



RENTOKIL INITIAL PLC / CANNON HYGIENE LIMITED

RESPONSE TO NOTICE ON POSSIBLE REMEDIES

1. Introduction

1.1 This paper constitutes the consolidated response of Rentokil Initial plc (*Rentokil*) and Cannon Hygiene Limited (*Cannon*) (the *Parties*) to the CMA's notice on possible remedies published on 18 October 2018 (the *Notice*) and, in particular, the suggestion that the Parties should divest the entire Cannon UK business in order to remedy the substantial lessening of competition (*SLC*) provisionally identified by the CMA in relation to the supply of waste disposal services to the following national and multi-regional customers:

- (a) customers located in eight or more regions of the UK purchasing directly from their premises from a washroom services supplier (*end customers*).
- (b) public and private framework customers with national or multi-regional coverage.¹

1.2 As will be explained in the submissions and evidence to be provided in response to the provisional findings (the *PFs*), the CMA's theory of harm in this case is revealingly vague, poorly articulated and unsubstantiated. Moreover, there are big evidential gaps in its assessment that the CMA has failed to fill relating to the tendering process in the industry, customer feedback (including the CMA's own survey) and public and private frameworks. The CMA still fails adequately to consider the impact that buy around strategies and new entry (particularly from Elis given the recent information that we have received about its imminent national level entry) would have on the constraints imposed on the merged entity.²

1.3 The CMA must show that, on the 'balance of probabilities',³ the Transaction may be expected to result in an SLC.⁴ The legal onus is on the CMA to prove an SLC and in this case the available evidence does not permit it to do so. The case which the CMA has built is not evidence-based, and ultimately rests on supposition, presumptions and inference. As a consequence, it has committed a range of material public law errors and errors of assessment. The CMA cannot justifiably conclude that a SLC is likely to arise as a result of the Transaction. For these reasons alone, a remedy is unwarranted.

1.4 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

¹ PFs, paragraph 62 and 11.1.

² The Parties will address this point separately with the CMA, but they are concerned that the failure properly to interrogate Elis' entry intentions is another error of assessment in its investigation of the changing market dynamics.

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.

⁴ Section 35(1)(b) of the Enterprise Act 2002.

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.

1.5 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.

1.6 The Parties will provide in the remainder of this response:

- (a) an explanation as to why the divestiture of the entire Cannon UK business would in any event be disproportionate and unreasonable as a remedy to the size of the overlap and scale of the SLC provisionally identified by the CMA;
- (b) on a without prejudice basis, the specifications of a remedy proposal that the Parties would be prepared to consider as an alternative to the divestiture of the entire Cannon UK business (the **Remedy Proposal**) – if the CMA could (which it has not and the Parties submit cannot) justify a finding of harm;
- (c) an explanation as to why the Remedy Proposal would (if any remedy were needed) be an effective remedy to the provisionally suggested SLC (if it could be justified);
- (d) an explanation as to why the Remedy Proposal does not give rise to divestiture risks; and
- (e) responses to the specific invitations to comment in the Notice (see **Schedule I**).

2. The divestiture of the entire Cannon UK business would be disproportionate and unreasonable as a remedy to the SLC

2.1 As will be explained in the response that the Parties will provide to the PFs, the CMA should conclude that no SLC is likely to arise as a result of the Transaction and a remedy is unwarranted. However, even if the CMA considered that it could reach an SLC finding:

- (a) The CMA has been given by Parliament a discretionary power under the Enterprise Act (the **Act**) to determine whether it should take action to remedy an SLC and, if so, what remedy is appropriate.
- (b) It follows that Parliament recognised that there could be cases in which, in the context of a particular conclusion on harm, and in a

particular context, it was not appropriate or justifiable to take intrusive action.

- (c) In exercising its discretion under the Act, the CMA has a duty to act in a manner that is reasonable and proportionate as a matter of public law.
- (d) The context in this case is important. The SLC provisionally identified in this case is narrow and relates to what is only a very small part of the Cannon UK business: only approx. [Redacted] % of its annual revenues (estimated by the Parties as approx. £[Redacted] of total revenue of approx. £[Redacted]). The likelihood of harm is low and the scale of the provisionally identified adverse effects is small.
- (e) It is in that context that the CMA is now considering whether to take action which would involve compulsory divestiture of the entire Cannon UK business.
- (f) That brings into very sharp focus whether such a remedy could satisfy standards of reasonableness and proportionality. It would need to be a remedy which involved a reasonably proportionate fit between the problem and the solution. It would need to be justifiable as striking a fair balance.
- (g) In this context, the Parties consider that the divestiture of the entire Cannon UK business would be disproportionate and unreasonable as a remedy to the SLC. It would also deprive customers of the benefits of the Transaction.

2.2 It is classically said that a public authority acts disproportionately if it uses a sledgehammer to crack a nut. This can mean that the authority must find an alternative tool which can crack the nut without doing the sledgehammer's wider damage. But it can also mean that, if the authority can only identify the sledgehammer, it and the damage which it will do cannot be a justified recourse for what is, after all, a nut. This is the common sense meaning of the fair balance which is at the heart of the proportionality principle.

