vallès and Badia, which are also in the scope of the contract of 1983.

Lack of public tender. The new service has been given without public tender*,* but with direct awarding to a private company. As stated in the art. 138.2 RDL 3/2011, the awarding of contracts have to be done, ordinarily, using the opened proceeding or the restricted proceeding. The negotiated proceeding is therefore an exception, and the circumstances to make it eligible are set in the art. 170 RDL 3/2011, which says: "*When, for technical or artistic reasons or for other reasons related to the protection of exclusivity rights the contracts can only be given to a single company"*. This exception is not valid here at all, because it is not true that the water management in the *AMB* can only be given to AGBAR, since there are other water operators in cities that belong to the *AMB* (Castellbisbal – AICSA; Molins de Rei and Sant Andreu de la Barca – Aqualia; Bellaterra – CASSA; and La Palma de Cervelló – Aigües de Catalunya). Moreover AGBAR has no responsibility in the supply and sanitation of the water in '*alta'*, nor in the supply and treatment of non drinkable water. In addition to that, the fact of giving a period for the new contract of 50 years, starting in 1997 and not in 1983, it is not only unjustified but also implies an extension of the contracts signed before this date or with shorter periods, as it happens in the cities of Pallejà, Santa Coloma de Cervelló, El Papiol, Sant Climent de Llobregat, Torrelles de Llobregat, Begues, Badia del Vallès, Corbera de Llobregat, Cervelló, Molins de Rei and Sant Andreu de la Barca. Thus, the direct awarding of the concession could be a critical violation of the basic principles of public contracting, the free competition and a positive discrimination to AGBAR, in contrast with the other water companies.

Assets valuation. In any document aimed to the establishment of a public service by means of a mixed social capital company it is compulsory to include an economic study and a set of rules to establish the prices that users will have to pay to the company (art. 159 and 160, from art. 188.5 ROASC). In this case the documentation given is clearly insufficient. The starting point is a valuation of AGBAR worth 476,54 M€. While the legality of the contract of 18th of April 1983 is accepted, it is not considered that the *Generalitat*, according to this contract, would have now the ownership of some facilities, and is not considered neither any kind of amortization of the AGBAR's assets since the beginning of this supposed concession. In addition to that, the social capital of the new mixed society is set in 337M€ of which *AMB* would give a 15% by means of the valuation of EMSSA (50,55 M€) and AGBAR the other 85% (286,45 M€). The AGBAR's remainder value, (190,09 M€) will be acquired by the new mixed society. There is not any analysis specifying the reasons why these 190,09 M€ must be bought by charging the Treasury nor the price established to do the transaction.

EIGHT. It should be noticed that some of the public managers who kept this irregularities, and who performed against the general interest, today they belong to the company that is benefiting from this situation.

We consider that these facts, given the knowledge of the administrations about the lack of a legal concession and without acting to fix the situation, should be investigated and therefore we call you for a pronunciation in this issue.

Water provision to particulars is a basic public service, included under municipal competency by the 25.2 article, 7/1985 Law (Bases of Local Regime), which must be managed with any of the modalities proposed at the article 85 from that same law, that is, by direct management or indirect management, according to the conditions established in the management contract/award of the public service, ruled by consolidated text of the 3/2011 Public contracts law, passed on November 14th.

As exposed on the mentioned sentence by the Barcelona Administrative Court Nº12, regardless that during the nineteenth century the Aigües de Barcelona Society or its precursor had received an award of hydraulic exploitation, there is no resolution that concedes the home water service. On March 31st 1966, the Barcelona City Council approved the “Agreement Requirements with Aigües de Barcelona S.G for the arrangement of water provision services”, a document that foresees entrusting the service to the cited society, but the concession couldn't be fulfilled through this planning, given that it requested a previous process and, in any case, it should follow a system of public tender offers in the terms established by legislation valid at the time, which is to be found in the article 115 et seq. from the Local Regulation Law passed by decree on June 24th 1955, the Service Regulation from June 17th 1955, the Contract Regulation for Public Corporations from January 9th 1953 and the Text from National Contract Law passed by the 923/65 decree, therefore the not awarded concession in the above mentioned terms is perverted by nullity right from the beginning, as imposed by article 116 of the first law cited.

