JLA/Washstation: Response to Preliminary Findings

1. Introduction

1.1 This submission sets out the response of JLA New Equityco Limited ("**JLA**") to the Provisional Findings ("**PFs**") dated 10 August 2018, relating to JLA's completed acquisition of Washstation Limited ("**Washstation**"), (the "**Merger**").

1.2 The PFs state that the CMA believes that the Merger is likely to result in a substantial lessening of competition ("**SLC**") in the market for managed laundry services to higher education ("**HE**") customers under vend share agreements in the UK.

1.3 JLA welcomes the opportunity to comment on the PFs which are by their very nature provisional. JLA will in this submission identity the flawed analysis on which the PFs are based. In particular, the analysis of entry and expansion in the supply of managed laundry services to HE customers under vend share agreements is fundamentally misconceived. The conclusions in the PFs on entry and expansion are based on the CMA's observation that there has been limited entry/expansion in recent years, rather than on a robust analysis (supported by evidence and third party comment) of the ability and likelihood of others to enter/expand following the Merger to replace the competitive constraint that Washstation imposed on JLA before the Merger, in the event that the merged entity worsened its offer to HE customers.

1.4 JLA submits that the PFs are characterised by inconsistencies and a number of errors of assessment relating to the facts, evidence, and economic analysis, as well as errors of law. A critical analysis of, in particular, the evidence on entry and expansion can only lead to a reversal of the PFs and a conclusion in the CMA's final report that no SLC has arisen, or can be expected to arise, from the Merger. As a result, the PFs do not meet the requisite standard of proof to reach an SLC finding.

1.5 In addition, and related to the standard of proof, there are relevant customer benefits ("**RCBs**") arising directly from the Merger to which insufficient regard is given in the PFs. There is clear and verifiable evidence of RCBs in that Washstation customers have received commissions that were overdue (in some instances by more than 12 months) and since the Merger are being paid their commissions on a timely basis. In the present case, there is clear evidence of RCBs which are timely and merger specific but which have not been properly taken into account when considering the likelihood of an SLC on the balance of probabilities[1].

1.6 Furthermore, the Phase 2 process has been undermined by serious procedural errors. In particular the failure of the CMA to properly assess the evidence in a manner consistent with the legal standard required in Phase 2 is both flawed on its own terms and, further, appears to reflect an insufficient level of separation between Phase 1 and Phase 2 personnel. This has resulted in an apparent bias by the Phase 2 decision-maker in favour of confirming the Phase 1 reference decision. Given the clear risk of bias in these circumstances, the CMA is under a heightened duty to demonstrate that it has reviewed by the evidence fairly and robustly. The CMA has failed to do so. Such concerns are not allayed by the selective and inconsistent approach which the CMA has taken to the evidence in the PFs. Rather, the approach taken in the PFs confirms the apparent bias. As such, the impact of these procedural deficiencies is evident in the PFs, which has led to the erroneous conclusions therein.

[1] This is also relevant as to whether a remedy is required or proportionate even if an SLC is found. See further para. 3.43 et seq.

2. The Relevant Legal Test: A Substantial Lessening of Competition

2.1 The PFs do not meet the necessary standard to conclude that the Merger is likely to result in an SLC. The PFs are predicated on errors of law and assessment in this regard.

2.2 To find that the Merger would give rise to an SLC, the CMA would need to conclude that on the balance of probabilities (i.e. more likely than not) the loss of Washstation as a competitor would have a significant adverse effect on rivalry over time, so as to significantly decrease the competitive pressure on JLA, leading to customer harm[2].

2.3 All mergers between parties that operate in the same market may be expected to lead to some lessening of competition. However, the CMA is not entitled to presume that this effect would be significant. In this case, based on a proper evaluation of the evidence, the effect on competition cannot be described as substantial. The fact that the CMA has not accurately applied the correct legal (including evidential) standard is demonstrated by a number of facts, including (but not limited to) the following:

i. The balance of probabilities test

2.4 To conclude that the Merger will lead to an SLC the CMA must be satisfied that is the case, on the balance of probabilities. However, the conclusions in the PFs are based on assessments that do not meet the requisite balance of probabilities standard and are instead tentative and/or speculative. This view is supported by numerous examples in the PFs, for example:

- "*higher education customers have some different requirements from customers in other sectors, due to their end-user profile, which may limit the ability of providers active in other sectors to quickly supply them*" (para. 19, emphasis added);
- "*providers without an established presence in the sector may find it difficult to identify opportunities that are not publicly tendered*" (para. 35, emphasis added);
- "*Collectively these barriers may be material, costly to overcome and may deter both entry and expansion by existing providers*" (para. 36, emphasis added);
- "*This implies that Armstrong has a lower proportion of larger customers than JLA or Washstation, which may indicate that Armstrong is less able to win larger contracts than JLA or Washstation*" (para. 7.29, emphasis added);
- "*for new contracts, the Merger may provide the incentive to deteriorate any element of the competitive offer, including both price and service levels*" (para. 7.108, emphasis added);
- "*For existing contracts, the Merger may also provide the incentive to deteriorate service levels*" (para. 7.109, emphasis added)

2.5 The examples above are described as no more than mere possibilities (essentially a Phase 1 test), which falls a long way short of the likelihood that the circumstances described will arise as required to reach an SLC conclusion in Phase 2. Whilst provisional, these statements represent the conclusions reached by the CMA after many months of analysis. As such, they highlight the weak evidential basis for the provisional SLC finding. The wording in the final report cannot simply be amended in an attempt to meet the requisite legal test (i.e. more likely than not/balance of probabilities test). Such a change would require additional corroborative evidence to

[2] Merger Assessment Guidelines, September 2010, CC2/OFT 1254, para. 4.1.3.

support strengthening the conclusions reached by the CMA; if not, semantics would replace the need for evidence.

ii. Prices do not need to be at pre-Merger level to defeat an SLC

2.6 It is incorrect as a matter of law to say – as the PFs do at para. 8.3(c) – that prices need to be at pre-Merger levels to defeat an SLC. The notion of an SLC, based on the clear and unambiguous wording of the Enterprise Act ("**Act**"), means that there can be a loss of competition which is not substantial and therefore 'acceptable', which compels the approval of the Merger.