2.3 As will be explained in section 3 and 4, the position is all the stronger when it is seen that the Remedy Proposal is more reasonable and proportionate while remaining effective. There is an alternative to crack the nut, if the CMA can justify the conclusion that there truly is a problem which calls for action.

The CMA has discretionary power under the Enterprise Act

2.4 The CMA has been given by Parliament a statutory discretionary power to determine whether it should take action to remedy an SLC or any adverse effects resulting from it and, if so, what remedy is required:⁵

- (a) Section 35(3)(a) of the Act states that the CMA “shall [...] decide [...] whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial

⁵ Throughout this document, underlining in quotations connotes emphasis added.

lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition”.

(b) Section 41(2) states that “*The [CMA] shall take such action [...] as it considers to be reasonable and practicable — (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition*”.

(c) Section 35(3)(c) of the Act states that the CMA “*shall [...] decide [...] in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented*”.

2.5 In making such a determination in respect of completed mergers, section 35(4) of the Act provides a mandatory relevancy to which the CMA is to have regard: the CMA shall “*have regard 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*”. There is no statutory duty to achieve this need, but rather a statutory duty to have regard to it (i.e. to take it into account).

2.6 The statutory relevancy is itself qualified, to reflect the discretion and judgment which the CMA has: the CMA shall “*have regard 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*”.

2.7 Parliament had specifically in mind that there would be cases in which the CMA could and would in an appropriate case need to conclude that the nature of a SLC which it thought it had identified did not nevertheless call for action. It also had in mind that the CMA could properly conclude that action, including comprehensive action, would not be reasonable in all the circumstances.

2.8 The CMA’s Merger Remedies: Competition Commission Guidelines (the **Remedy Guidelines**) refer to cases where the circumstances – which the CMA describes as “*exceptional*” are such that: “*the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects*”, in which case the CMA “*would not pursue the remedy in question.*”⁶

2.9 The CMA needs to ask itself whether the remedy is truly justifiable, in the light of the supposed harm. That is an ‘in the round’ assessment which calls for re-evaluation of:

(a) The materiality of the harm, its nature and scale viewed in an informed overall context, any countervailing considerations pointing the other way, and the strength of the thesis on which the supposed harm is based.

⁶ Remedy Guidelines, paragraph 1.13.

- (b) The appropriateness of exercising the discretionary power to insist on action.
- (c) The nature, degree and implications of the action being envisaged.
- (d) The overall picture taking into account (a)-(c).

In exercising its discretion under the Act, the CMA has a duty to act in a manner that is reasonable and proportionate

2.10 In exercising its discretion under the Act, the CMA also has an important and overarching duty to act in a manner that is reasonable and proportionate when conducting a merger review and considering remedies. The relevant public law principles are very well established and long standing and include these key features⁷:

- (a) The CMA must identify an aim (i) which is legitimate and (ii) which is sufficiently important to justify the interference.
- (b) The response must be rationally connected to the legitimate aim, and no more than necessary to accomplish the objective.
- (c) Moreover, a fair balance must be struck between the rights and interests of the persons affected and the interests of the community.
- (d) That means that a careful assessment is needed of the severity and consequences of the response.⁸

2.11 The principles which relate to the fair balance and the nature of the consequences mean that:

- (a) The disadvantages caused must not be disproportionate to the aims pursued.⁹
- (b) The response must not impose an excessive burden on the person affected.¹⁰

2.12 The principle of proportionality has also been recognised by the CAT in equivalent situations:

- (a) In *Tesco v Competition Commission*, the CAT stated as follows on market investigation remedies: *“In this regard it may well be sensible for the Commission to apply a “double proportionality approach”: for example, the more important a particular factor seems likely to be in the overall proportionality assessment, or the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may*

⁷ As famously articulated by Lord Bingham in *Huang* [2007] 2 AC 167 at paragraph 19.

⁸ In particular, given the big evidential gaps that the Parties will address in their response to the PFs.

⁹ *Eastside Cheese* [1999] Eu LR 968 at paragraph 41.

¹⁰ *International Transport Roth GmbH* [2003] QB 728 at paragraph 52.

need to be. Ultimately the Commission must do what is necessary to put itself into a position properly to decide the statutory questions."¹¹

- (b) In *Eurotunnel I*, drawing on the formulation in *Tesco v Commission*, the CAT stated as follows on merger remedies: "[t]he measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued."¹²

2.13 In accordance with the above, the CMA must act in a manner that is reasonable and proportionate when conducting a merger review and considering remedies. It must not use a sledgehammer to crack a nut, for that is classically disproportionate as well as unreasonable.¹³

The SLC provisionally identified in this case is narrow and relates to only a very small part of the Cannon UK business. Adverse effects are neither likely nor large

2.14 In this case, even if the CMA convinces itself that it can reach an SLC finding, it has done so only in relation to a very small part of the target business:

- (a) The CMA has found no SLC in mats and healthcare waste (revenue generated by the Cannon UK business in 2017: £[Redacted]) – only in washroom services (which was viewed by the European Commission as the relevant market in *CWS-boco / Rentokil Initial Target Business*).¹⁴
- (b) Of the seven service categories that comprise washroom services, the CMA has found no SLC except in relation to one: waste disposal (revenue generated by the Cannon UK business from other washroom services in 2017: £[Redacted]).
- (c) Within waste disposal, the CMA has found no SLC except in relation to national customers (waste disposal revenue generated by the Cannon UK business from local and regional customers in 2017: £[Redacted]).
- (d) Even within waste disposal to national customers, the CMA has found no SLC in relation to national FM customers (revenue generated by the Cannon UK business in 2017: £[Redacted]).
- (e) As noted in Schedule II, even within the remaining national customer base, there are other customers that should also be removed from the list of customers identified by the CMA as affected by its SLC finding.

