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RENTOKIL INITIAL PLC / CANNON HYGIENE LIMITED

RESPONSE TO PROVISIONAL FINDINGS

1. Introduction

1.1 This paper constitutes the response of Rentokil Initial plc (***Rentokil***) and Cannon Hygiene Limited (***Cannon***) (the ***Parties***) to the CMA's provisional findings published on 18 October 2018 (the ***PFs***). It addresses the provisional conclusion that the Transaction has resulted, or may be expected to result, in a substantial lessening of competition (***SLC***) due to a reduction in the number of effective competitors from three to two in the provision of national waste disposal services. The CMA provisionally considers that the following national and multi-regional customers will be negatively impacted:

(a) customers located in eight or more regions of the UK purchasing directly from a washroom services supplier (end customers); and

(b) public and private framework customers with national or multi-regional coverage.[1]

1.2 The CMA must show that the Transaction may be expected to result in an SLC.[2] That means a degree of likelihood for such a result which is more than 50%[3], in other words: on the balance of probabilities. The legal onus is on the CMA to prove an SLC, on the balance of probabilities, and to do so based on evidence. The available evidence in this case does not permit it to do so.

1.3 It is disturbing that the CMA has – throughout this case – appeared unwilling to engage in exploring or obtaining certain evidence that would point to the Transaction being cleared without conditions. Not least:

(a) in spite of urging by the Parties, the CMA has failed to exercise its powers to obtain evidence to help understand the significant number of tenders that are won by *"unknown"* competitors to the Parties or to understand PHS' win-loss data. Such evidence is likely to be material to a better understanding of the competitive set. Without such evidence the CMA has been acting with a material 'blind spot', as to which it has moreover chosen to make un-evidenced and unjustified inferences;

(b) the Parties indicated one competitor (Elis) was likely to enter or expand its UK presence significantly, and have been told that [Redacted]. [Redacted] the CMA even started (at a very late stage in proceedings) to re-examine the possibility of material entry in the market.

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[1] PFs, paragraphs 62 and 11.1.

[2] Section 35(1)(b) of the Enterprise Act 2002.

[3] The Court of Appeal has endorsed the approach of expressing this as a more than 50% chance. See *IBA Health Ltd v OFT* [2004] EWCA Civ 142, paragraph 46.

1.4 The CMA has also failed to have regard to evidence on the file (e.g. the Parties' GUPPI analysis and survey data) that would further point to the Transaction being cleared without conditions.

1.5 Had the CMA engaged earlier on these issues, and/or paid due regard to the evidence provided by the Parties, the PFs may have been very different. The CMA may very well have reached a different conclusion in relation to SLC than the one it provisionally reached.

1.6 This response shows that proper engagement on identifying and exploring theories of harm and in relation to the evidence must lead to a conclusion that the Transaction should now unconditionally be cleared. The response should be read in conjunction with a paper prepared by the Parties' economic consultants, RBB, setting out in greater detail why the economic underpinning of this case does not allow the CMA to reach an SLC decision (see **Annex I**).

2. Executive summary

2.1 The CMA has not discharged, and cannot discharge, the onus of showing, based on evidence and on the balance of probabilities, that the Transaction will result in an SLC. In short:

(a) the CMA has not put forward any consistent, clear or credible theory of harm that could justify the SLC provisional finding – its theory of harm is vague, poorly articulated and unsubstantiated. In particular, the concern advanced in relation to PHS and the entirely unsubstantiated concern around public and private framework customers do not stand up to scutiny;

(b) even if there were an intelligible theory of harm that there is a reduction in the number of effective competitors from three to two, the CMA has failed to demonstrate that the Transaction actually has this effect. Its case is undermined by material evidential gaps, material failures of inquiry and other material errors of assessment described in detail below;

(c) even if there were a reduction today in the number of effective competitors from three to two, the CMA has failed to take into account – indeed has failed to make due inquiry and/or have regard to - evidence on the file that shows that significant and substantial new entry / expansion in the UK is imminent. The CMA has ignored the plans of Elis, whose entry / expansion into the UK washroom services market is timely, likely and sufficient to prevent any SLC;

(d) this failure properly to investigate potential market entry / expansion is part of a broader failure to consider the impact of the Transaction on a dynamic basis. The CMA's exclusive focus on the impact of the Transaction on a static basis (and more specifically how competition has worked in the past) has resulted in a failure to consider – as required of the CMA – what the position would be in the future, after and *as a result of* the Transaction;

(e) in this regard, the CMA has failed to recognise the implications of the market context and realities in terms of the significance of a smaller competitor having been able to achieve national 'break-through';

(f) moreover, even if the Transaction resulted in a reduction in the number of effective competitors from three to two and even if the entry / expansion plans of Elis could be ignored, the CMA has failed to demonstrate that the Transaction would lead to a substantial lessening of competition. This is in part the result of failing to consider the impact of the Transaction on a dynamic basis (see (d) above), but equally arises through the failure to have regard to economic evidence (e.g. the Parties' GUPPI analysis) that suggests that this is not a case where any lessening of competition would be substantial;

(g) further and in any event, the CMA has failed to demonstrate that the remedy proposed to address the provisionally identified SLC is reasonable and proportionate.

2.2 The case which the CMA has built is not evidence-based, and ultimately rests on supposition, presumptions and inference. Viewed analytically and with any rigour, the CMA's provisional findings constitute a decision which 'does not stack up'. The CMA's approach involves a range of material public law errors, material failures of inquiry and other material errors of assessment. The CMA cannot justifiably conclude that a SLC is likely to arise as a result of the Transaction. A remedy is therefore unwarranted and any decision along the lines of the PFs will be subjectable to successful legal challenge.

3. The CMA has not put forward a sufficiently consistent, clear or credible theory of harm that could justify the SLC provisional finding – its theory of harm in this case is vague, poorly articulated and unsubstantiated

3.1 The CMA has provisionally concluded that the Transaction has resulted, or may be expected to result, in an SLC in relation to the supply of waste disposal services to end customers purchasing directly and public and private framework customers with national and multi-regional coverage. However, the CMA's theory of harm is revealingly vague, poorly articulated and unsubstantiated. The more the theory of harm is unpacked, the less it stands up to scrutiny. Despite a protracted investigation and lengthy PFs, there is a basic lack of clarity as to what the theory of harm is, how it is realised in practice and how it applies to public and private framework customers.

No clear or credible theory of harm

3.2 The CMA has provisionally concluded that the Transaction is likely to enhance the Parties' ability to increase prices and/or reduce the incentives for PHS to compete against the merged entity relative to the pre-Transaction situation.[4] However:

(a) the theory of harm is barely referenced or explained in the PFs;

[4] PFs, paragraph 58.

