

JLA/Washstation: Response to Remedies Notice

1 Introduction

- 1.1 This submission sets out the response of JLA New Equityco Limited (“**JLA**”) to the CMA’s notice of possible remedies dated 10 August 2018 (the “**Notice**”) concerning JLA’s completed acquisition of Washstation Limited (“**Washstation**”) (the “**Merger**”).
- 1.2 This submission is without prejudice to JLA’s views on the CMA’s Provisional Findings (“**PFs**”) relating to the Merger, and in particular the provisional conclusion that the Merger has resulted, or may be expected to result, in a substantial lessening of competition (“**SLC**”) in the supply of managed laundry services to higher education (“**HE**”) customers in the UK. JLA will separately (by 31 August 2018) provide comments on the provisional finding of an SLC in its submission on the PFs.
- 1.3 Therefore, for the purposes of this submission, JLA only addresses potential remedies. The Notice sets out the CMA’s provisional view that divestment of the Washstation business would represent a comprehensive solution to the SLC provisionally identified in the PFs and that behavioural remedies are unlikely to be effective.
- 1.4 It is particularly important to ensure (as recognised in the Notice) that any remedy is proportionate. JLA agrees that divestment of the Washstation business would represent a comprehensive solution. However, the components of such a remedy must be proportionate. JLA considers that a structural remedy comprising all the elements set out in para. 20 of the Notice would be manifestly disproportionate, for the reasons explained below.
- 1.5 In any event, JLA believes this is one of those rare cases in which the CMA should seriously consider whether any remedy is in fact proportionate. This is because the nature of any SLC (if ultimately determined) is at the lower end of the scale, in particular given that the merger relates to the acquisition of a business with annual turnover of less than £3million and – with third parties having stated their intention to grow – the market would ‘self-correct’¹. In fact, the market is already ‘self-correcting’ as illustrated by the planned expansion of a number of competitors. In this respect JLA notes that the Notice cites the CMA’s guidance and states that the CMA will “*seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects*”².

2 Structural remedy

- 2.1 The Notice sets out (at para. 20) the components of a divestment that the CMA considers could be required as part of an effective remedy. These are considered below.
- (a) The Washstation contracts acquired by JLA*
- 2.2 JLA accepts that a structural remedy must create a viable business. The divestment of Washstation’s existing HE contracts (together with necessary support, which can be

¹ This point will be covered in the response to the PFs and will address the fact that evidence has been ignored or dismissed by the CMA in reaching its provisional conclusions. It should also be noted that the CMA’s guidance clearly recognises that the “*magnitude*” of harm that may arise may differ from case to case (see, e.g. CMA2, para. 11.25 and OFT1122, para. 5.8 which cites that the “*more extensive the competition concerns in question in terms of magnitude of potential customer harm*” the more certain the CMA must be in accepting a remedy in Phase 1).

² Notice, para. 30 (and CC8, para. 1.9).

provided on a transitional basis – see further below) would clearly be sufficient to achieve this.

- 2.3 In the PFs the CMA finds that, at the time of the acquisition of Washstation by JLA, Washstation was a viable and profitable business. This is confirmed by the statements in the PFs that Washstation “*was on a clear growth path before the Merger, largely due to its success in securing long term contracts, and it was forecast to improve its financial performance and position over time*”³ and that “*due diligence on Washstation indicates that the business was forecast to grow in terms of revenues, profitability and cash flow*”⁴. The PFs also show that the Washstation business had gross profit of c. £[<].⁵ The CMA must reflect these findings when designing any remedy.
- 2.4 The viability of the Washstation business does not depend on having exactly the same number of contracts as at the time of the Merger, or precisely replicating the customer base. Rather, it rests on having a sufficiently large number of contracts and that is being achieved by the existing Washstation business as currently managed by the Hold Separate Manager (“HSM”).
- 2.5 JLA acquired [<] contracts with the Washstation business⁶. These are set out in Annex 1. The vast majority of these contracts, both by volume and value, continue to be in force and are being managed independently as Washstation contracts by the HSM, as shown in Annex 1.
- 2.6 Annex 1 also shows that the HSM has [<]. This is itself, notwithstanding the uncertainty of the Phase 2 process, shows that the Washstation business as currently comprised is a viable business (with the current support being provided by JLA which will be available to a purchaser, if required, for an agreed period of time). Of the customers which have not renewed their contacts with Washstation, only a very small number has been lost to JLA⁷.
- 2.7 [<]⁸. In other words, Washstation’s HE business [<] is a viable stand-alone business.
- 2.8 So far as JLA is aware from due diligence conducted in connection with the Merger, at the time the HSM took over the management of Washstation, only [<] of Washstation’s customers (accounting for [<] individual sites) had change of control wording in their respective contracts⁹. [<] Given the very limited number and revenues - £[<] post-commission - of current Washstation contracts with change of control provisions compared to the rest of the Washstation business, whether or not those [<] customers choose to exercise the change of control provision in their contracts does not affect the viability of the Washstation business.
- 2.9 It is unnecessary, and would be wholly disproportionate, to require additional, non-Washstation contracts, to be included in any remedy package. For the avoidance of doubt, the current Washstation contracts comprise a viable business (with the support, as necessary, described below) and include Washstation contracts that expired in the