¹¹ *Tesco plc v Competition Commission* [2009] CAT 6, paragraph 139.

¹² *Groupe Eurotunnel S.A. v Competition Commission* [2013] CAT 30, paragraph 380, drawing on the formulation in *Tesco plc v Competition Commission* [2009] CAT 6, paragraph 137.

¹³ *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 759D.

¹⁴ M.8399 – *CWS-boco / Rentokil Initial Target Business*, 7 June 2017. The combined share of Cannon and Rentokil in the UK based on the market definition in this case would be [Redacted] %.

These are customers that, for example, have been lost, liquidated or included by the CMA in error (waste disposal revenue generated by the Cannon UK business for these customers in 2017: £[Redacted])

- 2.15 In the end, the CMA has only found an SLC in relation to waste disposal services provided to two small sub-segments of Cannon's national customer base – end customers (waste disposal revenue generated by the Cannon UK business in 2017: £[Redacted]) and public and private framework customers with national or multi-national coverage (waste disposal revenue generated by the Cannon UK business in 2017: £[Redacted]).

Revenue attributable to SLC as proportion of overall Cannon UK business

[Redacted]

Source: RBB based on Cannon data

- 2.16 Of these two segments, the inclusion of the public and private framework customers with national or multi-regional coverage account for nearly half (£[Redacted]) of the revenue attributable to the SLC. That was not a segment which the CMA considered, in any natural or straightforward way, to be apt for inclusion. It has been put to the Parties only belatedly, as if to seek to bolster a theory. It remains particularly underdeveloped. The CMA never put it properly, squarely, explicitly or in any detail, as an area of concern prior to the PFs. That is revealing. As will be explained in the response to the PFs, had the Parties been given the opportunity to respond to the SLC in relation to this sub-segment, they would have been able to demonstrate that framework customers benefit from many of the characteristics that caused the CMA to conclude that FM customers will suffer no harm as a result of the Transaction. In addition, frameworks are non-exclusive options for customers, who therefore retain the ability to use – and do use – alternative suppliers (including regional suppliers given that end customers' requirements on frameworks are typically local) outside the framework arrangements (unlike the typical FM arrangement).
- 2.17 In any event, irrespective of whether end users and/or public and private framework customers are captured, the allegedly problematic overlap in this case is narrow and relates to only a very small part of the Cannon UK business: a sub-segment of a sub-segment of a sub-segment of a sub-segment. The affected value represents only approx. [Redacted]% of the annual revenues of the Cannon UK business (estimated by the Parties as approx. £[Redacted] of total revenue of approx. £[Redacted]). To put the scale of these figures into further perspective: the average washroom revenue of a single Cannon branch in the UK was equal to £[Redacted] in 2017. In terms of customer count, the overlap relates to less than [Redacted]% of customers served by Cannon ([Redacted] end customers and [Redacted] public and private frameworks relative to a total of approximately [Redacted] washroom customers).¹⁵ Consequently, the putative affected segment in this case is tiny.

¹⁵ Please see Schedule II for details on which customers are included for this calculation. Note that this counts the frameworks as in the CMA's analysis in Table 3 of the PFs. For the reasons outlined in Schedule II, this may overstate the number of relevant framework customers for this calculation.

And neither customers nor competitors (other than PHS, the market leader) are concerned.

The divestiture of the entire Cannon UK business as a remedy to the narrow SLC in this case is disproportionate and unreasonable

- 2.18 In light of the above, in proposing the divestiture of the entire Cannon UK business as a remedy to the narrow SLC identified is a classic case of using a sledgehammer to crack a nut, the CMA is threatening to arrive at a remedy decision that is unreasonable and disproportionate, that fails to strike a fair balance, as well as being based on faulty, incomplete analysis.
- 2.19 The Parties note that given the “intrusive” and “wide-ranging” nature of a remedy that consists of the divestiture of the entire Cannon UK business, the CMA should in accordance with *Tesco v Commission* have conducted a “more detailed or deeper [...] investigation of the factor in question”.¹⁶ As will be explained in the response to the PFs, such an investigation has evidently not been done in the context of whether an SLC should have been identified in the first place: the CMA has failed to conduct a sufficient inquiry and has committed a range of material errors of assessment in this regard. The Parties are now concerned that it will also not be done in the context of remedy discussions, where the Parties observe that:
- (a) the CMA has evidently given no consideration to – and has invited no views on – how the divestiture of the entire Cannon UK business will affect the competitive dynamics in markets in which no SLC has been identified e.g. mats and healthcare waste. This is a critical aspect of the remedy that the CMA is required to investigate – see response to Q.16 of Schedule II.
 - (b) the CMA has already dismissed behavioural remedies as being “very unlikely to be an effective remedy” and alternative divestiture options as carrying “divestiture risks [that are] likely to substantially limit their effectiveness”.¹⁷
- 2.20 The latter statements indicate that the CMA’s ‘mind is already made up’. They are highly prejudicial to the outcome of any market testing of third party views. The CMA is obliged to keep an open mind and ensure that the appearances support that position; not to fetter its discretion; and to take into account all relevant considerations. The CMA has also not articulated which divestiture risks it considered likely to substantially limit the effectiveness of alternative divestiture options and on what basis, which means the precise nature of its concerns is unclear to the Parties.