(b) the theory of harm is not described in an internally consistent or intellectually coherent manner; and

(c) there is no substantiation of the theory of harm.

3.3 First, the CMA has barely referenced or explained in the PFs the theory of harm as it relates to the *Parties' ability to increase prices*. The Parties count three occasions on which the theory of harm is referenced – at paragraphs 58, 8.320 and 8.336. On two occasions, there is no further explanation of the theory of harm. On one occasion, there is a sentence to say that *"the elimination of a credible competitor as a result of the Merger, in a market that is already concentrated, is likely to reduce customers' bargaining strength with both the Parties and PHS"*. This purported explanation is manifestly insufficient as the basis for an SLC finding.

3.4 Second, the PFs are not internally consistent or intellectually coherent in seeking to describe a theory of harm. This is not a mere semantic point. It has important substantive implications:

(a) At paragraphs 58, 8.320 and 8.336, in its overarching summation of the theory of harm, the CMA states that *"the Merger is likely to enhance <u>the Parties' ability to increase prices</u> and/or reduce the incentives for PHS to compete against the merged entity relative to the pre-Merger situation"*.[5] However, at paragraphs 47 and 8.119, where it discusses PHS, the CMA states that *"the Merger is likely to enhance <u>the ability of PHS to increase prices</u> <u>and/or</u> reduce the incentives for PHS to compete against the merged entity relative to the pre-Merger situation"*.

(b) It appears from paragraphs 47 and 8.119, therefore, that the CMA sees price increases "*and/or*" reduced incentives to compete as different things. And it is not clear which one the CMA considers will occur. If the CMA's conclusion in respect of PHS is that its prices will increase as a result of the Transaction, that conclusion must surely be tracked into its overarching summation of the theory of harm as articulated at paragraphs 58, 8.320 and 8.336.

(c) Conversely, if the CMA's view is that PHS' prices will not increase as a result of the Transaction, then it is incumbent on the CMA to explain what *"reduce the incentives for PHS to compete"* actually means if not price increases. The Parties assume that the CMA is not positing a coordinated effects theory of harm given the lack of any reference to this in the PFs and the fact that the CMA has not assessed the Transaction against the standard criteria. In any event such an argument would not be sustainable given the lack of sufficient pricing transparency or a credible deterrent mechanism, as well as the existence of effective competitive constraints.

[5] Throughout this document, underling in quotations connotes emphasis added.

3.5 Third, the CMA has not done anything other than *assert* PHS's incentives to compete would be reduced.[6] In particular, and as described further in section 4 below, the CMA has done little to assess the competitive constraints on PHS from competitors other than the Parties. Given the size of PHS in the market and the theory of harm, this should have formed an important part of the CMA's assessment. In fact it forms no part.

No explanation or evidence as to how the theory of harm is realised

3.6 The CMA's theory of harm does not engage with the precise delivery mechanism by which it is supposed to be realised:

(a) The CMA has produced no evidence to show that, notwithstanding the lack of price transparency in the market; the existence and confidential nature of the tendering process (a process which is available to all national customers to enhance competition); the presence of other national suppliers; and the fact that customers play suppliers off against each other in the tendering process (*"Given that many customers tender or negotiated by playing off three suppliers […]"*[7]), the merged entity's or PHS' prices would rise *"and/or"*[8] PHS would compete less hard as a result of the Transaction.

(b) If customers felt that the Transaction would make it more difficult for them to run an effective tender process, they could have been expected to say so. However, customer views are overwhelmingly neutral or positive on the Transaction both as a whole and when only national and multi-regional customers are considered. See for, example:

(i) *"it was not concerned about the Merger. Losing Cannon is not a big issue since Cannon was not competitive in previous tenders."*[9]

(ii) *"told us that the merger may not impact it since it never considered Cannon in previous tenders."*[10]

(iii) *"told us that it was not concerned about the merger as it felt that the merger would have very little impact on its business."*[11]

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[6] This assertion is contained in a single paragraph of the PFs, paragraph 8.334. It is notable that the CMA has not provided any evidence at all to support the assertion that PHS *"may respond to any price increase by the Parties … because of the bargaining strength of [customers] depend[ing], amongst other factors, on the number of outside options available"*. Equally notable is its recognition, at paragraph 10.13, that *"In some circumstances, an individual customer may be able to use its negotiating strength to limit the ability of a merged firm to raise prices"*.

[7] PFs, paragraph 10.30.

[8] PFs, paragraphs 58, 8.320 and 8.336.

[9] PFs, appendix E, paragraph 102(a).

[10] PFs, appendix E, paragraph 102(c).

[11] PFs, appendix E, paragraph 102(g).

(iv) *"told us it was not concerned about the merger as it would have very little impact."*[12]

Given the availability of tendering as a competitive mechanism, and given that the CMA has found that there are other national competitors, any of whom could be invited to a tender to ensure an ongoing constraint on PHS and the Parties, and given all the additional reasons set out in section 4 below, it is entirely unsurprising that customers are not concerned. Yet the CMA is inexplicably unwilling to accept the straightforward and revealing evidence of that fact.

No explanation of how the theory of harm applies to frameworks

3.7 For the reasons set out above, there is insufficient evidence or analysis to justify an SLC provisional finding in respect of national and multi-regional end customers. The deficiency of the PFs is more acute still in relation to framework customers in respect of whom the theory of harm is not even properly set out and there is no evidential underpinning:

(a) Paragraphs 6.5 and 6.6 may imply that the theory of harm for washroom services as a whole is the same: *"In our statement of issues, we set out two theories of harm relating to the supply of washroom services – one in relation to supply to national customers and the second in relation to supply to regional and local customers. These two theories of harm have been the focus of our inquiry and are assessed in the following chapters of this provisional findings report."*

(b) However, in respect of public and private framework customers, the CMA does not appear to explicitly say – as it does for end users – that the Transaction is likely to enhance the Parties' ability to increase prices and/or reduce the incentives for PHS to compete against the merged entity relative to the pre-Transaction situation.

(c) Indeed, the only specific description of the effects of the Transaction on public and private framework customers is at paragraphs 68-72 and 8.348-8.351 – however, neither passage describes, analyses or evidences the theory of harm on even a basic level.

3.8 As explained below, the CMA cannot sustain the position that alternative suppliers to framework customers are limited to national suppliers given that, first, frameworks also elect to list regional suppliers and, second, the CMA itself finds that the end customers of these frameworks are overwhelmingly local or regional customers, which can, and do, also choose to purchase washroom services directly from local and regional suppliers (see, further, section 4 below and **Annex I**). Notably the CMA has found no SLC in the supply of washroom services to local and regional customers. Furthermore, the arguments raised in this response in respect of the application of competitive constraints from PHS and other competitors to direct customers apply *mutatis mutandis* to public and private framework customers.