³ PFs, para. 5.29.

⁴ PFs, para 5.36(a).

⁵ PFs, Figure 4.

⁶ PFs, Figure 5 (para. 2.28).

⁷ [<].

⁸ [<].

⁹ These contracts identified in due diligence on the Washstation business are: [<].

period following the acquisition by JLA but which have been renewed on Washstation terms and as Washstation contracts¹⁰.

- 2.10 Furthermore, as the SLC identified relates to the “*supply of managed laundry services to higher education customers under vend share agreements in the UK*”¹¹, only Washstation’s contracts with HE customers are necessary for an effective remedy. This is for two reasons.
- 2.11 First, the PFs state that the CMA’s investigation “*indicates that there is a significant higher number of competitors supplying managed laundry services to other [i.e. non-HE] sectors*”¹². There is no SLC finding in respect of non-HE customer and so no need for any remedy.
- 2.12 Secondly, excluding contracts with non-HE customers would not undermine the effectiveness of the divestment remedy. That is because “*the revenue of Washstation generated from the supply of managed laundry services to sectors other than higher education was less than £[<]*”¹³. Further, these contracts account for only [<] of Washstation’s customers, and only [<] out of its [<] contracts.
- 2.13 Consequently, a divestment comprising all of Washstation’s current contracts with HE customers would be viable as it would comprise a large number of contracts (recreating the second largest supplier in the sector) with annual revenues of c. £[<] pre-commission and c. £[<] million post-commission – i.e. almost identical to the pre-Merger Washstation. If the conclusions in the PFs support the SLC finding then those conclusions must be relevant to the assessment of remedies. In this respect, the PFs note that Washstation was forecast to grow based, inter alia, on the fact that “*most of Washstation’s contracts appear to be profitable*”¹⁴. Anything more would be disproportionate.
- 2.14 A divestment comprising only existing Washstation contracts (and in particular Washstation HE contracts) is supported by the remedies discussion between the CMA and JLA in Phase 1. After the Phase 1 decision, JLA discussed with the CMA possible undertakings in lieu of reference. Whilst the decision maker was not privy to those discussions, after discussions with the case team, and with input from the CMA’s remedies unit, a hypothetical remedy was agreed upon which the case team indicated they would be comfortable submitting to the decision maker. The hypothetical remedy comprised the divestment of all Washstation contracts to a purchaser approved by the CMA, together with any transitional services such purchaser might require for a specified time period. It did not, in particular, include the divestment of any other (i.e. non-Washstation) contracts.
- 2.15 In this respect, it is important to note that a remedy in Phase 1 must be ‘clear cut’ and therefore arguably more comprehensive than a remedy that might be required in Phase 2 to address the same SLC finding. In this case, the SLC identified in the PFs is exactly the same as the SLC identified in Phase 1. In other words, the scope of the SLC has not widened in any way.
- 2.16 Therefore, it would clearly be disproportionate for any remedy in Phase 2 to go further than the hypothetical remedy agreed with the case team and remedies unit in Phase 1 (albeit not formally approved). In fact, the relevant legal test concerning remedies is

¹⁰ E.g. [<].

¹¹ PFs, para. 9.1(b).

¹² PFs, footnote 91.

¹³ *ibid.*

¹⁴ PFs, para. 5.33.

the same¹⁵, yet in Phase 1 the remedy must also be ‘clear cut’¹⁶. To be ‘clear cut’, the hypothetical remedy went further than necessary to address the SLC identified in Phase 1 (which is the same SLC identified in the PFs) in that it included all Washstation contracts, i.e. including those with non-HE customers.