The divestiture of the entire Cannon UK business as a remedy would deprive customers of the benefits of the Transaction

¹⁶ *Tesco plc v Competition Commission* [2009] CAT 6, paragraph 139

¹⁷ Notice of Possible Remedies, paragraphs 15 and 21.

- 2.21 The Parties have previously argued that the Transaction would have led to relevant customer benefits in the washroom services, mats and healthcare businesses. The divestiture of the entire Cannon UK business will deprive affected customers of these benefits in respect of not just washroom services, but mats and healthcare as well. These benefits include the introduction of Rentokil's very high service standards and an expanded product range. Such customer benefits have already been realised elsewhere outside the UK, notably in Australia, where customers have benefitted from *inter alia* environmental benefits and the introduction of rigorous service tracking.
- 2.22 Many customers (at a national, regional and local level) have expressed positive or neutral views about the Transaction:
- (a) end customers are reported as saying:
 - (i) *"it was not concerned about the Merger. Losing Cannon is not a big issue since Cannon was not competitive in previous tenders."*¹⁸
 - (ii) *"told us that the merger may not impact it since it never considered Cannon in previous tenders."*¹⁹
 - (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."*²⁰
 - (iv) *"told us it was not concerned about the merger as it would have very little impact."*²¹
 - (b) framework customers are reported as saying:
 - (i) *"unsure about whether it was concerned [...] the framework is most favourable and customers would receive the best price."*²²
 - (ii) *"it is not sure if there will be any impact."*²³
 - (iii) *"it was not concerned about the merger."*²⁴
 - (c) 8 of 11 multi-regional customers in the GfK survey said they expected the Transaction to be 'neutral.'²⁵

¹⁸ PFs, appendix E, paragraph 102(a).

¹⁹ PFs, appendix E, paragraph 102(c).

²⁰ PFs, appendix E, paragraph 102(g).

²¹ PFs, appendix E, paragraph 102(h).

²² PFs, appendix E, paragraph 109(a).

²³ PFs, appendix E, paragraph 109(c).

²⁴ PFs, appendix E, paragraph 109(e).

²⁵ PFs, appendix E, paragraph 8.1(g).

- 2.23 Given the CMA has not identified an SLC in respect of the mats and healthcare businesses, there can be no justification for depriving these customers of the benefits of the Transaction at least in respect of the mats and healthcare businesses.

3. The specifications of a Remedy Proposal

- 3.1 Despite all of the above, and strictly without prejudice to the Parties' position – which they strongly maintain - that no remedy is warranted, the Parties identify here an alternative to the divestiture of the entire Cannon UK business, as a structural solution which is less intrusive, more reasonable and proportionate, and far better aligned to the SLC, and which would strike a fair balance were there a justification for action.
- 3.2 This would consist of the divestiture of a UK washroom services business operating under the Cannon brand; such assets (including branches, vans and employees) as the divestment taker (whose business plan would need to be approved by the CMA) deemed necessary to be an effective national competitor; and the entire washroom services²⁶ - as well as any other services (e.g. mats and healthcare waste) provided under the same contractual arrangement – of those Cannon end customers located in eight or more regions of the UK and public and private framework customers with national or multi-regional coverage (the ***Divestment Business***). The Parties would retain all assets and liabilities not relating to the Divestment Business (the ***Retained Business***). This includes the mats business, the healthcare business and the washroom services contracts not included in the Divestment Business.
- 3.3 The Remedy Proposal has a number of advantages, including that:
- (a) [Redacted]. The Parties have already received expressions of interest in the Divestment Business from [Redacted], each of whom has told the Parties in preliminary discussions that the Remedy Proposal would be *more attractive* than divestiture of the entire Cannon UK business.
 - (b) The Remedy Proposal would be effective in addressing the narrow SLC identified by the CMA, and viable, while being considerably less disproportionate than the divestment of the entirety of the Cannon UK business.

Description of the Divestment Business

- 3.4 The Divestment Business would comprise as follows, subject to the requirements of the purchaser:
- (a) **entity:** either:
 - (i) 100% of the shares in a new company incorporated as a private limited company (***NewCo***) that includes the assets that comprise the Divestment Business;

²⁶ Not just waste disposal, the area in which the CMA has provisionally identified an SLC. This means the remedy proposal includes [Redacted] additional washroom, medical and mats revenue, over and above the waste disposal revenues for which the CMA has provisionally identified an SLC.

