

## **Veolia / Suez provisional findings**

### **Appendices**

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## Appendix A: Terms of reference and conduct of the inquiry

1. In exercise of its duty under section 33(1) of the Enterprise Act 2002 the Competition and Markets Authority believes that it is or may be the case that:
  - (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, in that:
    - (i) enterprises carried on by Veolia Environnement S.A. will cease to be distinct from enterprises carried on by Suez S.A.; and
    - (ii) the condition specified in section 23(1)(b) of the Act is satisfied; and
  - (b) the creation of that situation may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom for goods or services, including:
    - The supply of complex waste management contracts procured by local authorities in the UK;
    - The supply of non-hazardous commercial and industrial waste collection services in the UK;
    - The supply of non-hazardous municipal waste collection services in the UK;
    - The supply of services for the operation and maintenance of local authority-owned energy recovery facilities in the UK;
    - The supply of non-hazardous waste incineration services at local level in the Teesside, Wilton 11, Marchwood, and Kemsley local areas;
    - The supply of organic waste composting services at open-windrow composting facilities at local level in the Coven and Packington local areas;
    - The O&M of water and wastewater treatment facilities for industrial customers in the UK; and
    - The supply of mobile water services in the UK.
2. Therefore, in exercise of its duty under section 33(1) of the Act, the CMA hereby makes a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 in order that

the group may investigate and report, within a period ending on 17 July 2022, on the following questions in accordance with section 36(1) of the Act:

- (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
- (b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services.

**Andrea Coscelli**  
**Chief Executive**  
**Competition and Markets Authority**  
**21 December 2021**

## Conduct of the Inquiry

3. We published the biographies of the members of the Inquiry Group conducting the Phase 2 inquiry on our inquiry [webpage](#) on 21 December 2021 and an administrative timetable for the inquiry was published on 14 January 2022. At commencement of the inquiry, the statutory deadline was 6 June 2022. This deadline was subsequently extended until 17 July 2022 for the reasons set out in paragraph 10 below.
4. On 28 January 2022, the CMA published an [Issues Statement](#) on the inquiry webpage setting out the areas on which it envisaged that the Phase 2 inquiry would focus.
5. On 16 and 24 February 2022 members of the Inquiry Group, accompanied by CMA staff, attended virtual/hybrid 'site visits' with the Parties and their advisers. Some attendees were present in person at the CMA's London office and some attended via video-conference. These arrangements were made because of the Coronavirus (COVID-19) pandemic and in accordance with the Government's associated guidelines.
6. We received written evidence from the Parties in the form of submissions and responses to information requests, including a large number of internal documents from the Parties. A non-confidential version of Veolia's [initial phase 2 submission](#) was published on the inquiry webpage on 18 March 2022. We also held separate hearings with each of the Parties on 13 and 14 April 2022.
7. Prior to the hearings, we sent the Parties a number of working papers (including non-confidential third party evidence) for comment. The Parties were also sent an annotated issues statement, which outlined our thinking at that stage. Veolia provided comments on those papers on 19 and 22 April 2022.
8. We invited a wide range of interested parties to comment on the Merger, including local authorities, commercial customers, competitors and industry experts. A number of third parties provided us with information by telephone or video conference hearings as well as by responding to supplementary written questions. Evidence was also obtained from third parties using written requests.<sup>1</sup> The Parties provided us contact details of industry participants

including customers and competitors. We contracted all of them as a part of our evidence gathering. Evidence submitted during the CMA's Phase 1 investigation into the Merger was also considered.

9. The initial enforcement order issued in phase 1 was revoked on 20 December 2021. A new initial enforcement order was served on the same date and derogations were granted under it and published on the inquiry [webpage](#).
10. Due to Suez and Veolia's failure to comply with the requirements of their respective section 109 notices requesting information, the Inquiry Group paused the statutory timetable on 7 January 2022,<sup>2</sup> pending receipt of the information sought. Notices of extension were published on the inquiry [webpage](#).<sup>3</sup> Following receipt of the outstanding information required by the section 109 notices, the Inquiry Group re-started the statutory timetable on 17 February 2022 and notices of termination of extension were published on the inquiry [webpage](#). The timetable was stopped for a total of 41 days, extending the statutory deadline to 17 July 2022. An updated administrative timetable was published on the inquiry webpage on 18 February 2022 to reflect this extension.
11. A non-confidential version of our provisional findings report has been published on the inquiry [webpage](#). As we have provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition by reference to certain of the markets investigated by the Inquiry Group, a notice of possible remedies has also been published on the inquiry [webpage](#). Interested parties are invited to comment on both of these documents.
12. We would like to thank all those who have assisted our inquiry so far.