2.7 If, hypothetically, a new entrant (or expanding competitor) offered prices that were just above pre-Merger prices[3], that would mean that the SLC would not be substantial. The test is whether any loss of competition is "substantial". Therefore, the degree of any loss of competition (which the PFs do not address) is central to the analysis[4]. The CMA is not entitled – as the PFs do at paragraph 8.3(c) – to presume that any effect on competition would be significant.

iii. The threat of entry has not been considered and would itself prevent an SLC

2.8 The threat of entry and expansion can in fact prevent a price increase, even if entry is alleged to be unprofitable at current prices. The PFs state that "*[e]ntry is unlikely to return prices to the same level as in the counterfactual (in most cases pre-Merger prices) if the entrant would not find pre-Merger prices profitable*"[5]. This misses the point about the role of entry as a constraint.

2.9 The PFs do not consider the fact that (if the CMA's hypothesis were correct) a temporarily higher price could allow an entrant to enter even on the small scale required to cover its initial entry cost (which, in the present case, would be only **[✂]** sites even at current prices). Following such entry, if prices return to their current (pre-entry) level the entrant would already have covered its initial costs and would not be at a disadvantage compared to Washstation (i.e. the constraint to be replaced). This argument holds all the more in the case of established players (such as Hughes Armstrong and Goodman Sparks). In short, the threat of entry and expansion can still prevent a price increase (i.e. reduction in commissions), even if entry is alleged to be unprofitable at current prices. It should also be noted that lower commissions to HE vend share customers would in itself provide a stimulus for competitors to expand.

2.10 The conclusions on the likelihood and sufficiency of entry based on whether it would be profitable are also inconsistent. If Washstation was profitable (see, e.g., Figure 10 and para. 5.29 of the PFs) then there is no basis to conclude that entry or expansion by a third party might not occur because an entrant might "*not find pre-Merger prices profitable*".

2.11 As stated in the CMA's guidance, the question of whether a lessening of competition is substantial requires "*a significant adverse effect on rivalry over time*" (emphasis added). The PFs have failed to take account of this relevant dynamic consideration and, moreover, reach provisional conclusions which are inconsistent with the evidence relied on. Consequently, the analysis in the PFs around the profitability of

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3 In the context of this case, a higher price means a lower commission paid to the customer.

4 In any event, it is important to note that, as set out below in para. 3.9, there is no evidence that the Merger has affected prices in any way. The PFs do not allege that prices have risen since the Merger.

5 PFs, paragraph 8.3(c).

entry/expansion, is fundamentally flawed and does not meet the legal test to conclude that an SLC might arise.

iv. There is no loss of absolute competition

2.12 While it may be correct that when JLA lost a contract, the majority of lost value went to Washstation, lost contracts in absolute terms accounted for only a very small share of contracts that JLA retained, lost or won.

2.13 This highlights the difference between relative competition (it is accepted that Washstation was JLA's closest rival) and absolute competition – contracts won from JLA by Washstation accounted for only a small percentage (i.e. c. **[✂]**) of contract value won, retained or lost by JLA in 2016[6]. This further undermines the conclusion in the PFs that any loss of competition is likely to be substantial.

2.14 The failure to distinguish between these two concepts is captured most clearly in para. 7.40 of the PFs which states: "*JLA noted that only a very small share of contracts were lost to Washstation (around* **[✂]** *of all contracts that JLA won, retained or lost). However, as few contracts were lost by JLA to other providers, we cannot place particular weight on this figure which relates to all JLA contracts as it is not indicative of the relative strength of the competitive constraint that each of the remaining competitors imposed on JLA pre-Merger*" (emphasis added).

2.15 In summary, the PFs err by focusing on relative levels of competition between the Parties but not properly assessing the absolute amount of competition removed by the Merger. In the present case, the loss of absolute competition is minimal. As such, any lessening of competition cannot be substantial.

v. Limited competition between the Parties

2.16 The PFs assert that competition is essentially only for new contracts. The PFs claim that the most relevant market shares are those for "new" contracts (i.e. excluding retained and rolled-over contracts), as set out in Figure 13 of the PFs. Specifically, the PFs state that "*many contracts are extended or rolled over without the customer considering alternative providers*" (emphasis added, para. 7.26) such that "*in the absence of evidence that competition occurred for contracts marked as new by JLA we consider Figure 13 provides a better representation of the competitive conditions in the market*" (emphasis added, para. 7.27).

2.17 In other words the PFs consider that the Figure 14 (showing shares based on all new opportunities, i.e. both new and renewed contracts) is not as good an indicator of competition as Figure 13 which shows shares based on only new contracts).

2.18 If, as the PFs suggest, there was no competition for renewed contracts, this substantially reduces the scope for competition between JLA and Washstation (and others). The PFs therefore imply that competition would be limited only to "new" contracts, i.e. customers/sites that had never previously had a managed laundry vend share contract. Based on data for 2015 and 2016, such contracts account for *less than* **[✂]** of JLA's total vend share revenues. Moreover, even in the case of new contracts, JLA and Washstation were not always in competition with each other. For example,

6 PFs, paragraph 7.37(c).

the customer survey provides evidence that the parties were not always competing for the same tenders[7].