- (ii) the sale of 100% of the shares in Cannon UK after all assets and liabilities not relating to the Divestment Business are transferred to a new entity in the Retained Business; or
 - (iii) an asset sale of the assets that comprise the Divestment Business.
- (b) **brand and other intellectual property:**
 - (i) “*Cannon Hygiene*” brand and the “*Cannon*” brand, to the extent owned or controlled by the Parties in the UK. In particular, the “*Cannon Hygiene*” brand will be included in the Divestment Business. In addition, to eliminate any potential for confusion between the Cannon Hygiene brand to be used by the Divestment Business and the “*Cannon*” brand that otherwise would be used by the Retained Business, the Parties are willing to assign all of their rights, title and interest in the overarching “*Cannon*” brand in the UK to the purchaser, providing the purchaser with control of these trade marks in the UK. The Parties will implement a prompt post-transfer rebranding process (including company name changes) of the Retained Business and any relevant business lines to remove the risk of any confusion between the Divestment Business and the retained Cannon Group following closing of the divestiture;
 - (ii) all intangible assets owned or controlled by Cannon UK and necessary to carry out washroom services provided in the Divestment Business, including the relevant intellectual property rights (including trademarks, service marks and domain names).
- (c) **employees and other personnel:**
 - (i) all Cannon employees and other personnel primarily engaged in providing or supporting the Divestment Business, including central national account management capability, service technicians and those with other central functions (subject to employment law restrictions);
 - (ii) any personnel not listed above but who are both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, or an adequate substitute.
- (d) **permits and licences:** all permits and licences in relation to waste collection and disposal of healthcare waste services including waste carrier licences, to the extent transferrable.
- (e) **customer contracts:** the customer contracts implied by the SLC, meaning the contracts related to the [Redacted] end customers in eight or more regions in the UK and the [Redacted] framework customers listed in **Annex I** (the *Divested Cannon Contracts*). A methodology in

respect of how these customers were selected is set out in **Schedule II**. Details on the transfer of the Divested Cannon Contracts are set out in **Schedule III**.

(f) **assets:**

- (i) all Cannon UK facilities engaged in washroom services for the Divested Cannon Contracts, including all on-site equipment related to such washroom services as well as all such leased equipment to be transferred to the purchaser to the fullest extent possible;
- (ii) all leases for the transferred Cannon UK facilities described above, or a sub-lease as appropriate, to the extent transferrable;
- (iii) all Cannon vehicles currently owned or leased by Cannon UK and used to provide washroom services for the Divested Customer Contracts;
- (iv) any asset not listed above but which is both used (exclusively or not) in the Divestment Business and necessary for the continued viability and competitiveness of the Divestment Business, or an adequate substitute.

- 3.5 For the avoidance of doubt, this list is subject to the requirements of the purchaser and the Parties think it unlikely that a purchaser will need all of the above.

Non-solicitation

- 3.6 The Parties shall undertake, subject to customary limitations, not to solicit, and to procure that its affiliated undertakings do not solicit, for the waste disposal services of customers covered by the Divested Cannon Contracts for a period of time (to be agreed) from closing of the divestiture.

Non-reacquisition

- 3.7 The Parties shall undertake not to re-acquire, and procure that its affiliated undertakings will not re-acquire, the Divestment Business for a period of [Redacted] years from closing of the divestiture without the prior written consent of the CMA.

Transitional support services

- 3.8 Subject to the requirements of the purchaser, the Parties would provide as follows:
- (a) transitional services to the purchaser under a transitional services agreement (**TSA**) as necessary;
 - (b) reasonable training assistance at its own expense to the purchaser to ensure a smooth transition of the Divestment Business;
 - (c) supply of hygiene and washroom products and consumables for an agreed transitional time period not to exceed [Redacted] and/or

reasonable assistance in liaising with suppliers to ensure a smooth transfer of products/consumables to the purchaser.²⁷

Transfer of the Divestment Business

- 3.9 As stated above, the transfer of the Divestment Business would be implemented by the sale of NewCo or the sale of Cannon UK (following the transfer to the Retained Business of all assets and liabilities not related to the Divestment Business), or an asset sale, as described above.
- 3.10 Of the options above, the Parties would choose the structure that provides the most efficient and effective divestiture option, taking into account in particular the wishes of the purchaser.

4. The Remedy Proposal would be an effective remedy to the SLC and not give rise to divestiture risks

- 4.1 The CMA has indicated in the Notice that *“if feasible, a structural remedy requiring only the divestiture of those customers located in eight or more regions of the UK purchasing directly for their premises from a washroom services supplier and public and private framework customers with national or multi-regional coverage would align with the identified SLC. However, at this stage, the CMA considers the divestiture risks associated with alternative divestiture options are likely to substantially limit their effectiveness.”*
- 4.2 As stated in section 2 above, the CMA has a duty to act in a manner that is reasonable and proportionate. However, the Parties are also entitled to expect that the CMA will follow its own Remedy Guidelines and therefore select the Remedy Proposal as the most *“reasonable”* and *“proportionate”* solution of effective remedy options available to it.²⁸
- 4.3 As explained below, the Remedy Proposal meets the CMA’s own criteria for an effective remedy (i.e. impact on SLC and resulting adverse effects, appropriate duration and timing, practicality and acceptable risk profile)²⁹ and gives rise to no material divestiture risks in respect of its implementation. Consequently, it should be selected over the divestiture of the entire Cannon UK business if a remedy is ultimately required.