[12] PFs, appendix E, paragraph 102(h).

4. The CMA has failed to demonstrate that the Transaction actually results in a reduction in the number of effective competitors from three to two

4.1 The CMA has provisionally concluded that the Transaction is a "3-to-2" merger and in doing so dismissed the strength of constraint from other competitors on the Parties and PHS post-Transaction. However, its case – here as elsewhere – is not demonstrated, on balance, and by evidence: it is undermined by material evidential gaps, material failures of inquiry and other material errors of assessment.

Existing competitive constraints

4.2 Fundamental to the provisional SLC conclusion is the finding that Cathedral, Mayflower and regional *"buy-around"* will act as a relatively limited constraint on the Parties post-Transaction – see, for example, paragraph 59 of the PFs. This conclusion is undermined by a lack of evidence to support it and:

(a) the failure to make due inquiry into the significant number of cases in which the Parties have lost a tender to an *"unknown"* competitor in their own tendering and 'win loss' data;

(b) the failure to make due inquiry in relation to competitive constraints on PHS from other competitors like Cathedral and Mayflower and in particular to request 'win loss' data from PHS; and

(c) the failure to make due inquiry and/or have regard to evidence on the file in respect of *"buy-around"* by national end customers using a combination of regional (or national and regional) washroom services providers rather than a single national provider. Set out below at paragraph 4.5, for example, is new and significant evidence of major customers' ability and intention to buy-around Rentokil by using regional suppliers.

4.3 In respect of paragraph 4.2(a) above:

(a) The CMA has failed properly to analyse the large number of cases in which the Parties have lost business to an *"unknown"* competitor – either in the tendering data (where *"unknowns"* account for [Redacted] of Rentokil public sector tender losses and [Redacted] of Cannon public sector tender losses) or in the 'win loss' data, where cases of *"unknown"* account for [Redacted] of value for all large customers in the whole dataset ([Redacted] when the revenue threshold is removed). The CMA states that unknowns are less than [Redacted] of the 'win loss' data for customers lost in eight or more regions, however, as is explained in **Annex I** in detail, this is not correct.[13] The CMA is aware that both Cathedral and Mayflower have a large number of national customers (Table 3 of the PFs). The CMA has the powers to obtain the names of these customers and assess the extent to which they match those lost by

[13] PFs, appendix D, paragraph 14.

the Parties. It does not appear to have done this. The CMA therefore has no basis to assert that *"unknowns"* make no difference.

(b) The CMA relies on the tendering data and 'win loss' data to reach conclusions on the competitive constraints faced by Rentokil from Cannon and the closeness of competition between them. It is wrong, in these circumstances, to dismiss the significant value of *"unknowns"* in reaching a finding regarding the extent to which other competitors compete for national/multi-regional customers. The CMA in reaching any balanced finding, must at least contemplate that companies other than the Parties and PHS are winning the contracts where the winner is *"unknown"*.

(c) In the end, a simple proposition remains: the unknown competitor is not the Parties and the CMA provides no evidence to suggest that the unknown competitor is PHS notwithstanding the extensive number of calls and meetings it has had with PHS throughout the process.

(d) The CMA is aware that obtaining this evidence would have been possible - and the Parties have urged the CMA to obtain this - and yet it does not appear to have attempted to do so. This results in a significant evidential gap in the assessment of the competitor set and in particular which competitors are winning tenders. If the CMA has tried and failed to gather this evidence, the Parties should have been given the benefit of the doubt in a balanced decision as regards these *"unknowns"*. They were not.

4.4 In respect of paragraph 4.2(b) above:

(a) PHS is without doubt (as acknowledged by the CMA) a very strong constraint on the Parties. And the PFs make clear that PHS will continue to act as a constraint post-Transaction, albeit the CMA is concerned that PHS will be incentivised to compete less hard.[14] However, in arriving at this conclusion, the CMA has not considered competitive constraints on PHS from other competitors like Cathedral and Mayflower in its assessment and has instead focused only on business lost by the Parties, despite recognising the competitive constraints on one player are not necessarily the same as on another (*"We also found that Rentokil is a stronger constraint on Cannon than Cannon is on Rentokil"*[15]).

(b) The CMA does not appear, from the PFs, to have requested 'win loss' data from PHS, despite repeated requests from the Parties and in spite of the fact that it spoke with PHS on multiple occasions throughout the merger review. This matters because a rival's ability to win from the clear market leader PHS implies an ability to win from the Parties. This point is effectively dismissed by the CMA which notes that the Parties

[14] This allegation is effectively contradicted in the PFs which acknowledge on multiple occasions (see **Schedule I**) that PHS will continue to be a strong competitor post-Transaction. The theory of harm therefore cannot be that PHS will be a weakened competitor post-Transaction – at most that the higher demand it faces might induce it to raise prices.

[15] PFs, paragraph 45.

urged it to consider a broad set of 'win loss' data on the basis this would be *"more reflective of the market as a whole"* but then simply comments that *"[i]n our view, the business lost by the Rentokil reflects the competitive constraints faced by Rentokil from Cannon and from other suppliers. We therefore consider this data to be relevant to the assessment of the competitive effects of the Merger"*[16].

(c) This suggests that the CMA chose not to assess whether Cathedral and Mayflower or others won national/multi-regional customers from PHS. That is very striking. Had it done so, and had there been evidence that Cathedral and Mayflower had won such customers, it would have demonstrated a clear ability to challenge the biggest players in the market. Instead the CMA assumed the opposite. The CMA could and should have investigated this point. Failure to do so has meant that the CMA's conclusions on *"competitive constraints"* are incomplete and accordingly not a reliable or evidenced basis on which to form an SLC conclusion.

4.5 In respect of paragraph 4.2(c) above:

(a) The Parties have always maintained that if national customers do not like the outcome of a tender, they can easily retender, including by breaking up the country into small lots.

(b) The CMA has stated that: *"a key question is whether or not a customer, which currently uses a single supplier of waste disposal for the entire estate, would be able and willing to change its behaviour and switch to multiple regional suppliers to service different parts of their estate."*[17]

(c) In response to this *"key question"*, the CMA has provisionally concluded that: *"customers consider that customers would be very unlikely to change the organisation structure in response to a price increase in waste disposal services. For example, an organisation with central procurement would be unlikely to set up regional procurement functions, or to change to a franchise or symbol group model, in response to a price increase in waste disposal. This is because washroom services are typically a small part of the expenditure of a business."*[18] However, this conclusion significantly overstates the challenges associated with setting up regional procurement functions: there is no reason why, for example, a central procurement function cannot simply run regional tenders, and no need whatsoever to change to a franchise or symbol group model. Furthermore, the CMA's conclusion is not – as we explain in the following sub-section – supported by customers.