2.19 On this basis any loss of competition cannot by definition be substantial as most of both JLA and Washstation's existing contracts were, on the CMA's hypothesis, not contestable. In other words, the contracts that the PFs state are those that provide "*a better representation of the competitive conditions in the market*" are small in number – for both JLA and Washstation – such that the Merger cannot give rise to a substantial lessening of competition. This contradiction in the PFs undermines the basis of the conclusion on the SLC[8].

2.20 In line with this lack of any substantial lessening of competition, the majority of respondents (69%) to the CMA's survey did not indicate concern with the Merger (see further para. 3.23 below).

3. Assessment of Evidence

3.1 The body of evidence, taken in the round, does not support the conclusion that an SLC can be expected to arise in this case[9]. In fact, there are a number of material deficiencies in the way evidence has been treated in the PFs.

3.2 Helpful evidence has been ignored or dismissed even when, on any objective basis, it is far more compelling than the, often unsubstantiated, evidence adverse to JLA's case which is favoured[10]. In particular, more weight has been given to unsubstantiated comments and supposition than to the hard evidence that has been provided by JLA and third parties.

3.3 A list of non-exhaustive examples is provided below. JLA notes that these examples relate to areas which are central to the CMA's provisional finding of an SLC. Given the importance of these issues and the nature of the Phase 2 investigation, the CMA is under a heightened duty to consider and give proper weight to the evidence which it has assembled in order to ensure that it has an adequate factual basis for its decision[11]. The CMA has failed to discharge that duty.

3.4 Moreover, as the Act provides for a separate decision-maker in Phase 2, it is incumbent on the CMA to ensure that the evidence gathered in Phase 1 is reconsidered, with a fresh pair of eyes, in light of the different (higher) legal / evidential standard. It is apparent from the PFs that the approach taken to the weighting of evidence by the Phase 1 case team has been largely adopted in the PFs. This likely

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7 See PFs, paragraph 7.50 (a) *"There was no other provider bidding in 3 of the 6 instances JLA won.*" See also PFs, footnote 170 *"Moreover, Washstation did not bid in the tender in which Armstrong was ranked second after JLA.*"

8 Furthermore, this supports the contention in the response to the Remedies Notice that if the CMA were to find an SLC, any remedy would be disproportionate.

9 Section 31(b), Enterprise Act 2002.

10 As a matter or basic, fair public decision-making, the CMA is under a duty not to ignore a relevant consideration or relevant evidence or leave a relevant factor unclear. See *Interbrew S.A. and Interbrew UK Holdings Ltd v. Competition Commission and others* [2001] EWHC Admin 367 and *Flynn Pharma Limited and others v CMA* [2018] CAT 11, paras. 365, 391.

11 *Unichem Limited v OFT* [2005] CAT 8, para. 278.

reflects the institutional bias that arises as a result of the fact that many of the Phase 1 case team are part of the case team in Phase 2.

i. More weight has been given to Alistair Copley's comments than the evidence supports

3.5 Alistair Copley's comments have been accepted without critique throughout the PFs, even in situation where it is clear that the information is incorrect. This is an unfair and unbalanced approach to evidence. For instance, Alistair Copley consistently exaggerated the number of Washstation engineers in pitches, while he only employed six engineers prior to the Merger and never (to JLA's knowledge) called upon subcontractors[12]. He also told the CMA that "*Washstation never lost a contract*"[13], although it is clear from JLA's and third party submissions that Washstation did lose contracts (as any supplier would).

3.6 Alistair Copley also claimed that he was developing a Washstation app prior to the Merger, of which there is no evidence (which the CMA will otherwise have seen, having been provided with all Alistair Copley's e-mails in JLA's possession). JLA also notes that the assertion that Washstation was developing an app is not supported by any information provided to the CMA following apparent extensive interaction with him during the Phase 2 investigation. The PFs do not state (even on a redacted basis) with which third party the alleged app was being developed.

3.7 None of these points, where the evidence clearly contradicts information provided by Alistair Copley, are addressed in the PFs. This is particularly concerning as there is clear and consistent case law, including from the Competition Appeal Tribunal ("**CAT**"), that evidence which is asserted but which is otherwise unevidenced should be approached with caution. In such circumstances, the CAT has been clear that the CMA should seek "*corroboration from other evidence wherever possible*"[14].

3.8 Against this background, when facts are genuinely in dispute (e.g. who approached whom in the context of the Merger), there is no basis to accept Alistair Copley's version of events compared to JLA's. Indeed, given that one would expect, if his claims were true, contemporaneous documents to exist supporting his claims (e.g., on the app), the absence of any such documents is an eloquent silence, ignored by the CMA. Yet, each time, the CMA appears to accept Alistair Copley's comments as correct without any comment, critical analysis or corroborating evidence. This is a fatal flaw in the PFs and the conclusions drawn. It is wrong in principle to approach evidential analysis on this basis, not least because the CMA bears the burden of proving the SLC in Phase 2.

ii. The CMA disregards the empirical evidence relating to KPIs

3.9 The CMA finds no fault in the analysis presented by RBB to demonstrate that commission rates have not fallen post-Merger. In fact, the CMA's own econometric analysis confirms JLA's analysis that there has been no deterioration of commission levels post-Merger. However, the PFs present two (weak) counter-arguments. The first is as follows:

"evidence on the level of commissions … and service level KPI … since the completion of the Merger cannot be given significant weight, because the merged entity may have

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12 In due diligence, and in Washstation's (incomplete) records acquired on completion of the Merger, no evidence at all exists that Washstation had [✂]. Details of the claims made in this regards were provided to the CMA in both Phase 1 and Phase 2, yet have been systematically dismissed or ignored.