Impact on SLC and resulting adverse effects

- 4.4 The SLC in this case is narrow. It captures only [Redacted] end customers and [Redacted] public and private framework customers. Paragraph 1.8(a) of the

²⁷ From a practical point of view, this should not be a concern in any event as there is no shortage of suppliers for non-specialist products of this type.

²⁸ Remedy Guidelines, paragraph 1.9: *“Having considered the effectiveness of remedy options, the CC will then consider the costs of those remedies that it expects would be effective in addressing the SLC and resulting adverse effects. In order to be reasonable and proportionate the CC will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CC is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. The CC will seek to ensure, as outlined in paragraph 1.12, that no remedy is disproportionate in relation to the SLC and its adverse effects.”*

²⁹ Remedy Guidelines, paragraph 1.8.

Remedies Guidelines states that structural remedies “*should be expected to address the adverse effects at source.*” As the CMA recognises, the Remedy Proposal aligns with the identified SLC. The Remedy Proposal is a targeted structural solution that addresses the entirety of the overlap in waste disposal found by the CMA to be problematic (i.e. the Divested Cannon Contracts) and in fact involves divestment of over 100% more revenue than the SLC revenue (i.e. because the Parties would divest the washroom, mats and medical contracts, not just waste disposal revenue).

- 4.5 In addition, the Remedy Proposal includes all assets and transitional support that may reasonably be required by the purchaser in order for it to service the Divested Cannon Contracts, and enhance its ability to compete as a national supplier.

Appropriate duration and timing

- 4.6 Paragraph 1.8(b) of the Remedies Guidelines states that remedies “*that act quickly in addressing competitive concerns are preferable*”. The Remedy Proposal will address the SLC immediately upon closing of the divestiture. The Parties have set out a clear and straightforward procedure for transferring the Divested Cannon Contracts to the purchaser in Schedule III.

- 4.7 Paragraph 1.8(a) also states that “*remedies need to address the SLC effectively throughout its expected duration*”. The Remedy Proposal achieves this. Because it is a targeted structural solution, once the Divested Cannon Contracts have been transferred, the SLC will have been addressed. In addition, to take account of the short term nature of contracting in the washroom services industry and give the CMA additional comfort, the Parties shall undertake, subject to customary limitations, not to solicit, and to procure that its affiliated undertakings do not solicit, any customers covered by the Divested Cannon Contracts for an agreed period from closing of the divestiture.

Practicality

- 4.8 Paragraph 1.8(c) of the Remedies Guidelines states that “*a practical remedy should be capable of effective implementation, monitoring and enforcement [...] The practicality of any remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required. Remedies regulating ongoing behaviour are generally subject to the disadvantage of requiring ongoing monitoring and compliance activity*”.
- 4.9 The Remedy Proposal gives rise to no such concerns given it is not a behavioural remedy but rather a targeted structural solution that requires no ongoing monitoring and compliance.
- 4.10 In preparing the Remedy Proposal, the Parties have been working to collect, and analyse the transferability of, the Divested Cannon Contracts to ensure the practicality of the Remedy. In the limited time available, the Parties believe they have identified the contract terms that they understand relate to [Redacted] of the end customers and all [Redacted] of the public and private framework agreements listed in Annex I.

- 4.11 [Redacted].
- 4.12 [Redacted].
- 4.13 The Parties shall apply standard contract transfer principles commonly used in asset transfer arrangements to transfer the contracts (see **Schedule III**).

Acceptable risk profile

- 4.14 Paragraph 18(d) of the Remedies Guidelines states that the CMA will “*seek remedies that have a high degree of certainty of achieving their intended effect*”. The Remedy Proposal gives the CMA the comfort it requires on the basis that it is a targeted structural solution that addresses the entirety of the overlap in waste disposal found by the CMA to be problematic (i.e. the Divested Cannon Contracts) and in fact involves divestment of over 100% more revenue than the SLC revenue (i.e. waste disposal revenue).

5. The Remedy Proposal does not give rise to divestiture risks

- 5.1 Paragraph 3.3 of the Remedies Guidelines states that there are three broad categories of risks that may impair the effectiveness of divestiture remedies: (i) composition risks; (ii) purchaser risks; and (iii) asset risks. None of these arise in relation to the Remedy Proposal.

Composition risks

- 5.2 Composition risks are “*risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.*” In this case, the Remedy Proposal will not give rise to any risks of this nature on the basis that it consists of all of Cannon’s national washroom services contracts together with all assets and transitional support that may be required by a purchaser. These national washroom services contracts are an attractive proposition, as exemplified by the fact that the Parties have already received expressions of interest in the Divestment Business from [Redacted].
- 5.3 The majority of the contracts reviewed to date have an initial term of [Redacted] which then revert to a [Redacted] term which can be terminated on [Redacted] notice. However, any composition risk as a result of contract duration would be the same irrespective of whether the remedy is the Remedy Proposal or divestiture of the entire Cannon UK business. The Parties have sought to minimise any composition risk in respect of the Remedy Proposal by undertaking, subject to customary limitations, not to solicit, and to procure that its affiliated undertakings do not solicit, any customers covered by the Divested Cannon Contracts for a period of time (to be agreed) from closing of the divestiture.
- 5.4 In terms of configuration:
- (a) [Redacted]