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<sup>2</sup> The extension in respect of Suez's failure to comply with its section 109 request came into force on 7 January 2022, and the extension in respect of Veolia's failure to comply with its section 109 notice came into force on 11 January 2022 (by which date the reference period had already been extended by virtue of Suez's failure to comply).

<sup>3</sup> The CMA issued three Notices of Extension as follows: 7 January 2022 (Suez), 11 January 2022 (Veolia) and 21 January 2022 (Suez).

## Appendix B: Regulatory environment

### The regulatory environment in which the Parties operate

1. This Appendix details the regulatory landscape in which the Parties operate in the UK. It summarises:
  - (a) the public procurement rules, which govern how local authorities must procure certain of their waste management contracts; and
  - (b) the Environment Act 2021, of which certain provisions are or will become relevant to the Parties' operations.

#### **Procurement**

2. The main piece of legislation governing public procurement in England, Wales and Northern Ireland<sup>1</sup> is the Public Contracts Regulations 2015.<sup>2</sup>
3. The Regulations establish a legal framework governing the procedures and principles for the award of public contracts which fall within the scope of the rules and exceed specified financial values. This legal framework is intended to ensure that bidders are treated equally and without discrimination and that the procedure is carried out in a transparent and proportionate manner.
4. The Regulations apply to bodies that are 'contracting authorities'<sup>3</sup> seeking offers in relation to proposed 'public contracts'.<sup>4</sup> The scope of the Regulations includes local authorities tendering for goods, works and/or service contracts (provided that no exclusions apply) that are over certain financial thresholds<sup>5</sup>, including certain of the Parties' waste management contracts with local authorities.

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<sup>1</sup> These regulations do not extend to Scotland where separate, but similar, regulations have been adopted.

<sup>2</sup> See also the Concession Contracts Regulations 2016 (SI 2016/273) (CCR 2016), the Utilities Contracts Regulations 2016 (SI 2016/274) (UCR 2016) and the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016.

<sup>3</sup> 'Contracting authorities' means 'the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity' (s2 of the Regulations).

<sup>4</sup> 'Public contracts' means 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services' (s2 of the Regulations).

<sup>5</sup> See UK Government website (Cabinet office): [Procurement Policy Note – New Thresholds Values and Inclusion of VAT in Contract Estimates](#), December 2021, accessed by the CMA on 10 May 2022 for the latest applicable financial thresholds.

## *Choice of procedures*

5. A contracting authority running a procurement process for a public contract under the Regulations should select the appropriate procedure to follow.<sup>6</sup> There are five main types of procedure:
- (a) **Open procedure:** A single stage process without a separate selection stage where the contracting authority invites all interested bidders to submit tenders for the contract that are then evaluated and the contract is awarded without negotiation.
  - (b) **Restricted procedure:** A two-stage process where any bidder may request to participate in the procurement but only a minimum of five shortlisted bidders invited by the contracting authority following a selection stage may submit tenders for the contract which are then evaluated and the contract is awarded without negotiation.
  - (c) **Competitive dialogue:** Where, after a selection stage, the contracting authority invites a minimum of three shortlisted bidders to take part in a dialogue process with the aim of identifying the solution best suited to meet the contracting authority's needs. Bidders may be further shortlisted at various points following evaluation of tenders. When the dialogue process is complete, final tenders are invited from those bidders remaining in the process. Negotiation is permitted with the successful bidder in order to confirm and finalise its tender, provided this does not distort competition or cause discrimination and provided its tender is not materially modified.
  - (d) **Competitive procedure with negotiation:** Where, after a selection stage, a minimum of three shortlisted bidders is invited to submit initial tenders and to take part in a negotiation process to improve their tenders. Suppliers may be further shortlisted following evaluation of initial and subsequent tenders. The possibility of negotiations after final tenders have been submitted is not expressly provided for.
  - (e) **Innovation partnership:** used where a contracting authority has identified a need for an innovative product, services or works that is not available on the market.