But we don't even face a void awarding, since the 1966 agreement didn't grant the concession and the resolution only contains a single awarding project that never realised. Therefore, we understand that the officers from both the Barcelona City Council and the AMB should have allocated the awarding through an open procedure, having published the specifications ruling the public call for tenders wherein every interested company can submit a proposal, thus excluding any negotiation regarding contract specifications and breaching the Law of Contracts for the Public Sector.

In the same way, the contract signed on April 18th 1983 by the CMB and AGBAR, whose purpose was the concession of the home water supply for a 50 year period time “when it results proper”, was not legally fulfilled as it lacked every document which should specify the basic terms of public contracts: duration, fares, party's rights and duties, causes for contract termination, etc. It is remarkable that the lack of defined contract duration breaches the public contracts legislation (Art. 278 RDL 3/2011).

The lack of a valid contract is clearly pointed by the decision of the Barcelona Administrative Court Nº12, since it confirms that, after having requested both the Barcelona City Council and the Metropolitan Authority of Hydraulic Services (today AMB) the complete documentation related with the matter, the Societat General d'Aigües de Barcelona is indeed providing the home water service without the mandatory contract.

Although current public servers could state unawareness of the situation, given that they didn't cause it, but their predecessors, since the moment the Court requires the involved administrations to publish the contract and after it asserts in a sentence that the contract of service provision doesn't even exist, the public managers are mandated to act according to legality and launch a formal procedure to allocate the service, as established in the Contract Law for the Public Sector (RDL 3/2011).

Knowing that the Juridical Right protected by the prevarication crime is the rightful practice of the public function, according to constitutional parameters, and specifically the respect of legal principles of the public function. In this regard, the crime of prevarication contained in the article 404 from the Penal Code requires that an authority or public official, aware of being committing an injustice, adopts a resolution in an administrative case. Therefore, the injustice must come from an administrative resolution. Accordingly, the official's dereliction of duties when facing a citizen's petition, after the stipulated period expires, leaves the citizen in front of an administrative silence. Generally, the absence of administrative reaction has a positive or affirming character (article 43.1 from 30/92 Law and article 54.b from 26/2010 Law). And in this particular case, the lack of a resolution constitutes a presumed administrative action, just as valid and effective as an explicit action, and thus it belongs to the typical conduct categorized in the cited article, in case this resolution is against legality.

Despite the irregular situation of such a public service, essential to life and to people's dignity, officials from the demanded institutions did not act ex officio to resolve this situation from the very moment that a Court issued a sentence, but neither they attended the constant petitions from civil organizations, which have required a solution for this process irregularity and such a defenceless situation that the Barcelona citizenship was suffering, and by extension most of the AMB.

Although this omission of duty could be enough by this Prosecutor's Office to considerate a possible lega irregularity, the fact that AMB has recently approved the creation of a Public-Private Partnership (PPP), with an 85% participation of AGBAR and no public awarding process at all, lead us to believe that the AMB officials take a resolution, possibly conscious that it does not entirely comply with justice, since it opposes the laws that regulate public concessions (RDL 3/2011).
The plan grants the service management to the PPP on the base of an agreement with the “existent company”, thus assuming that the company currently entitled for the service provision is AGBAR, which is straight false in certain towns where the service is managed by different companies or by direct public operation, and it also equates the AGBAR management within AMB with a formal and effective concession, contradicting the basic principles of the administration law and the public contract legislation, like the consolidated text of the Contract Law for the Public Sector (RDL 3/2011).

Through this process, the service concession to a private company is being legalized disregarding the procedure imposed by legislation, which implies that the AMB officials issued an unlawful resolution in order to favour private interests. For that reason we call the Prosecutor's Office to analyze if a possible prevarication crime could have been commited, as described in the art. 404 from the Penal Code.