- (b) Only limited transitional support is expected to be required. As is common practice in large businesses, the Divestment Business currently receives IT systems support and other services from other members of the OCS (or following the CMA-approved IT transition, Rentokil Initial) group. A thorough and robust review process has been initiated to: (i) identify those systems and services; and (ii) prepare the service descriptions in TSA which will govern the migration and transitional support services (and which will replicate the existing service levels and descriptions currently in place between the Divestment Business and the Retained Business). This will ensure that all systems and services will, to the extent that they are not transferring with the Divestment Business, be provided on a transitional basis such that the Divestment Business will be able to continue to operate as a competitive and independent washroom services business immediately following completion. Following the expiry of the transitional services there will be no interdependencies between the Parties and the Divestment Business.

Purchaser risks

- 5.5 Purchaser risks are “*risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser.*” In this case, the Parties have already received expressions of interest in the Divestment Business from [Redacted]. This supports the conviction of Rentokil that the Remedy Proposal is both viable and effective. [Redacted]. The washroom services business is a profitable industry with excellent growth opportunities – as [Redacted]. The Parties are confident that the Remedy Proposal would be viewed as an attractive proposition to potential purchasers (more attractive in many cases than a divestment of the entire Cannon UK business) that would not give rise to any purchaser risks.
- 5.6 More generally, the Parties will ensure to the CMA’s satisfaction that any prospective purchaser:
- (a) is independent of the Parties;
 - (b) has the necessary capability to compete;
 - (c) is committed to competing for those customers located in eight or more regions in the UK and provisionally identified by the SLC; and
 - (d) will not create further competition concerns.³⁰

Asset risks

- 5.7 Asset risks are “*risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through loss of customers or key members of staff.*” In determining the duration of a divestiture period, the CMA will always need to balance its requirement to reduce asset risk and give rapid effect to the remedy with the need to ensure

³⁰ Notice of Possible Remedies, paragraph 23.

that the Parties have enough time to achieve the effective disposal. In this case, the Parties consider that a period of [Redacted] would be appropriate to canvass suitable purchasers [Redacted], facilitate adequate due diligence, create an effective and appropriate divestiture package and obtain the customer consents to transfer the Divested Cannon Contracts. Such a period is not expected to result in appreciable asset risk given that:

- (a) The Parties have demonstrated their ability to maintain the value of the Divestment Business since it was acquired on 1 January 2018. They are already subject to an enforcement order pursuant to section 81 of the Act and have a monitoring trustee in place to ensure the Parties' compliance.
- (b) As stated above, the Parties have already received expressions of interest in the Divestment Business from [Redacted].
- (c) The Parties consider that the divestiture process could be run largely within the scope of existing derogations to the enforcement order.

6. Conclusion

- 6.1 The Parties consider that the CMA should conclude that no SLC is liable to arise as a result of the Transaction and a remedy is unwarranted. However, even if the CMA concludes that it can reach an SLC finding, the divestiture of the entire Cannon UK business would be a disproportionate and unreasonable remedy. On a without prejudice basis, the Remedy Proposal is more reasonable and proportionate while remaining effective.

SCHEDULE I

Specific invitations to comment in the Notice

1. Introduction

- 1.1 Without prejudice to their submissions in response to the PFs, the Parties set out their answer below to each of the specific invitations to comment in the Notice.

2. The package of assets to be divested

3. Whether there are risks that the scope of the divestiture package (the sale of the entire Cannon UK business), may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market

4. Whether there are risks that a suitable purchaser is not available or that the merger parties will divest to a weak or otherwise inappropriate purchaser

5. Whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture³¹

- 5.1 The divestiture of the entire Cannon UK business is disproportionate and unreasonable as a remedy to the SLC. The Remedy Proposal is a targeted structural solution that addresses all customers whom the CMA expects to be adversely effected by the Transaction (i.e. the Divested Cannon Contracts). This should represent the upper limit of any package of assets to be divested.

- 5.2 In respect of the Remedy Proposal, the Parties do not consider that it would give rise to composition risks, purchaser risks or asset risks for the reasons set out in section 4 above. Indeed, in relation to purchaser risks, the Remedy Proposal is arguably superior to full divestiture of the Cannon UK business as it allows the purchaser to select, subject to CMA oversight, that package of assets which would make it an effective competitor whilst not burdening it with the costs and liabilities associated with dealing with assets superfluous to the purchasers' requirements.

6. Whether the Cannon brand, 'Cannon Hygiene', should be included in the divestiture package

- 6.1 The Parties have offered to include the "*Cannon Hygiene*" brand and the "*Cannon*" brand for the UK in the divestiture package, to the extent such brands are owned or controlled by Cannon UK or Rentokil, without any requirement to split/share the brands in the UK with the Parties. See section 4 in the main body of the response.

7. Whether a divestiture package excluding the mats and healthcare waste businesses of Cannon would be effective, may be too constrained or not

³¹ Remedy Guidelines, paragraphs 3.3(c), 3.4.

appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market

- 7.1 Subject to the requirements of the purchaser, the Parties assume that all services under the Divested Cannon Contracts will be transferred to the purchaser under the Remedy Proposal (i.e. not just washroom services, but mats and healthcare waste as well). The Parties shall apply standard contract transfer principles commonly used in asset transfer arrangements to transfer the contracts (see Schedule III).