13 PFs, para. 7.19(b).

14 *Flynn Pharma Limited and others v. CMA* [2018] CAT 11, para. 85.

avoided decreasing commission rates or worsening its service offer in anticipation of a potential CMA's investigation" (para. 7.110 (a), emphasis added)

3.10 The PFs criticise JLA's econometric analysis on the basis that it "*does not account for a number of other parameters of the competitive offer which could have changed such as service quality*" (para. 7.87(b)). In that regard, the PFs reject JLA's submissions that service quality has not been affected by the Merger, stating as the second counter-argument that:

"*A worsening of the services parameters will not necessarily lead to loss of income generated by JLA's vend share agreements or a breach of contract. In fact, service levels can be degraded without resulting in a machine not being operational. Even if a machine is out of service, this would generally only affect JLA's revenue if there are no other operational JLA machines available in the laundry room that the students could use instead (either immediately or once the machine becomes available)*" (para. 7.110(b)).

3.11 The first argument (in para. 7.110(a)) is baseless, purely speculative, and self-serving. Were it true, the CMA would have found some written evidence in the very large number of e-mails submitted in the context of the CMA's document requests (in Phase 1 and Phase 2). It should go without saying that the CMA cannot in Phase 2 dismiss hard evidence provided by the Parties on the basis of no evidence of its own. Moreover, the dataset covers a relatively long period from January 2016 to December 2017 and there is absolutely no basis, even on the CMA's baseless speculation, to think that the earlier period of the dataset could have been affected in any possible way.

3.12 In addition, were the hypothesis correct, JLA would have *volunteered* this analysis to the CMA (i.e. to show no worsening of price or service quality). In fact, it was the CMA which requested this analysis following the Issues Paper in Phase 1, which can only logically mean that the presence or absence of commission reductions was considered material to its analysis. The CMA cannot then turn around and ignore the absence of such evidence The fact that the PFs even allege this as a possibility highlights the weakness of the analysis (and the confirmation bias – see further below).

3.13 The second argument in the PFs (in para. 7.110(b)) about degrading service quality contains inherent weaknesses, as follows:

3.14 The CMA's survey overwhelmingly supports the view that service quality has *not* fallen since the Merger[15].

3.15 The PFs are incorrect to assert – once again, without supporting evidence – that an incentive exists not to service a machine[16] – a clearly counterintuitive notion to begin with (since a broken/defective machine cannot make money or makes less money for both the supplier and the customer). If that hypothesis were correct, i.e. that a broken machine would have no impact on revenue because diverted demand would be accommodated by the other machines on site, there would be no reason to incur the cost of putting the extra machine into a site in the first place. As the documents show,

[15] CMA Survey, Table 27 (Changes to service provision). 87% of JLA's customers (excluding "don't knows") and 90% of all Washstation's customers found that the quality of service had not changed or had improved.

[16] PFs, para. 7.110.

and as explained to the CMA, the number of machines is primarily determined by the number of students[17].

3.16 If a machine was not necessary to meet the demands of students, it would simply not be installed in the first place. In addition, the PFs ignore the fact that – as stated by JLA – a broken machine will generate customer and end-user complaints and would be likely to adversely affect the incumbent supplier's chances of winning the contract on renewal[18]. This means that any supplier has every incentive to make sure machines are always in working order and to fix them as soon as reasonably possible when they break down.

3.17 Service level agreements exist for existing contracts. The CMA accepts that commission rates are pre-determined in this case. The same is true of levels of service due to service level agreements. Nonetheless, the CMA asserts that "*the service level offered [by the] Parties before the Merger might have been above the contracted level*" (para. 7.109, emphasis added). The PFs in essence assert an extreme (and hypothetical) scenario in which pre-Merger service levels substantially exceeded the contracted minimum level and post-Merger service levels would drop to that minimum. However, the PFs do not provide any evidence to suggest that service levels substantially exceed minimum levels in practice. This is another theory of harm predicated on unsubstantiated supposition.

3.18 It should also be noted that Washstation did not record service quality results making a comparison of pre- and post-Merger service levels for Washstation customers impossible. However, JLA provided evidence of service levels for JLA contracts from May 2016 onwards (and for Washstation contracts from the date on which JLA began to record actual service levels) which showed: (i) no deterioration in service quality for JLA contracts pre- and post-Merger (which would be expected if there were an SLC); or (ii) any variation between service levels for JLA and Washstation contracts from the point at which data to enable comparisons to be available. This evidence further corroborates the strong support from the CMA's survey that service quality did not fall post-Merger. The comments in the PFs on this point are therefore unsubstantiated, based only on supposition and not supported by any evidence.

3.19 Furthermore, certain comments on service quality in the PFs are based on a false premise. For example, the PFs state that "*[w]e understand from the HSM that JLA was looking to honour the contractual obligations (e.g. repair times) by Washstation, but note that JLA has not fully done so*" (para. 7.87(b)). This implies that such service level obligations were met by Washstation. However, that was not the case. Certain service level obligations in Washstation contracts were impossible to meet (e.g. a 4 hour repair commitment when the nearest Washstation engineer was based at least 6 hours away). Yet the PFs erroneously assume these service level obligations were met by Washstation but that implication is not based on any evidence. Therefore the fact that JLA has not fully met those obligations is because they are incapable of being met and the position today is no worse than pre-Merger (as evidenced by the findings in the survey)[19]. The CMA conspicuously fails to consider whether the fact that

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[17] See, for instance, the [✂] tender (previously submitted as Annex 19.2 to the response to the 16 April 2018 S.109 Request), which provides the ideal student to machine ratio.

[18] See, for instance, Response to Phase 1 Decision dated 4 May 2018, para. 5.6.

[19] CMA Survey, Table 27. In addition, in terms of weighing the evidence as required (see para. 3.4 and 3.17 above), the fact that service levels promised by Washstation were not capable of being fulfilled is corroborated by the evidence provided to the CMA in Phase 1 and again in Phase 2 that Washstation proposals identified access to 30+ engineers which Washstation simply did not have, and by the HSM who referred to instances of where "*Washstation had over-promised on the technical capabilities of its machine availability monitoring and payment systems*" (PFs, footnote 87).