(d) If any customers can "*buy around*", then the impact of that is very significant, as there is no reason to suppose that many other customers

[16] PFs, paragraphs 8.81-8.82.

[17] PFs, paragraph 8.206.

[18] PFs, paragraph 8.206.

could not do the same. The merged entity would have no mechanism for distinguishing (and therefore discriminating between) customers that would buy around, and those that would not. Given this, the magnitude of the competitive constraint imposed on the Parties by the ability and willingness of some customers to *"buy-around"* is significantly multiplied.

(e) And customers can and do adopt this strategy. A live example of exactly how customers use *"buy-around"* has emerged recently as, [Redacted] Another example of how customers use *"buy-around"* is [Redacted].

(f) This evidence of a national customer [Redacted] who would be prepared to change from central to regional procurement is important new evidence that cuts across the CMA's broad conclusion that customers would not countenance organisational changes to facilitate *"buy-around"*. It is a gross exaggeration to say that they would need to change their organisational structure to do so – they would simply need to enter additional contracts. Customers absolutely would countenance this and are doing so. The CMA's provisional conclusion that regional *"buy-around"* acts as a relatively limited constraint on the Parties therefore cannot stand.

(g) Finally, it should be emphasised that customers need not *"buy-around"* in every region. If the merged entity sought to increase price by 5% on waste disposal, then if a customer switched away [Redacted] of waste disposal value this would frequently be sufficient to deter the price rise. This could be achieved by switching to just one regional supplier. It could also be achieved by dropping washroom service lines other than waste disposal (i.e. lines for which the CMA accepts competition exists). Further details are provided in **Annex I**.

Customer views

4.6 Fundamental to the SLC provisional conclusion is the finding that the options available to national and multi-regional customers will be reduced from three to two as a result of the elimination of an effective competitor and that this will negatively impact customers – see, for example, paragraphs 57 and 58 of the PFs. This conclusion ignores the evidence on the CMA's file that, far from suggesting that customers expect to have insufficient choice or competition, in fact suggests that customers are confident they will not be adversely affected by the Transaction.

4.7 The CMA has consistently received the feedback that customers are overwhelmingly neutral or supportive of the Transaction. Based on its own survey, once *"Don't know respondents"* are excluded, 90% of Cannon customers and 97% of Rentokil customers perceive the impact of the Transaction to be either neutral or good. That flies in the face of a conclusion that post-Transaction customers would encounter insufficient choice: and suggests that the CMA feels it cannot trust 90-97% of customers to assess their choices in the market.

4.8 Even more specifically, national customers have provided comments to the CMA showing they would not tolerate price rises and are willing to use sophisticated procurement techniques including tendering in what is an opaque market, as well as geographic multi-sourcing:

(a) *"The service we receive is currently good and convenient – though anything above 5% would trigger a thorough review of suppliers."*[19]

(b) *"If prices were to increase by around 5%, […] would consider breaking tenders up regionally."*[20]

(c) *"[…] told us that following a 5% increase it would consider another national provider and 'potentially' a combination of regional suppliers if they are able to meet pricing, quality and coverage."* [21]

(d) *"A 5% price increase by PHS would be rejected and […] would be forced to conduct another RFQ to ensure market competitiveness."*[22]

(e) *"[…] a textile rental services provider […] explained that it uses multiple providers in order to meet its requirements."*[23]

(f) *"[…] explained that it uses multiple providers for geographic reasons and client requests."*[24]

(g) *"[…] an operator of pubs, restaurants and bars, uses Rentokil on c. 1600 sites and PHS on 50 sites. It said it retained PHS on the sites acquired from another company in 2014."*[25]

4.9 All of the above is consistent with and supported by the survey carried out by the CMA; a more detailed analysis of which is set out in **Annex I**. The CMA seeks to dismiss these results on the basis that its survey did not focus sufficiently on national customers. In response, the Parties requested the CMA to provide details of the survey respondents that did fall into the category of national or multi-regional customers. The majority of these indicated a willingness to "*buy-around*" in contradiction with the findings in the PFs and the vast majority were not concerned by the Transaction (**Annex I**).

4.10 The CMA cannot validly discard a survey that supports the Parties' views on the basis that its survey design was inadequate (i.e. supposedly too focused on local customers), or ignore the feedback it was provided by customers that is summarised in paragraph 4.8 above. It designed a survey intended and considered (as disclosure of internal documents would no doubt confirm) to be fit for purpose; but it has then discarded that survey based on results favourable

[19] PFs, appendix E, paragraph 93.

[20] PFs, appendix E, paragraph 94.

[21] PFs, appendix E, paragraph 92(b).

[22] PFs, appendix E, paragraph 94(d)(v).

[23] PFs, appendix E, paragraph 87(b).

[24] PFs, appendix E, paragraph 87(c)

[25] PFs, appendix E, paragraph 87(a).

to the Parties and running counter to a momentum-gathering CMA theory. The CMA could have designed its survey to focus on national competition – and indeed it is striking that it did not do so when at the time of the survey it had determined that national competition was a primary focus.

4.11 The CMA compounded what on its own logic and reasoning is a conspicuous failure by omitting to take steps to secure any alternative and adequate subsequent outreach to customers considered to be more representatively relevant to fill this evidential gap. Rather than using the survey or re-designing the survey and rather than reaching out on any broad or systematic basis to customers, the CMA chose to draw inferences from information it had from just 13 customers from whom it had heard (with one of these operating in only 3 regions).[26]

4.12 In effect, the CMA therefore spoke to only [Redacted] of the [Redacted] affected Rentokil and Cannon end customers it identified in Table 3 of the PFs.[27] This equates to less than [Redacted] of those customers concerned, a minute sample. To reject customer views supporting the proposition that there will be adequate choice post-Transaction and to reject a customer survey that also supports the same proposition (on the basis it does not think its own design of the survey to be adequate) without finding an alternative mechanism to adduce evidence from those customers most likely to be impacted by its theory of harm manifestly fails the test of providing a balanced assessment.

4.13 Indeed, new evidence (made available after the PFs) from an additional [Redacted] customers in the same segment *contradicts* some of the CMA's findings, e.g. on willingness to source from regional suppliers. The one common theme from these two samples is the *absence of concern* about the merger (see **Annex I**).

Frameworks

4.14 Fundamental to the provisional SLC conclusion is that it extends to the supply of waste disposal services to public and private framework customers – see, for example, paragraph 72 of the PFs. This conclusion is without an evidential foundation and entirely undermined by:

(a) the failure to make due inquiry and/or have regard to evidence on the file on the characteristics of frameworks and their members.