- 2.17 The fact that a remedy comprising only Washstation contracts was considered likely to be acceptable in Phase 1 should give the CMA further comfort that – for the reasons explained above – the divestment of existing Washstation contracts alone constitutes an effective remedy.

(b) Washstation machines

- 2.18 The Notice states that to be effective, the remedy should include Washstation machines installed at customer premises and other machines owned by Washstation at the time of the acquisition (or equivalent machines).
- 2.19 JLA agrees that all Washstation machines installed at customer premises should be included in a remedy package. In addition, any machines removed from sites that Washstation has lost since the Merger which are being stored by JLA could be included, if requested by the purchaser¹⁷.
- 2.20 To the extent that machines were acquired by JLA when JLA acquired the Washstation business and then sold in the ordinary course of business it is not necessary for them to be replaced and included in any divestment package¹⁸. This is because machines are readily available and the purchaser could buy them on normal commercial terms (as does JLA). In particular, if the purchaser “*prefers a different supplier*” (i.e. brand) it is not necessary for JLA to acquire such machines for them only to be sold with the divestment package to the purchaser. JLA only purchases machines for use in HE vend share agreements from Alliance, so the purchaser could itself acquire other OEMs’ machines (most probably on terms no less favourable than those available to JLA). Also, as the purchaser may wish (unknown to JLA) to acquire a larger number of machines than the number to replace those originally inherited from Washstation the purchaser could benefit from purchasing economies and better pricing by negotiating directly with the supplier or distributor.
- 2.21 These factors mean that, as part of an effective remedy, it is only necessary to include machines that are installed at Washstation customer sites, or that have been removed after the date of the IEO and stored by JLA.

(c) Engineers

- 2.22 The Notice states that a divestment remedy could include the team of engineers that transferred to JLA with the Washstation business (or an equivalent team of engineers).
- 2.23 As the CMA is aware, of the six engineers employed by the Washstation business immediately prior to the Merger: [§<] three are still employed in the wider JLA business.

¹⁵ Sections 41(4) and 73(3) of the Enterprise Act 2002 both refer to “*the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it*”.

¹⁶ CMA Draft guidance on merger remedies (CMA87), para 3.27.

¹⁷ For example, JLA is storing [§<] from the [§<] when JLA won a contract with a new customer which had taken over a site previously installed with Washstation machines.

¹⁸ Information on such sales was provided to the MT by JLA and further information was requested by the CMA on 13 August 2018.

- 2.24 Whilst it is clear that engineering support is required to provide managed laundry services to customers (in all sectors not just higher education) a viable divestment package does not need to include any engineers currently employed by JLA.
- 2.25 This is for two reasons. First, the purchaser is very likely to have its own engineers (unless it is not active at all in the wider commercial laundry market).
- 2.26 Secondly, and more importantly, as the PFs state “*the investigation appears to indicate that there is a large population of engineers who frequently switch between businesses*”¹⁹ and providers can and do “*outsource the installation and/or maintenance of the machines*”²⁰. Armstrong confirmed to the CMA that “*it is not really an issue to find new engineers*”²¹. Furthermore, suppliers confirmed that they can hire freelance engineers on a temporary basis, as required²².
- 2.27 It is therefore clear that a purchaser of the Washstation business will either already have engineers, or will be able to readily access a pool of skilled engineers to service customer contracts. As such a viable remedy does not require the transfer of engineers (all of whom work across JLA’s customer base and, for any individual engineer servicing HE customers with machines supplied on a vend share model, will be a small part of their workload). It should also be noted that JLA does not have any engineers who are dedicated to servicing Washstation customers. In fact, in the year-to-date, on average, a JLA engineer will spend only c. [X]% of his time on vend share customers and only c. [X]% of his time dealing with Washstation customers/contracts (as there are only a relatively small number of such customers/contracts).
- 2.28 That said, if required by a purchaser, JLA believes it would be reasonable and proportionate to offer to provide engineering services to the purchaser for a short period under any transitional services agreement. However, there is no need for any divestment to include any engineers (who would need to consent to a transfer under TUPE).
- (d) Brand, customer records, call centre, back office support and sales staff*
- 2.29 JLA agrees that a divestment package should include the Washstation brand and customer records. As part of the hypothetical remedy in Phase 1, JLA intended that any divestment should also include the Washstation domain name (www.washstation.co.uk), trademark (WS WASHSTATION) and device (UK00003266644) and remaining stock of Washstation-branded student top-up cards. JLA considers that these items would be necessary as part of any divestment package²³.
- 2.30 JLA notes that Washstation did not have a call centre. Washstation out-sourced this service to a third party – as any purchaser could do – and end-users (i.e. students) called a dedicated number if help was required (0800 141 2331) (which would be transferred as part of any divestment). Unlike JLA’s business, which has approximately [X] customers across its laundry, catering, heating and fire safety

¹⁹ PFs, para. 8.48.