Washstation did not even record actual service levels may be consistent with Washstation being a relatively weak competitive constraint on JLA.

iii. The CMA's approach to the survey is inconsistent

3.20 The PFs state that they considered the "*broad patterns of responses and adopted a qualitative rather than quantitative approach to the results*" (emphasis added)[20]. However, the PFs quote quantitative results from the survey when this supports its views[21] but ignores, for example, the "*broad pattern*" of most customers (and 90% of Washstation's customers) stating they would be "*fairly likely*" or "*very likely*" to consider a supplier new to the HE sector[22].

3.21 The PFs also ignore the "*broad findings*" (para. 7.58) from the survey which show that the vast majority of Washstation's HE customers have perceived no changes in service provision since the acquisition (for example, 9 out of the 10 surveyed by the CMA)[23].

3.22 The PFs also argue that customer requirements of experience of providing laundry services are sufficient to form a barrier to entry. However, this assertion relies on customers' responses to the survey when they were prompted with this answer. When not prompted (in which case the CMA itself states responses should carry more weight than prompted responses), only 3 out of 59 respondents identified this as *being* an important factor, suggesting that this is not a key reason for choosing one provider over another and hence by no means a barrier that is insurmountable[24].

3.23 Similarly, the PFs ignore an important survey result that more than twice the number of respondents stated that the impact of the Merger was "good" or "neutral" (69%), compared to those who stated it was "bad" (31%)[25]. On any measure, these broad findings, which go to the very heart of the necessary assessment in Phase 2, cannot be said to have resulted in a substantial lessening of competition. Furthermore, if the PFs can ignore this "*broad finding*" then no weight should be given to the survey at all. However, this is another example of inconsistent treatment and selective use of evidence, which undermines the whole basis of the PFs.

iv. The CMA dismisses the stated intentions of competitors to expand

3.24 Commercial laundry suppliers are expanding in the HE segment. This is evident from third party summaries (e.g. Hughes, Goodman Sparks, Forbes Rental) and publicly available information (e.g., Laundry Equipment Direct, a recent entrant)[26]. Yet, the

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20 PFs, para. 3.20.

21 For example, para. 6.15: "*only 10 out of the 50 respondents said that they were likely to consider a provider which does not offer vend share agreement*" (emphasis added); para. 7.89-7.91: only six out of 58 Washstation and JLA customers found that the service had deteriorated, but each adverse comment is quoted; and para. 7.107: "*13 out of 59 respondents […] said that the Merger will have a negative impact*" and a number of specific concerns are listed, whilst none of the comments of those who said that the Merger has had a positive impact are quoted.

22 CMA Survey, Table 24. 50 out of 56 respondents (excluding three "don't know") said service levels had not decreased).

23 CMA Survey, Table 27.

24 Customer Survey, Table 11. In support of the view that unprompted responses should carry more weight when assessing the importance of various factors, the CMA concluded in its Market Definition Working Paper that: *"Vend share agreements ... did not get any spontaneous mentions when respondents were asked to name the most important factors when choosing their laundry provider. This suggests that they are not a key reason for choosing one provider over another."* See Market Definition Working Paper, para. 23.

25 CMA Survey, Table 26 (Impact of acquisition). Excluding "don't knows"), 29 out of 42 respondents said "good" or "neutral"; 13 said "bad".

26 Please see, notably, JLA's response to the Issues Statement, dated 25 May 2018.

CMA considers itself better placed than the market participants themselves to assess future opportunities and expansion plans which they have identified.

3.25 Specifically in relation to Hughes/Armstrong, the CMA has given greater weight to the comments made by Armstrong compared to the ones provided by Hughes. Armstrong has said that "*it saw the acquisition of Washstation by JLA as an opportunity*"[27], but identified difficulties it might encounter when expanding into the HE sector. Meanwhile, Hughes, "*seemed more optimistic*"[28] and told the CMA that it intends to expand Armstrong's HE business. Despite this, the CMA claims that "*it is difficult to have confidence that Hughes' (and Armstrong's) aspirations […] will be realised in the foreseeable future*" in the absence of a "*concrete plan*". In this respect, the PFs again take an inconsistent approach to the evidence, as Washstation itself did not have a "*concrete plan*" (and certainly not one that was written down as the PFs appear to require from Hughes). There is no reason for the CMA to give greater weight to Armstrong's views, in particular as Hughes will determine Armstrong's strategy going forward and has already demonstrated an increased focus on the HE segment.

3.26 The evidence is more than clear in this regard and comes from the horse's mouth. There can be few cases in which the leading competitor to the merging parties provides clear evidence to the CMA about its expansion plans along the following lines: "*Hughes told us it has a 5-year 'plan' to expand in the higher education sector (although no detailed business and financial plan has been prepared to that effect). Hughes/Armstrong is planning on bidding for every higher education opportunity it is able to handle geographically, including private higher education customers and large universities*"[29] and also identifying "*higher education (universities/colleges) as one of the key areas for growth in the Armstrong business*" as part of its rationale for acquiring Armstrong[30].

3.27 There is also very recent new evidence of expansion by Hughes, which has just opened a new branch in Glasgow following another new branch in Huntingdon one month ago.[31] Whilst unclear as to whether this expansion is HE specific it confirms that Hughes is serious about expansion, and gives further weight to its stated intention to expand following its acquisition of Armstrong. Its website has also been recently updated and states "*We have also acquired a substantial respected company in the commercial laundry sector called Armstrong with a long and proud history, of a scale that means our commercial team will move into that company … Uniting two great teams means we are creating a fantastic business bristling with enthusiasm, knowledge and wherewithal. Over the months and years our commercial offering will be developed with more stock and better systems benefiting all our customers*"[32]. These are statements that further evidence a clear focus on expansion and growth. Although there was no basis for the PFs to dismiss Hughes' previous comments to the CMA about its expansion plans in the HE sector, this new evidence requires a fresh assessment. This new evidence, together with Hughes' previous statements about the expansion of its HE offering, mean that the conclusions in the PFs concerning the likely expansion by Hughes must be reversed.