(b) procedural unfairness as a result of introducing frameworks to bolster a supposed case, having failed properly and fairly to put a concern in relation to frameworks to the Parties in any detail prior to the PFs.

4.15 In respect of paragraph 4.14(a) above:

(a) First and foremost, as the CMA acknowledges, the requirements of end customers on frameworks are typically local, meaning that their

[26] Customer evidence summary table, 1 October 2018.

[27] In other words, the CMA spoke to an even smaller proportion of *all* national end customers that it provisionally considered to be affected.

requirements could be fulfilled by regional suppliers. To put this in perspective, in the case of [Redacted].

Regional suppliers therefore constrain the Parties. They do so on-framework, where the framework elects to list regional suppliers ([Redacted], for example, accounts for a similar share as [Redacted] on the overall [Redacted] framework agreement[28]). And they do so off-framework (where the end customer elects to purchase off of the framework). In the latter regard, as the CMA itself notes, [Redacted] lost an end customer that was purchasing through the private [Redacted] framework to [Redacted], which was not on the framework. Indeed, the Parties note that [Redacted] is the only washroom supplier on the private [Redacted] framework and yet it only services around half of [Redacted] members, which implies that the other half of members are procuring washroom services off-framework and in many cases (given their local requirements) from regional suppliers (see **Annex I**).

In addition, there are many other examples of [Redacted] losing members of frameworks to [Redacted] and regional suppliers that are not listed on the framework, such as [Redacted] (see paragraph 2.5.2.3 of **Annex I**).

(b) Second, the CMA has not adduced evidence that regional suppliers systematically operate at a cost or service disadvantage. To the contrary, the CMA has found post-Transaction competition to be effective at a local and regional level. Moreover, there is evidence of regional suppliers offering lower prices to members on frameworks (for example, [Redacted] on the [Redacted] framework) and of [Redacted] losing business where end customers have elected to switch to procure washroom services off of frameworks (as set out immediately above).

(c) Third, the Transaction does not give rise to substantial upwards price pressure (as confirmed by a GUPPI analysis focused on public and private frameworks). In this regard it is noted that the CMA's assertion that the Parties' analysis is not consistent with CMA practice is incorrect (see paragraph 8.2(b) below).

(d) Fourth, this ability of frameworks to source services not only from national players, but also from regional and local operators, confirms the diversity of suppliers which are used to provide washroom services. It undermines the CMA's case that the Transaction will lead to a reduction in the number of suppliers for framework customers from three to two.

(e) Fifth, frameworks benefit from many of the characteristics that caused the CMA to conclude that FM customers have buyer power and will suffer no harm as a result of the Transaction:

[28] Both [Redacted] and [Redacted] account for [Redacted] % of total framework revenues compared to [Redacted] % generated by Rentokil and [Redacted] % by PHS. If the CMA is to dismiss [Redacted] as a credible competitor on this framework then it must also find [Redacted] to be a weak competitor (see **Annex I**).

(i) First, frameworks are an important route to end customers for the Parties ([Redacted]).

(ii) Second, and fundamentally, frameworks are sophisticated purchasing organisations. It is their role to deal with numerous suppliers. They are well positioned to take advantage of multi-sourcing from a wide pool of suppliers. A good example of this is [Redacted], a public framework, which is currently supplied by [Redacted]. It would be straightforward for [Redacted] to add more suppliers to that list.

4.16 In respect of paragraph 4.14(b) above:

(a) The CMA has failed to put the SLC in relation to frameworks explicitly to the Parties in any detail prior to the PFs. For example, it is only given a passing mention in the annotated issues statement dated 7 September 2018. This meant that it was not discussed in the hearing on 14 September 2018.

(b) Consequently, the Parties have not been provided with an adequate opportunity to respond to the concerns raised by the CMA given the late stage in the process.

4.17 More detailed analysis of frameworks is set out in **Annex I**.

5. The CMA has failed to make due inquiry and/or have regard to evidence on the file that shows that the entry / expansion of Elis into the UK washroom services market is timely, likely and sufficient to prevent the SLC

5.1 Fundamental to the provisional SLC conclusion is the finding that Elis would encounter barriers to entry and not be a timely, likely or sufficient entrant – see, in particular (to the extent the redacted version is intelligible), paragraphs 8.177 and 8.178 as well as paragraphs 10.54, 55, 65, 66, 68 and 73, and appendix G. This conclusion is unsupported by evidence and entirely undermined by the CMA's failure to make due inquiry and/or have regard to evidence on the file in respect of Elis entry / expansion into the UK washroom services market, [Redacted], as discussed below.

5.2 As set out in further detail in the Parties' submission on market entry / expansion of Elis dated 5 November 2018 (see **Annex II**), this entry / expansion is timely, likely and sufficient under paragraph 5.8.3 of the Merger Assessment Guidelines (the ***Guidelines***) to prevent the SLC provisionally identified by the CMA in its PFs:

(a) **Timely.** [Redacted]. In particular, the Parties understand *inter alia* as follows (which the CMA is in a position to confirm with Elis):

(i) [Redacted].

(ii) [Redacted].

(iii) [Redacted].

(iv) [Redacted].

(v) [Redacted].

(b) **Likely.** Elis has the ability and incentive to enter / expand in the UK washroom services market:

(i) As regards ability, Elis already has an existing network of branches with national coverage and a strong national customer base in an adjacent industry through Berendsen. It can easily leverage both branches and customers to rapidly grow its washroom business in the UK. The very strategy and purpose of its industrial and tribe model is to facilitate multiple service offerings. It also has a track record of rapidly-scaling entry / expansion into new geographies[29] that indicates relevant experience and expertise, and it has the financial strength and resources to do so across the UK without difficulty.

(ii) As regards incentive, [Redacted]. There is also clear evidence of incentive in Elis' own strategy, integrated business model and track record in new geographies including territories where it has acquired Berendsen's market position and assets.

(c) **Sufficient.** Elis' strategic goal in *"each country"* in which it operates is to become *"market leader"* through entry and expansion (*"Group's strategy outside France is to consolidate its market share and geographic coverage in each country and deploy its expertise to become the market leader in every one of them"*).[30] It has a track record of success in this regard – see, for example, in Switzerland and Brazil, where Elis entered and expanded rapidly, transferred global expertise to assist local operations in pushing the business forward, pursued national success (not just a local or regional presence) and combined multiple services in its offering to customers, using workwear, linen and washroom services (*"HWB appliance services"*) as a base. Elis seems to be using this formula in relation to Berendsen

In the UK, Elis appear to be on a similar trajectory and is already more advanced than it was in Switzerland in 2010 or in Brazil in 2012. [Redacted]. It has acquired an existing network of branches with national coverage. It has a strong presence and existing national customer base in workwear and linen through Berendsen – which it now only needs to leverage and supplement with in-house washroom services. [Redacted]. It has a plant in the UK through Kennedy Hygiene Products that designs and manufactures washroom appliances. Elis in combination with Berendsen will be an immediately powerful and credible washroom services supplier for customers at all levels of the

[29] See Elis IPO document provided as attachment to **Annex II**.