In addition, the share distribution within the newly created Partnership is completely arbitrary, considering that AGBAR provides facilities to the supply network which it doesn't own. These facilities were declared of interest by the Generalitat de Catalunya through the article 5 of the 4/1990 Law, from March 9th, that regulates the water supply in the Barcelona Area and that states that "*the facilities and goods included in the public service under the Generalitat competency are those of public ownership that make up the basic provision network as referred in the article 2.2. Such goods and facilities are assigned to the Water Supply Entity created by this Law to serve its purpose*".

Article 2.2 from that same Law sets that "*the basic provision network is constituted by the collection works, water treatment plants for purification, pipes, tanks and pump stations which are suitable to supply water to more than one secondary network. The facilities that compose the basic provision network are listed, with general character, in the appendixes 1 and 2, by their public or private ownership, and new facilities constituted or defined with that same characteristics and purposes will be included.*"

For all this we ask to the Prosecutor's Office if it esteems that public institutions have performed against the general interest, favouring private interests of a company that, additionally, has recruited some of these public officials into its payroll.

Knowing that the penal custody of public activity must guarantee the proper development of the public function, enforcing the constitutional previsions related with the matter, and that public activity is an instrument that serves the citizen and not private companies, and cases like the one we face, where there could be a hurtful and serious demeanour by the administrators against the administrated, we think it is necessary to inform in order to investigate and act by means of a possible intervention of the Penal Jurisdiction.

We consider that these facts could be legal offences, hence we you ask for your consideration on the issue.

Knowing that The Penal Code defines, in its article 252, that are liable for illicit appropriation, those who, in detriment to another, appropriate or subtract money, effects, assets or any other property or patrimonial good that they have received as deposit, commission or administration, or another title that implies commitment to free them or give them back, or who would deny having received them, when the amount confiscated exceeds four hundred Euros.

The Juridical Right protected by this crime is on one side the propriety and on the other hand the right to accomplish the obligation to return that that is possessed to its proprietor. The Jurisprudence defines some requirements in order to consider that illicit appropriation applies:

Initial legitimate possession of the money on the part of the active subject, that the title produces commitment to give it back, an act of disposition of the good, and a subjective element that it would be the seek for profit.

We consider that in the present case, even though we are possibly facing a special type of illicit appropriation, it seems that the mentioned requirements occur. Therefore the corporation AGBAR, having a legal title in appearance, as it would be an administration concession for the management of the service of water supply in Barcelona, which produces a commitment to return it at the time the concession expires, it has continued with the service without having a final concession assigned in a definitive form, therefore appropriating in an illegitimate way a public service owned by the Barcelona local administrators, and all of it with a seek for profit that constitutes the fare that has been charged for the service.

The same sentence by the Administrative Court Nº 12 from Barcelona, also stipulates that in relation with "the General Tax Law, there is no doubt that a service as the home water supply is subject to a tax. This implies the complete application of the tax regulation to everything referred to the approval procedure -through fiscal bylaw- and also to other fundamental aspects of the Tax Juridical Regime, like the submission of its determinant elements to a legal reserve, the form and limits on the amount determination and, generally, the application of a tax regime as the coercive levy via urge (…) Therefore, in front of a fare that has been processed as a private rate, it must be concluded that the fare that Societat General d'Aigües charges in exchange for the service provided to the citizens of Barcelona is illegal (…) Consequently, both the service royalty and the VAT must be cancelled, but not the associate taxes.

For all the above, and knowing that these facts could be legal offences, we ask to the Prosecutor's Office for an investigation and pronunciation

Barcelona, January 31st, 2013

Associació ACORDEM, Associació Catalana d'Enginyeria Sense Fronteres, Ecologistas en Acción – CODA, Federació d'Associacions de Veïns i Veïnes de Barcelona i Xarxa per una Nova Cultura de l'Aigua.