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27 Summary of hearing with Armstrong, para. 12.

28 PFs, para. 8.89.

29 PFs, para. 8.85.

30 PFs, para. 8.87.

31 See Annex B, LinkedIn updates posted two days ago (29 August 2018) and one month ago.

32 See https://www.hughes.co.uk/blog/introducing-hughes-pro-professional-laundry-equipment/.

v. The PFs grossly overstate the difficulty of entry and expansion

3.28 The PFs state that there are significant barriers to entry and expansion for a number of reasons[33]. However, these reasons are speculative and any barriers to entry could be overcome by a dedicated, proactive new entrant. The conclusions in the PFs on barriers to entry are as follows:

- **The specific requirements of HE customers.** The PFs state: "*a new provider may operate under a potential cost disadvantage by purchasing machines from a distributor (instead of an OEM) or require time to reach sufficient scale to gain its own distributorship. The cumulative cost of offering a cashless payment system, online services and the refurbishment services required by many customers appears to limit entry by firms who do not have suitable financial backing, especially when factoring in the risk associated with the vend share agreement model*" (emphases added)[34].

- **The importance customers attribute to reputation and/or experience in the supply of managed laundry services in the HE sector.** The PFs state: *"Overall, the evidence appears to indicate that an established reputation as a supplier of laundry services is an important factor, while experience in the supply [of] managed laundry services to higher education customers appears to be a secondary factor, but still relevant to some customers*" (emphases added)[35].

- **The lack of opportunity to win customers.** The PFs state: "*the above factors could detract from the transparency of opportunities... It could also increase both the costs of entry and the likelihood of successful contract wins…*" (emphases added)[36].

- **Capacity constraints of some potential providers.** The PFs state: "*Some third parties also identified the ability to install new machines within the deadline required by the higher education customers as a constraint*" (emphasis added)[37].

3.29 JLA strongly disagrees that the preceding factors amount to barriers to entry or expansion. It also considers several claims to be based on an incorrect interpretation of the evidence. For example, taking the above points in turn:

3.30 There is no dispute about the magnitude of the costs of new entry. JLA provided estimates to the CMA of initial set up costs in Year 1 of £**[✂]** and for Year 2 and onwards of £**[✂]**. The PFs note that "*[a] comparison to the relevant costs in the Washstation financial model from 2012 indicates that JLA's estimates are reasonable*"[38]. On any basis these costs are low. If entry in these circumstances is not found to be likely or sufficient then it is hard to imagine any situation where entry could succeed.

3.31 However, the PFs accept, and do not dispute, the comment from Maxwell Adams that a barrier to entry is that in vend share "*the provider will not get any money until one month after the contract has started and the return on the investment takes a long time, around two years if not more*" (emphases added)[39]. These factors support the

[33] PFs, para. 8.18.

[34] PFs, para. 8.55.

[35] PFs, para. 8.46.

[36] PFs, para. 8.39.

[37] PFs, para. 8.49.

[38] PFs, para. 8.51.

[39] PFs, para. 8.53, footnote 252. In any event, in its fixed rental business, it seems unlikely that Maxwell Adams would be paid on, or prior to delivery of a machine. Rather, as is the case with most businesses, payment is

argument that barriers to entry/expansion are low, yet the CMA accepts them as evidence of the opposite.

3.32 Further, the PFs state that online services and apps may be difficult for some providers to supply[40]. The CMA's finding is based on the results of a University of Nottingham tender in which Armstrong scored lower than JLA on this point. The CMA does not indicate how much lower, which is clearly relevant to its argument and therefore has not provided JLA with an opportunity to properly comment on this statement. In reaching this conclusion, the CMA completely disregards the fact that JLA's app was developed by Greenwald, which owns the system and all the related IP. The system is not proprietary and JLA no longer has any exclusive rights. As set out in JLA's response to the Remedies Notice, Greenwald advertises its system, which is available to any third party and there are a number of equivalent applications in the market offered by various suppliers[41]. Online services and apps can therefore hardly be viewed as a barrier to entry or expansion.

3.33 The PFs argue that customer requirements of experience of providing laundry services are sufficient to form a barrier to entry[42]. However, this assertion relies on customers' responses to the survey when they were *prompted* with this answer. As noted in para. 3.22 above when not prompted (which the CMA itself states should carry more weight than prompted responses), only 3 out of 59 respondents identified this as being an important factor, suggesting that this is not a key reason for choosing one provider over another and hence by no means a barrier that is insurmountable.

3.34 If a customer thought that suppliers were not aware that it was looking for a new supplier, it would be straightforward (and rational) for the customer to contact Hughes Armstrong, Goodman Sparks or any other providers capable of offering managed laundry services to HE customers. Notwithstanding that these are business customers (rather than consumers), the CMA seems to presume that customers would not do this.

3.35 Furthermore, there is more "transparency of opportunity" in this market than in many others. Yet the CMA suggests that opportunities are difficult to identify, in particular so far as the private accommodation providers are concerned as new opportunities are not publicly tendered. However, private accommodation providers are readily identifiable, be it through third party reports such as Knight Frank and Cushman and Wakefield or tracking planning applications, which can easily be done online[43]. The search costs are low and could hardly give rise to barriers to entry and expansion.[44]

3.36 The CMA asserts that the lead times required by machine suppliers would prevent providers from meeting the deadlines between contract signing and installation set out in tenders[45]. However, even if this were correct (which is denied), customers who were concerned that JLA would not face enough competition could simply hold tenders a few weeks earlier to allow more time between contract signing and installation. Further

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likely to be due within a short period after delivery (e.g. 28 days or possibly longer depending on the credit terms agreed with the customer).