8. Whether there is a divestiture package that only included or more closely aligns to, the affected washroom services customers

- 8.1 Yes. Please refer to the Remedy Proposal outlined above.

9. Other elements that a divestiture package may require to be effective and comprehensively address the provisionally identified SLC

- 9.1 Please refer to the Remedy Proposal outlined above.

10. Whether there are any specific factors to which the CMA should pay particular regard in assessing purchaser suitability, for example whether the purchaser would need to have an existing presence in the market or would need to demonstrate an existing level of expertise with a direct cross over to washroom services, such as logistics

- 10.1 [Redacted]

11. The identity of a suitable purchaser

- 11.1 Please refer to section 4 in the main body of the response.

12. The appropriate timescale for achieving a divestiture³²

- 12.1 In determining the duration of a divestiture period, the CMA will always need to balance its requirement to reduce asset risk and give rapid effect to the remedy with the need to ensure that the Parties have enough time to achieve the effective disposal. In this case, the Parties consider that a period of [Redacted] would be appropriate to canvass suitable purchasers [Redacted], facilitate adequate due diligence, create an effective and appropriate divestiture package and obtain the customer consents to transfer the Divested Cannon Contracts.

13. Whether the functions of the monitoring trustee should be amended to ensure that the business is maintained during the course of the process³³

- 13.1 The functions of the monitoring trustee do not need to be amended. It is in the Parties' interest to ensure that the business being divested is maintained in a condition that will achieve the highest price.

³² Notice of Possible Remedies, paragraph 26.

³³ Notice of Possible Remedies, paragraph 29.

14. Whether the circumstances of this Merger necessitate the appointment of divestiture trustee at the outset of the divestiture process

14.1 No. The appointment of a divestiture trustee at the outset of the divestiture process would be unnecessary and unjustified because the divestiture process could be run largely within the scope of existing derogations to the enforcement order.

15. Proportionality and any relevant costs that are likely to arise in implementing different remedy options

15.1 As stated above, the divestiture of the entire Cannon UK business would be disproportionate and unreasonable as a remedy. Please refer to sections 2 and 4 in the main body of the response.

15.2 The Remedy Guidelines state that: *“The [CMA] will seek to ensure [...] that no remedy is disproportionate in relation to the SLC and its adverse effects.”* In addition, *“In order to be reasonable and proportionate the [CMA] will seek to select the least costly remedy, or package of remedies, that it considers will be effective.”*³⁴ In this case, the Remedy Proposal offered by the Parties is significantly more proportionate as it serves precisely to make the purchaser an effective national competitor consistent with its own assessment of its requirements (under CMA supervision) and as a result is also the least costly option for the purchaser as it does not require a divestment taker to assume the liabilities and obligations that the divestment of the entire Cannon UK business entails.

16. Relevant customer benefits and the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we the CMA is considering

16.1 Please refer to section 2 of the main body of the response.

³⁴ Remedy Guidelines, paragraph 1.9.

SCHEDULE II

[Redacted]

SCHEDULE III

Transferring Divested Cannon Contracts

1. Procedure

- 1.1 The Divested Cannon Contracts relating solely to washroom services will be transferred to the purchaser, subject to their requirements and under the supervision of the CMA.
- 1.2 The Divested Cannon Contracts relating to both washroom services and mats and/or healthcare waste services (the ***Shared Contracts***) will be transferred to the purchaser, subject to their terms and unless the purchaser elects instead for the Parties to use all reasonable endeavours to split these contracts so that the Divestment Business receives the benefit of the washroom services portion of the contract, and the Retained Business receives the benefit of the rest of the contract including the mat and healthcare waste services portion of the contract.
- 1.3 Assuming the purchaser elects to receive the whole of a Shared Contract, the Parties shall act as sub-contractor [Redacted] on behalf of the purchaser in relation to the mat and/or healthcare waste services portion of the contract, if the purchaser requests and the relevant contract permits sub-contracting (or the customer consents).
- 1.4 In order to effect a transfer of the Divested Cannon Contracts, the Parties shall apply standard contract transfer principles commonly used in asset transfer arrangements:
 - (a) for contracts where there is no prohibition or restriction on assignment, novation, sub-contracting or (where relevant) termination on a change of control, the Parties shall assign the benefit of the Divested Cannon Contract to the purchaser. Until such time as the burden of the contract can be novated to the purchaser, the purchaser shall perform (as the sub-contractor or agent of Cannon UK) all obligations of Cannon UK under the transferring contract; and
 - (b) for contracts that include a prohibition or restriction on transfer (either by way of a prohibition on assignment, novation, sub-contracting or a right to terminate on a change of control), or the splitting of the Divested Cannon Contracts is not possible, the Parties shall use all reasonable endeavours to obtain the relevant third party's consent to the transfer. Until such time as consent can be obtained, the Parties shall, subject to the terms of the contract, hold the contract on trust for the purchaser and account for and pay or deliver to the purchaser any monies, goods or other benefit which it receives.