²⁰ PFs, para. 3.10.

²¹ PFs, footnote 247.

²² PFs, para. 6.40.

²³ The PFs state that Mr Copley told the CMA that “*Washstation did not offer an app but had been developing a similar payment app to JLA*” (para. 7.65(a)). As previously advised, there is absolutely no evidence of this. It did not come up at all in due diligence and no details of such development (or consideration of such development) are contained in any of the Washstation materials acquired with the Merger. No evidence of this appears at all in any of Mr Copley’s e-mails, all of which were inherited by JLA on the acquisition and were provide to the CMA in Phase 1. Nonetheless, to the extent any such plans existed, JLA would include them as part of any divestment.

divisions and therefore needs a call centre to handle customer queries, the Washstation business is materially smaller and never had a call centre. As the CMA has provisionally concluded that the pre-Merger business was viable, there is therefore no basis on which to suggest that an effective divestment package requires a call centre.

- 2.31 Washstation had no sales personnel, other than Alistair Copley, and the back office functions were limited to billing and administrative tasks and were all carried out by one person (Mr Copley's partner who left the business the day after completion of the Merger). No industry-specific skills are required to perform such functions. Any purchaser is therefore highly likely to already have personnel available who could perform these roles and would not need this to be included as part of a divestment package in order to operate a viable business. As noted below, JLA would also be willing to transfer the services of the HSM with the Washstation business, who has been successful in retaining and winning new contracts since his appointment in May 2018 (see [Annex 1](#)).
- 2.32 Furthermore, in the very unlikely event that a purchaser did not have anyone capable of performing these functions, a suitable person could be readily employed. The comment in the Notice that a divestment package could include back office functions and sales staff is therefore unnecessary and disproportionate in order to support a business to replicate the competitive constraint imposed by Washstation on JLA.
- 2.33 Nonetheless, if required by a purchaser, JLA recognises that assistance dealing with customer queries, back-office functions and sales may be necessary for a limited period of time under a transitional services agreement ("**TSA**"). JLA would be willing to provide such services to any purchaser, as may be required by them, for a limited period of time under a TSA – but there is no basis to require the divestment package to include the transfer of personnel carrying out these functions (who would, in any event, be subject to TUPE). It should also be noted that, as the CMA is aware, there are no personnel within JLA who are dedicated to the Washstation business or who, in the ordinary course, dedicate a substantial proportion (let alone the majority) of their time to the Washstation business.
- 2.34 Although not specifically mentioned in the Notice, via its website, Washstation offered a monitoring system (allowing end-users to track machine usage and availability) and an online payment solution. For the avoidance of doubt, JLA would include all aspects of that functionality – including supporting contracts – in any divestment. Furthermore, please note 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. In fact, Greenwald advertises its system, which is available to any third party – see [Annex 2.1](#)²⁴. Indeed, there are several equivalent applications in the market offered by various providers, see for examples [Annexes 2.2-2.5](#).

Transitional services agreement

- 2.35 Any purchaser, whether or not they are currently active in supplying managed laundry services to HE customers, will have (or could easily acquire) the necessary engineering and installation support, and sales and back office functions.
- 2.36 However, to the extent the purchaser requires additional support and/or as it hires personnel to fulfil those roles, JLA would propose a TSA for a limited period (up to [x] months), terminable by the purchaser (not JLA) on one month's notice.

²⁴ Any purchaser of the divestment business wishing to offer an app could therefore readily use Greenwald or another third party app-provider, such as Monyx or VMC, both of which offer a similar solution.

- 2.37 For the reasons noted above, JLA believes it would be more appropriate and more proportionate for such functions to be provided under a TSA rather than requiring relevant personnel to be transferred with the Washstation business. This is an area where – as both options (i.e. transfer of personnel and provision under a TSA) would be equally effective – the CMA should “*choose that which imposes the least cost or restriction*”²⁵.