[30] Annex II, page 69.

UK washroom market including national and multi-regional customers and frameworks. Given its national footprint, serving these customers would provide a strong platform from which Berendsen could target other national and multi-regional customers without laundry or workwear needs.

Furthermore, [Redacted].

5.3 The Parties are very surprised that the CMA does not appear to have properly interrogated Elis, despite (a) the Parties making early representations about the likely entry of Elis; and (b) [Redacted] – which should have been a trigger to cause the CMA to question what were its intentions.

5.4 The Parties have now advanced a considerable body of evidence that demonstrates timely, likely and sufficient entry by Elis. To the extent it is possible to interpret the underlying text given the redactions, it does not appear that Elis has disclosed these [Redacted] entry preparations.

(a) If that is correct then, while the Parties do not know how Elis responded to the questions put to it by the CMA staff prior to PFs, there appear to be clear parallels with the *EWS/Marcroft* case[31], when a potential entrant, Freightliner, claimed in response to Competition Commission questioning that it was not intending to enter the UK market, and then promptly did so once the Competition Commission had found an SLC and ordered a divestment.

(b) If the Parties are incorrect, and Elis has revealed its intentions to the CMA, then there appears to have been no analysis of the huge implications of this for the UK market of entry by one of the world's most prominent washroom services providers.

5.5 In either case, Elis' entry / expansion into the UK washroom services market means that a number of fundamental findings of fact and analysis in the provisional findings cannot be sustained, especially those paragraphs which conclude that Elis would encounter barriers to entry and not be a timely, likely or sufficient entrant.

5.6 Pursuant to the Guidelines, Elis' entry / expansion would in fact be timely, likely and sufficient. We were told by the CMA staff that this case, immediately prior to the PFs, was [Redacted].[32] If so, then this new evidence about Elis' entry / expansion must push the CMA to reach an unconditional clearance decision. Elis would be a serious competitive threat to existing market participants. Consequently, the errors of fact made in respect of Elis and its plans undermine the central conclusion of the provisional findings that no competitors other than PHS would exercise a strong constraint. They should cause the CMA to overturn its provisional finding that the deal will lead to an SLC. If this requires

[31] See *EWS Railway Holdings / Marcroft Holdings and Marcroft Engineering* merger inquiry (CC) (12 December 2006)

[32] [Redacted].

an extension to the Phase 2 timetable then that is entirely appropriate to ensure that the CMA does not make a gross omission.

6. The CMA has failed to consider the impact of the Transaction on a dynamic basis. This has resulted in a failure to consider – as required of the CMA – what the position would be in the future, after *and as a result of* the Transaction

6.1 The CMA has consistently taken an overly static approach to its analysis by focusing on prior and current contracts won and lost by the Parties. However, the role of merger control is to undertake a forward-looking analysis. The question to which the CMA should address its mind is whether the merged entity would be constrained *post-Transaction* from raising prices or otherwise deteriorating its offer. This is vital to the legality and justification for the CMA's conclusions, but also relevant to reasonableness, fairness and proportionality: the CMA is necessarily required to base its findings, conclusions and actions on a real, evidenced, future problem.

6.2 Had the CMA addressed the specifics of this market in considering *what would happen* if the merged entity were to raise prices or deteriorate the quality of its offering, it would have been unable to reach its provisional finding of inadequate choice for national customers resulting in an SLC.

6.3 The CMA acknowledges that national customers tender for the provision of washroom services. The CMA has accepted that the tendering process in this market is very opaque – suppliers do not necessarily know who else is tendering, or even who the ultimate winner is of the tender process. The CMA has accepted that several companies other than PHS – including Mayflower and Cathedral - have national capabilities, meaning that customers will always have the ability to include at least four players in their tender process post-Transaction.[33] The Parties have also explained why the threat of buy-around is a genuine constraint.

6.4 In light of the above, the question that the CMA does not answer is why customers would not switch (or threaten to switch) in whole or in part to exert competitive pressure if the merged entity were to raise prices or deteriorate its offer. What is notable is that the CMA does not answer this question. It touches on the topic at paragraphs 8.146-8.149 and 8.165-1.66 but its conclusions at paragraphs 8.150 and 8.167 are that *"we have not seen sufficient evidence to provisionally conclude [Cathedral will compete with the merged company] post-Merger"* and *"that in our view, Mayflower is likely to remain a relatively limited constraint on the Parties post-Merger given the lack of strategic priority to target national and multi-regional customers"*. These conclusions rely exclusively on a static analysis and they disregard the points summarised in paragraphs 4.7 and 4.8 above which set out the customers' views as to choice

[33] The CMA has accepted that Cathedral and Mayflower have demonstrated an ability to serve national customers. PFs, paragraphs 8.150 and 167: *"The evidence indicates that Cathedral is able to supply waste disposal services to national and multi-regional customers but it is a smaller competitor than PHS, Rentokil and Cannon… Based on the evidence above, our provisional view is that Mayflower is able to supply waste disposal services to national and multi-regional customers."*

and the impact of the Transaction on them. They are insufficient to discharge the CMA's duty to consider on a forward-looking basis whether the Transaction *"may be expected to result"* in an SLC once the Parties are no longer held separate.

7. The CMA has failed to recognise the implications of the market context and realities in terms of the significance of a smaller competitor having been able to achieve national 'break-through'

7.1 The CMA provisionally concludes that Cathedral and Mayflower are national but not effective, but the criteria for that provisional conclusion are unclear.[34] What the CMA has failed to appreciate, despite its articulation of a separate market for national and multi-regional customers, is the special importance of being truly *"national"* in the present context. It necessarily carries with it a potency and power, because of what is needed to have the critical mass to 'break-through' and acquire customers of this type, and because of the powerful virtues which accompany that achievement. Put another way, there is here an inherent effectiveness which comes from becoming national for the first time that can be leveraged far more easily after the breakthrough to enlarge national business with subsequent customer acquisitions. To be a national player, a business has to be equipped to hold a position on that stage, which means necessarily being in a position to hold its own and make a difference. It is achieving the *"breakthrough"* that is the hardest part. This contextual reality is something which the CMA has overlooked in its apparent over-reliance on pure scale of overall washroom revenue.