40 PFs, para. 8.35, footnote 238.

41 See JLA's Response to the Remedies Notice, para. 2.34.

42 PFs, para. 8.46.

43 Please notably see JLA's response to Question 9 of the Market and Financial Questionnaire.

44 See, for example, Annex A, which sets out the largest private student accommodation providers in the market; these lists are extracted from a 2017 Report on Student Accommodation by Cushman & Wakefield and a Savills Report on Student Housing in the UK, these were previously submitted to the CMA as annexes 3.3 and 3.5 respectively to the JLA response to the section 109 request dated 16 April 2018.

45 PFs, para. 8.26.

and in any event, the average time between contract signing and installation for JLA's installations in 2018 is **[✂]** days – almost **[✂]** weeks. Over half of its contracts were installed more than **[✂]** days after the contract was signed (almost **[✂]** weeks). There are therefore already ample opportunities for a new entrant who requires the 6-7 week lead time cited by the CMA[46]. The capacity constraint concern is therefore refuted by the data.

3.37 Furthermore, as a large majority of installations take place during the summer months, suppliers have good visibility as to when orders should be placed.

3.38 In any event, irrespective of these issues, the ease of entry can be put in perspective by considering one point about which there is no dispute. The PFs do not dispute JLA's assessment that a new entrant would need to win only **[✂]** *sites* (not contracts) in order to recover its initial entry costs, which include those additional costs that would be relevant to a new entrant offering a similar service to Washstation[47]. The PFs accept that the market is growing, in particular in the private sector[48] so there is no reason to believe this is not achievable.

3.39 As the CMA itself admits, any difficulties associated with entry would likely be overcome by *"a proactive and determined provider, with the necessary financial backing"*[49]. The costs involved with doing so at current price levels are likely to be only around £**[✂]** in the first year (which is not disputed by the CMA)[50]. Securing financial backing of this magnitude should not be considered difficult, especially in comparison to the levels of financing required in other industries. Further, £**[✂]** amounts to just over **[✂]** of Washstation's 2016 turnover[51]. It is hard to justify such a small one-off expenditure as a barrier to entry. In addition, third parties have stated their intention to expand in the provision of managed laundry services to HE customers, which the PFs dismiss. For example, in dismissing the likelihood of entry/expansion the PFs state that "*although Hughes indicated that it proposes to expand Armstrong's higher education business, we understand that Hughes does not have a detailed investment plan for expansion*" (para. 8.96). However, in light of such low barriers to entry and growth, there is no basis for the CMA to require a detailed investment plan to corroborate Hughes' stated intention. Rather than – as JLA submits – this is evidence, on the balance of probabilities, of the likelihood of expansion by a well-resourced, pro-active and new owner of Armstrong[52]. See also para. 3.27 above for further details of new evidence of Hughes' recent expansion.

3.40 An important piece of information arising in the PFs is that the CMA acknowledges that part of the increase in competition from Hughes-Armstrong is merger specific. In other words, although it is likely that Hughes would have acquired Armstrong in the counterfactual, the PFs indicate that the Merger itself might be a spur to Hughes/Armstrong competing more aggressively: "*We think that, even if Hughes' acquisition of Armstrong could have occurred absent the Merger, the Merger may have*

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46 PFs, para. 8.26.

47 PFs, para. 8.52. Para. 8.51 concludes that JLA's estimates are reasonable. The PFs also state that additional costs, for example marketing, may be significant, although does not provide any evidence of how significant these may be (PFs, para. 8.54). However, it should be noted that JLA's worked example of entry costs does include tender preparation costs as a fixed cost. See "Other operating costs" in Figure 16 of the PFs.

48 PFs, paras. 3.35 and 3.36.

49 PFs, para. 8.57.

50 £[✂] fixed costs and £[✂] variable costs multiplied by [✂] sites. See PFs, Figures 16 and 17.

51 This was £[✂] million. See PFs, para. 2.22.

52 The latest annual report and accounts of Hughes Electrical show gross profit of £33.8 million for the year ended 31 March 2017. Hughes clearly has the resources to make the small investment needed to achieve its stated ambitions.

prompted or positively affected Hughes' plans to expand in the higher education sector. This is supported by Armstrong's statement to us that it saw the Merger as an opportunity to grow in the higher education sector. Therefore, our provisional view is that Hughes' expansion plans in relation to Armstrong were likely impacted by the Merger, although we are not in a position to determine exactly to what extent" (para. 5.40, emphasis added). Even if it were accepted that Hughes has "*no concrete plans*", its stated aims to expand in the HE sector will exert pressure on JLA to keep prices and service levels (which the evidence shows have not deteriorated) at competitive levels. At the very least, this merger-specific increase in competition from a rival must be considered as against any alleged reduction in competition.

vi. Relevant customer benefits

3.41 It is accepted that, pre-Merger, Washstation was delaying paying commissions to some customers, and that the total amount of unpaid commissions at the date of the Merger was significant. The PFs note that "*[t]he HSM has told us that there has been some evidence of customer dissatisfaction caused by the late payment of commission and service underperformance*" which led to customer losses (para. 5.34). The PFs do not dispute that outstanding commissions due to customers at the time of the Merger have been paid and that all commissions are now paid when due.

3.42 The Merger Assessment Guidelines ("**MAGs**") state that "*[t]he Act also enables efficiencies to be taken into account in the form of relevant customer benefits. These benefits are … not limited to efficiencies affecting rivalry. In addition, the statutory definition enables the Authorities to take into account … benefits to future customers*"[53]. However, the PFs do not place sufficient weight on the evidence of these customer benefits (which need to be seen in the context that before these issues were rectified they had led to customer dissatisfaction which led to some customer losses). That would have continued in the counterfactual (which the PFs state would have been the pre-Merger situation and therefore implies on-going late commission payments).