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<sup>6</sup> The use of Competitive Dialogue and Competitive Procedure with Negotiation must be justified on one of the grounds laid down in the Regulations. Veolia submitted that Competitive Dialogue Procedures and Competitive Procedures by Negotiation are the most commonly used routes for the larger, multifaceted waste management contracts Source: Veolia's Response [3<].

## *Procedural steps*

6. Once the contracting authority has selected the relevant procedure, it must follow the procedure as set out in the Regulations. This will typically involve the following steps:<sup>7</sup>
  - (a) **Pre-market engagement:** the contracting authority may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.
  - (b) **Advertisement:** the contract will be advertised and will identify the required criteria for suitable bidders, for example financial evaluation methodologies and affordability targets. The advertisement will invite expressions of interest by a certain time.
  - (c) **Pre-qualification and evaluation of pre-qualification responses** (if applicable): this stage involves determining whether potential bidders have necessary legal, financial, and economic standing and the technical and professional ability to perform the contract. If the contracting authority is using the competitive dialogue or competitive procedure with negotiation routes, a minimum of three bidders meeting the selection criteria must be invited to participate in the next stage.

When deciding whether to limit the number of qualified bidders, and in determining what might be an appropriate number, the following factors should be taken into account:

- (i) how competitive is the market;
- (ii) scope of requirements/solutions to be explored during the negotiation/dialogue stage;
- (iii) greater number of bidders will most likely increase competitiveness of the process;
- (iv) dialogue/negotiation with a greater number of bidders will increase cost of the process;
- (v) suppliers will be assessing their chances of being successful in the competition and a large number of shortlisted bidders invited to

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<sup>7</sup> The timing and format of the steps may differ depending on which type of procedure is used.



participate might discourage some suppliers from participating in the process or impact the level of their engagement.<sup>8</sup>

- (d) **Invitation to tender** (if applicable): based on the outcome of the step (c) above, selected bidders are invited to bid for the contract.
- (e) **Dialogue/negotiation** (if applicable): the contracting authority will hold meetings with bidders, often to encourage better/more tailored bids at submission stage. Depending on the procedure used, dialogue/negotiation may also take place later on in the process.
- (f) **Submission of tenders**: bidders submit their bids.
- (g) **Evaluation of bids**: the contracting authority will evaluate the bids received. Evaluation should be on the basis of pre-disclosed objective award criteria that must be linked to the subject matter of the contract, so as to determine the most economically advantageous tender. The most economically advantageous tender can be determined on the basis of price or cost (using a cost-effectiveness method) alone and/or on the basis of the best price-quality ratio, depending on the type of procedure used.
- (h) **Award Decision**: all bidders must be notified of the outcome of the tender.
- (i) **Standstill**: a period of time must be observed before a contract is formally awarded so as to give time for legal challenge of the decision.
- (j) **Completion of contract**: the local authority must advertise the contract award.

### *Lots*

7. The contracting authority may decide to split contracts into separate 'lots'.<sup>9</sup> If the contracting authority does not choose to subdivide a contract into lots, it must provide an indication of the main reasons for its decision. Multiple lots may be awarded to the same tenderer (provided that any maximum that has been set in advance is not exceeded).

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<sup>8</sup> UK Government website: [Competitive dialogue and competitive procedure with negotiation guidance note may 2021](#), accessed by the CMA on 10 May 2022

<sup>9</sup> S46 of the Regulations.