7.2 Given the need to generate sufficient densities to make national coverage viable, the crucial breakthrough for smaller players in the market is to be able to serve their first national customer. Once they have demonstrated an ability to do that. Two things follow. First, there is no reason why they cannot serve other national customers (e.g. investing in additional vans and technicians as required at relatively low cost). Second, it adds significantly to the incentive on such a supplier to seek additional customers with a national footprint to spread any costs of setting up a national account capability and to enhance density further. Any supplier capable of and servicing even a limited number of national customers must in principle be recognised as having achieved the position to stand as a real competitor and, as such, present a real and effective constraint to the merged entity.

7.3 Cathedral and Mayflower accomplished this *"breakthrough"* national status and position some time ago. They can and do serve national customers, as the CMA has itself recognised. Furthermore, they are growing rapidly (at least twice as fast as any of PHS, [Redacted] or [Redacted]) and winning business, including from the market leader. As explained in **Annex I**, the CMA has substantially overstated Cannon's present position as regards supply to end-customers operating in eight or more regions. When Cannon's (appropriately

[34] It finds that a number of other suppliers are also servicing national contracts. See Table 3 of the PFs.

revised) revenues from sales to end customers operating in eight or more regions are compared with those of Cathedral and Mayflower, [Redacted].

8. The CMA has failed to demonstrate that even if the Transaction results in a reduction in the number of effective competitors from three to two, that will lead to a *substantial* lessening of competition

8.1 Even if this were a *"3-to-2"* deal, it is incumbent on the CMA to demonstrate that there will be a substantial lessening of competition on the balance of probabilities. An assumption of harm based on academic theory is not enough. Instead, the CMA needs to *evidence* to the requisite legal standard that a *substantial* lessening of competition will result from this increased concentration. The word *"substantial"* constitutes an important statutory pre-condition. Here, it is absent.

8.2 In the first place, the CMA has simply not demonstrated that any loss of competition between the Parties would be substantial (see **Annex I**):

(a) the CMA's own analysis (although suggesting that Rentokil and Cannon are each other's second closest competitor) does not suggest that Rentokil and Cannon are such close competitors that there would be a significant diversion, [Redacted];[35] and

(b) the upwards price pressure arising from the Transaction is demonstrably small (well within the standard CMA margins of tolerance, as is explained in the economic response to the PFs attached as **Annex I**). This view holds all the more when there are other constraints on the Parties and PHS (such as Mayflower and Cathedral). Although it has attempted to dismiss the price pressure (i.e. GUPPI) analysis submitted by the Parties, the CMA's rejection is unjustified and inconsistent with its own prior use of pricing pressure tests in *Reckitt Benckiser/K-Y* and *AG Barr/Britvic*, as outlined in more detail in **Annex I**.

8.3 Moreover, the CMA has failed to have regard to other economic evidence that suggests that this is not a case where a lessening of competition – if there is any – would be substantial. Instead, this is a case where there is limited diversion between the parties, regardless of the customer segment concerned:

(a) For customers purchasing directly, the CMA's own evidence indicates [Redacted]. The CMA has no direct evidence on the degree to which directly purchasing national customers switch from Cannon to Rentokil. [Redacted]. The CMA cannot show on the balance of probabilities that diversion from Cannon to Rentokil would not be low. Indeed, the absence of end customer concern suggests that diversion from Cannon to Rentokil would be [Redacted]. As explained at **Annex I**, standard price pressure tests used regularly by the CMA indicate that there would not be material upwards pricing pressure caused by the transaction in relation to end customers.

[35] PFs, paragraphs 8.62 in relation to private tenders and 8.68 in relation to public tenders.

(b) Regarding public sector frameworks, Cannon is at most a [Redacted] – the diversion ratio from Rentokil to Cannon is only [Redacted] % (see Table 6 of the PFs). Moreover, the evidence suggests that Rentokil is not an important constraint on Cannon customers – the diversion from Cannon to Rentokil is [Redacted] (see paragraph 8.68b of the PFs). As explained at **Annex I**, standard price pressure tests used regularly by the CMA indicate that there would not be material upwards pricing pressure caused by the transaction in relation to public frameworks.

(c) Regarding private sector frameworks, the evidence does not indicate that Cannon is an important constraint on Rentokil – diversion from Rentokil to Cannon is just [Redacted] % (see Table 4 of the PFs). While diversion from Cannon to Rentokil is slightly higher ([Redacted] %, see Table 5 of the PFs), this affects only £[Redacted] of revenue from Cannon customers (and even less revenue in terms of waste disposal, at just £[Redacted]). In any event, as explained at **Annex I**, standard price pressure tests used regularly by the CMA indicate that there would not be material upwards pricing pressure caused by the transaction in relation to private frameworks.

8.4 The CMA has presented no credible evidence to rebut the economic evidence above. Against this backdrop, and as set out in more detail in the following section, it is not sufficient to say that 'there is a reduction in the number of players from three to two *therefore* the merged entity, or PHS, or both, will put up prices'. The CMA has to establish an actual causal link between those two statements, grounded in the specific facts (where the investigation is materially lacking) and market context in this case. It then has to evidence why this outcome is more likely than not, and it has failed to do so.

9. The CMA has failed to demonstrate that the remedy proposed to address the provisionally identified SLC is reasonable and proportionate

9.1 It is axiomatic that the CMA must act in a way which is reasonable, fair, justified and proportionate. There is a necessary link between evidenced basis and due enquiry. In *Tesco v Commission*, the CAT concluded that: *"Ultimately [the CMA] must do what is necessary to put itself into a position properly to decide the statutory questions."*[36] The CMA has not done what is *"necessary"* in this case – or even come close – to reach a conclusion that there is an SLC still less one warranting action.

9.2 However, even if the CMA were convinced that it can reach an SLC finding, the context and implications really matter. The SLC finding would have been made only in relation to a small part of the target business. The CMA has found no problems in mats and healthcare waste – only in washrooms. Within washrooms, it has found no concern in any product other than in waste disposal. Within waste disposal, it has found no problems other than in relation to national customers. And within the national customer base, it has found no problem for FMs. Based on the evidence above, it is clear that there can be no problem either in relation to frameworks. In other words, it has found a problem only in

[36] *Tesco plc v Competition Commission* [2009] CAT 6, para. 139.

relation to a sub-segment of a sub-segment of a sub-segment of a sub-segment of the acquired business (worth £[Redacted] [37] out of the £[Redacted] of acquired revenues). That is a very revealing truth as to the practical realities, and the justice, of the case.

9.3 And yet the CMA has provisionally said that on this basis it considers it necessary that Rentokil sell the whole Cannon business.

9.4 This is unreasonable and disproportionate. Even if it were the case that an adverse conclusion were justifiable, in the light of evidence and enquiry, this is a case where the question as to whether it is justifiable to act given the CMA's substantive findings is brought into sharp focus. What would be needed is a proper in-the-round assessment, which recognises the need to strike a fair balance, grappling with:

(a) the precise nature of the supposed harm being considered as potentially justifying action; and

(b) the precise nature of the action being considered as potentially being justifiable in the light of that supposed harm.