3.43 The payment of outstanding commissions and the payment of commissions when due is dismissed in the PFs, yet is quite plainly merger specific and timely. The evidence of this is clear yet, despite the absence of any evidence to the contrary, the PFs place "*limited weight on JLA's claims on efficiencies*" (para. 8.145) and the cost savings (paras. 8.141 and 8.142) and completely ignores the wider question of RCBs[54] (which, separately, is also relevant to the assessment of potential remedies).

4. Process and Procedure

4.1 The arguments set out in Sections 2 and 3 above are themselves sufficient to conclude that the PFs are flawed and that, on the balance of probabilities, the Merger does not give rise to an SLC.

4.2 In addition, the Phase 2 process has been undermined by serious procedural errors. In particular, the failure of the CMA to properly assess the evidence in a manner consistent with the Phase 2 legal standard appears to reflect an insufficient level of separation between Phase 1 and Phase 2 personnel and the central roles played by certain case team members in both Phase 1 and Phase 2. This has resulted in an

53 MAGs, para. 5.7.3.

54 In fact, footnote 287 of the PFs refer to para. 5.7.2 of the MAGs but do not address para. 5.7.3 of the MAGs which state "*[t]he Act also enables efficiencies to be taken into account in the form of relevant customer benefits*" (emphasis added).

apparent bias by the Phase 2 decision-maker in favour of confirming the Phase 1 reference decision (referred to below as "confirmation bias").

4.3 The general separation of Phase 1 and Phase 2 merger review is intended to offer institutional safeguards that confirmation bias is avoided or minimised. This requires in particular that there is separation of personnel between the two phases so as to ensure a 'fresh pair of eyes'. This did not occur in this case, as three core members of the case team transferred from Phase 1 to Phase 2. This is particularly relevant in the current case where none of the panel members had any prior experience of Phase 2 investigations.

4.4 To guard against the risk of confirmation bias, whilst also benefitting from the knowledge gained in Phase 1, the CMA's merger procedures are described by the CMA itself as "*allowing for a degree of* staff *transfer from phase 1 to phase 2*"[55]. However, transferring the three core Phase 1 staff to Phase 2 far exceeds normal practice and in any case resulted in an unacceptable risk of confirmation bias in the present case.

4.5 Whether or not there was actual confirmation bias is irrelevant. The fact that there was the risk of such bias is itself sufficient to raise concerns over the procedure.

4.6 Given the clear risk of bias in these circumstances, the CMA is under a heightened duty to demonstrate that it has reviewed the evidence fairly and robustly. The CMA has failed to do so, as demonstrated by the non-exhaustive examples in Sections 2 and 3 of this submission. Rather, JLA submits that the mis-use, mis-interpretation and/or mis-representation of evidence as described above demonstrates the real likelihood that the process has been characterised by a degree of confirmation bias. Whilst in no way deliberate or conscious, this has resulted in evidence being ignored or misinterpreted and ultimately adverse PFs.

4.7 This has lead to the dismissal of important evidence and undue weight has been given to other evidence, as described in Sections 2 and 3 above.

4.8 There is also an inconsistent and unjustified approach to the evidence from third party hearings and the survey. As noted above (para. 3.20), for the survey, the PFs consider the "*broad patterns of responses and adopted a qualitative rather than quantitative approach to the results*" (emphasis added)[56], but in practice the PFs quote quantitative results from the survey when this supports its views but ignores them when it does not (see footnote 20). Meanwhile, it has in several cases based entire arguments on an assertion made by one third party in a hearing. For example, the comment (accepted without any critical analysis in the PFs) made by Maxwell Adam[57]. Such unverified snippets are no evidence, still less dispositive evidence.

4.9 Furthermore, JLA not been provided with details of all the evidence on which the PFs seek to rely. In this respect, the PFs refer to comments from third parties on which JLA has not had an opportunity to comment. For example, para. 7.65(e) and footnote 183 refer to a hearing with Brewer and Bunny yet a summary has not been provided

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55 *Options to refine the UK competition regime: The CMA's response to the government's consultation*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/532140/cma-response-bis-consultation.pdf, para. 2.11.

56 PFs, para. 3.20.

57 Summary of hearing with Maxwell Adam, para. 6. See also para. 3.31 above.

to JLA. Similarly, para. 6.40 and footnote 125 imply that a discussion was held with Laundry365 yet again no details have been provided to JLA.

4.10 These procedural defects undermine the basis on which the PFs have been prepared, and call into question the conclusions therein. The starting point in any assessment of a relevant merger situation is that the law presumes a merger is not anti-competitive unless a relevant SLC is demonstrated to the requisite legal (including evidential) standard. The absence of a mandatory notification system for mergers in the UK reinforces this point. As such, the procedural deficiencies mean that the basis of the SLC conclusion in the PFs is flawed and the presumption that the Merger is not anti-competitive must prevail. Therefore, in addition to the reasons set out in Sections 2 and 3 above, the procedural issues mean that the PFs cannot stand and should be reversed.

5. Conclusion

5.1 The PFs do not meet the legal test to find a substantial lessening of competition has occurred (or is likely to occur).

5.2 In particular, evidence has been ignored or mis-construed and greater weight given to unsubstantiated third party comment than to empirical evidence. In this case there is clear evidence (not always observable in merger cases) that entry and expansion is possible and likely. That evidence provides a sound basis on which to conclude that there has not been, nor will there be, an SLC. No other case has found an SLC when entry and expansion is so straightforward and competitors have stated their intention to expand.

5.3 In addition, the investigation has suffered from procedural defects which undermine the PFs and, separately, provide a further reason as to why the PFs must be set aside.

31 August 2018