3 Behavioural remedies

- 3.1 The Notice states that the CMA’s current view is that a behavioural remedy is unlikely to be effective. Although JLA does not believe that any remedy would be proportionate in this case (for reasons to be explained in JLA’s submissions on the PFs), JLA agrees that a structural remedy would be more appropriate to address the SLC set out in the PFs.
- 3.2 Nonetheless, if requested by a purchaser, in addition to the terms of a TSA as described above JLA would also propose the following behavioural remedies to complement the structural (i.e. divestment) remedy for the duration of the TSA:
- 3.2.1 encouraging the HSM to remain with the Washstation business and, to the extent JLA is able to do so, facilitating the HSM’s transfer with the Washstation business;
- 3.2.2 in any event, to the extent possible (including through the HSM’s contract with JLA) requiring the HSM to assist the prospective purchaser in connection with the divestment;
- 3.2.3 selling the machines to the purchaser on a basis which is consistent with that upon which machines were previously supplied to Washstation, taking into account landed costs and associated administrative costs; and
- 3.2.4 if the purchaser has no suitable warehouse, providing warehousing services to store Washstation inventory for a small charge to cover additional administration costs.

4 Purchaser suitability

- 4.1 JLA considers that any entity active in or with knowledge and experience of the wider commercial laundry market would be manifestly suitable as a purchaser. This would include either a current or former supplier of commercial laundry services or a purchaser such as an investor which proposed to put in place a management team with experience of the sector. That is because such purchasers will already have relationships with or knowledge of suppliers and will be very familiar with installation and engineering requirements (even though those skills are common across any industry involving the supply of white goods), and vend share is simply a commercial choice relating to payment and therefore no prior experience would be necessary.
- 4.2 The suitability of any purchaser, especially one active in the wider commercial laundry market “*committed to competing in the market for the supply of managed laundry services to higher education customers on vend sharing agreements in the UK*” is reinforced by the simplicity of the business model. Indeed, the CMA itself appears to have recognised the simplicity of the business model (even if the PFs conclude that

²⁵ Notice, para. 30.

the constituent elements may be difficult for a supplier to replicate from scratch or with a small existing base sufficiently quickly)²⁶.

- 4.3 The divestment would provide the purchaser with the necessary critical mass and market presence, and the ability to run the business would clearly be satisfied by any party active in the wider commercial laundry market. The fact that the HSM, with no experience of the commercial laundry market at all, has alone been able to win contracts itself indicates that a wide range of potential purchasers will be suitable – especially as JLA is willing, if requested by the purchaser, to provide services to the purchaser under a TSA (which are similar to those being provided to the HSM).
- 4.4 As for identified prospective purchasers, JLA does not consider that there are any existing competitors that should be prohibited from acquiring the Washstation business due to competition concerns, or for any other reason. In particular, JLA considers Hughes Armstrong and Goodman Sparks would “*not create further competition concerns*” (para, 22(d)). This is based on the statements in the PFs about them being weak competitors. Whilst JLA does not agree with that characterisation as regards Hughes Armstrong (as will be explained in the response to the PFs) if those arguments, which are central to the findings in the PFs, are not accepted by the CMA then it would not be logical to subsequently assert in the remedies process that Hughes Armstrong or Goodman Sparks were not suitable purchasers on the basis that they raised competition concerns.

5 Divestment process

- 5.1 As Washstation is a small business which has been managed separately for some time now, JLA believes it would be appropriate for there to be a streamlined divestment process, overseen by the existing monitoring trustee. JLA would welcome the opportunity to discuss this through further engagement with the CMA, including through the remedies working paper(s), the remedies hearing and other meetings as appropriate.

6 Conclusion

- 6.1 If the CMA concludes that a remedy is necessary and proportionate to remedy the SLC identified in the PFs, JLA agrees a structural remedy would be most appropriate.
- 6.2 The transfer of all current Washstation contracts with HE customers, together with all associated machines as well as any other machines still owned by Washstation would constitute a viable business. Such a divestment package would be a very close approximation to the pre-Merger Washstation business.
- 6.3 Given the ready availability of engineers and back office staff, a remedy does not need to include the transfer of such personnel. However JLA will provide engineering, sales, back office, finance, IT and other administrative functions as requested by the purchaser under a comprehensive TSA (to be negotiated with the purchaser and approved by the CMA).

²⁶ See Hearing Transcript p. 43:22-25 where the Chair observed that “*It all seems to point to a market where, yes, individual components, potentially, Lego-style, can be put together by anybody, but when it comes to it and tenders are issued, relatively few companies actually ever turn and respond to those tenders*”..

- 6.4 JLA believes that a remedy as described above would clearly address the SLC identified in the PFs and is capable of effective implementation.

21 August 2018