9.5 These are not distinct stages to be approached in isolation from one another. The CMA has discretionary powers as to whether and what action is appropriate. It has duties to act proportionately and with justification. It must examine, holistically, the true nature and scale of the supposed problem and the scale and extent of the threatened remedy. Its action must be reasonable, proportionate and strike a fair balance. Those standards cannot be met.

9.6 The CMA's actions, seen in their true context and light, are contrary to public law principles – a classic case of using a sledgehammer to crack a nut.

9.7 Furthermore, as the Parties have set out in detail in their response to the Notice of Possible Remedies, even if action could be justified at all, the alternative remedy that has been proposed on a without prejudice basis is more proportionate and far less intrusive, while remaining effective and viable.

10. Conclusion

10.1 The CMA must show that the Transaction may be expected to result in an SLC.[38] That means a degree of likelihood for such a result which is more than 50%[39], in other words: on the balance of probabilities. The legal onus is on the CMA to prove an SLC, on the balance of probabilities, and to do so based on evidence. The available evidence in this case does not permit it to do so.

10.2 On the contrary, it is striking quite how many procedural and evidential failures there have been in this case. For example, the CMA:

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[37] [Redacted]

[38] Section 35(1)(b) of the Enterprise Act 2002.

[39] The Court of Appeal has endorsed the approach of expressing this as a more than 50% chance. See *IBA Health Ltd v OFT* [2004] EWCA Civ 142, paragraph 46.

(a) failed to analyse the *"unknowns"* in the win-loss data;

(b) did not properly interrogate Elis to evaluate the scale of its entry, [Redacted] ;

(c) introduced without evidence a barely articulated theory of harm in relation to PHS increasing its prices;

(d) failed then to make due inquiry into the competitive constraints on PHS;

(e) introduced frameworks as a concern very late in the process, without putting the SLC to the Parties in any detail prior to the PFs;

(f) failed to undertake the analysis which would have shown that framework customers are almost without exception local, and can and do buy services off-framework from regional suppliers;

(g) mis-designed and then ignored its own survey, and did not replace this with effective outreach to national customers;

(h) failed to undertake a dynamic analysis, overlooking the impact that other national competitors, tendering and buy around would have on the merged entity or PHS if the merged entity sought to exploit any market power;

(i) disregarded the economic evidence on the diversion ratios and subsequent GUPPI analysis indicating that any lessening of competition would not be substantial, using arguments which contradict its own work in previous cases, and relied instead on theory rather than evidence; and

(j) notwithstanding all these failings, has proposed the most draconian intervention available to it.

10.3 This is not a series of unfortunate errors that can be swept under the carpet. Every one of these individually goes to the very heart of the CMA's case against the Transaction. Collectively, they undermine entirely the provisional finding of an SLC.

10.4 The case which the CMA has built is not evidence-based, and ultimately rests on supposition and presumptions. The decision as a whole does not stack up. It would not withstand scrutiny. The CMA's approach involves a range of material public law errors, material failures of inquiry and other material errors of assessment which mean that the balance of probabilities test is not met, and the Parties must get the benefit of the doubt. A finding of an SLC cannot stand, a remedy is unwarranted and any decision along the lines of the PFs will be subjectable to successful legal challenge.

SCHEDULE I

References to PHS as constraint

(a) *"We found that PHS is the closest competitor to the Parties."*[40]

(b) *"We found that the Parties are the next closest competitors of each other after the largest supplier, PHS."*[41]

(c) *"We found that PHS is the closest competitor to the Parties in the supply to national and multi-regional customers. We also found that the Parties are each other's second closest competitor after PHS."*[42]

(d) *"We provisionally found that PHS is likely to continue to act as a constraint on the Parties post-Merger. However, we provisionally found that the Merger may enhance the ability of PHS to increase prices and/or reduce the incentives for PHS to compete against the merged entity relative to the pre-Merger situation."*[43]

(e) *"The Rentokil customer loss data and the Parties' tendering data indicate that the Parties are each other's second closest competitor, and PHS is the closest competitor to each of them. PHS captured the highest diversion from both Parties under all measures considered."*[44] (see also para. 8.113).

(f) *"In summary, the findings above point towards PHS being the strongest constraint, but also indicate that the Parties are each other's next closest competitors – albeit less closely than each of them competed with PHS. This finding is consistent with the Parties' internal documents. Our provisional view therefore is that PHS is the closest competitor with both Rentokil and Cannon, and that, after PHS, the Parties are each other's next closest competitor pre-Merger."*[45]

(g) *"In relation to PHS, the evidence set out above shows that PHS is the closest competitor to the Parties in the supply to national and multi-regional customers. We provisionally find that is PHS is likely to continue to act as a constraint on the Parties post-Merger. However, we provisionally find that the Merger may enhance the ability of PHS to increase prices and/or reduce the incentives for PHS to compete against the merged entity relative to the pre-Merger situation."*[46]

(h) Tender analysis:

  (i) On private tenders: *"In our view, the analysis of private sector tenders indicates that PHS is the closest competitor to each of Rentokil and Cannon for national and multi-regional customers.*

[40] PFs, paragraph 46.

[41] PFs, paragraph 45.

[42] PFs, paragraph 56.

[43] PFs, paragraph 47.

[44] PFs, paragraph 8.100(a).

[45] PFs, paragraph 8.101 and 8.102.

[46] PFs, paragraph 8.295.

For both Rentokil and Cannon, the other merger party is the next closest competitor after PHS. In both cases, the Parties lost more tenders to PHS than to each other indicating PHS imposes a strong constraint on both Parties."[47] (see, also, tables at para. 8.61).

(ii) On public tenders: *"In our view, the analysis of public tenders above indicates that PHS is the closest competitor to each of Rentokil and Cannon in the supply of washroom services to public sector customers. The analysis also indicates that Rentokil is the second closest competitor to Cannon after PHS and that Cannon is the second closest competitor to Rentokil after PHS."* (see, also, tables at para. 8.67).

(i) Customer loss analysis:

(i) *"We found that the diversion to PHS was* [Redacted] *% in washroom services (*[Redacted] *% in waste disposal), and the diversion to Cannon was* [Redacted] *% in washroom services (*[Redacted] *% in waste disposal)."*[48]

(ii) *"The analysis indicates that PHS, and to a lesser extent Cannon, were the main constraints on Rentokil in supplying washroom services or waste disposal to national or multi-regional customers pre-Merger."*[49]

[47] PFs, paragraph 8.65.

[48] PFs, paragraph 8.75.

[49] PFs, paragraph 8.84.