## *Future of the procurement regime*

8. The procurement regime described above is likely to be subject to reform in the foreseeable future. The Government has recently consulted on plans to simplify procurement procedures which would result in significant changes to the UK's procurement regime. The Procurement Green Paper, published December 2020, sets out the Government's ambition that bidding for public sector contracts will become simpler, quicker and cheaper.<sup>10</sup>
9. The Government has stated that new legislation introducing a reformed public procurement regime will come into effect in 2023.<sup>11</sup>

## **Environment Act**

10. The Environment Act 2021 underpins the Department for Environment, Food & Rural Affairs' Resources and Waste Strategy for England. The Environment Act sets out a legal framework for environmental governance in the UK and allows for measures for improvement of the environment in relation to waste, resource efficiency, air quality, water, nature and biodiversity, and conservation.
11. The main objectives of the Environment Act and the RWS as they relate to waste are to minimise waste and promote recycling, particularly in relation to food-grade plastic, PPE and PE plastics.
12. The majority of the Environment Act does not set out any immediate changes for organisations other than regulators. Changes to duties for businesses and other organisations are expected in subsequent secondary legislation made under the Environment Act.
13. Measures under the Environment Act [3<] include<sup>12</sup>:
  - (a) **Consistency of collection methodology** (section 57): Sets out requirements for the separate collection of recyclable waste in England. Under these requirements, recyclable household waste (whether from households or relevant non-domestic properties) must be collected (i) separately from other household waste, (ii) for recycling and composting, (iii) separately for each recyclable waste stream<sup>13</sup> (except where it is not

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<sup>10</sup> UK Government (Cabinet Office) website, [Green Paper: Transforming public procurement](#), December 2020, page 11, accessed by the CMA on 10 May 2022

<sup>11</sup> UK Government (Cabinet Office) website, [Transforming Public Procurement](#), December 2021, accessed by the CMA on 12 May 2022

<sup>12</sup> [3<].

<sup>13</sup> The recyclable waste streams are: glass, metal, plastic, paper and card, food waste and garden waste. Food waste and garden waste may be collected together, but not with any of the other recyclable waste streams.

technically or environmentally practicable, or has no environmental benefit), (iv) at least once a week if it is food waste. . These conditions also apply to C&I waste, with the exception of garden waste requirements. While this measure applies to waste collection authorities in England specifically, other nations may take a similar approach, For example, Wales' Blueprint for Collections proposes separate weekly collections for food waste.

- (b) **Extended producer responsibility** (sections 50 –51): Gives the relevant national authorities for England, Wales, Scotland and Northern Ireland power to make regulations (i) introducing waste producer responsibility obligations and providing for their enforcement, and (ii) requiring payments for the costs of disposing of products and materials.
- (c) **Deposit schemes** (section 54): Gives the relevant national authorities (for England, Wales and Northern Ireland) powers to make regulations establishing deposit schemes. Under the RWS, DEFRA is consulting on introducing a deposit return scheme for drinks cans and bottles in England, Wales and Northern Ireland. Further, a deposit return scheme for single-use drinks cans and bottles is due to come into force in Scotland in 2023.
- (d) **Electronic waste tracking** (section 58): Allows for requirements to be imposed on waste controllers to securely track the waste that passes through their systems. The purpose of this is to reduce waste crime and low environmental performance by waste controllers.
- (e) **Drainage and sewage management plans** (section 79): Places sewerage undertakers under an obligation to prepare, publish and maintain a drainage and sewerage management plan, which must meet criteria under section 79 of the Environment Act. It also provides that the sewerage undertaker must prepare and publish a revised plan in certain circumstances.

## Glossary of terms

<b>Term</b>	<b>Definition</b>
The Act	The Enterprise Act 2002
ACCC	The Australian Competition and Consumer Commission
AD	anaerobic digestion
the anticipated acquisition	The voluntary public offer by Veolia Environnement S.A. for the remaining issued share capital of Suez S.A., which at the time of the completed acquisition on 6 October 2020 had not completed. The Anticipated Acquisition completed on 18 January 2022
Biffa/Viridor transaction	The purchase of Virador's C&I collection business to Biffa
CMA	Competition and Markets Authority
the CMA's Phase 1 Decision	The CMA's Phase 1 decision and the reference decision in relation to the Merger
CMC	Controlled merchant capacity
the completed acquisition	Veolia Environnement S.A.'s acquisition of a 29.9% minority shareholding in Suez S.A. from an existing Suez shareholder, dated 6 October 2020
C&D	Construction and demolition
C&I	Non-hazardous commercial and industrial
DEFRA	Department for Environment, Food and Rural Affairs
D&C	Design and construction
DBO	Design-build-operate
DMR	Dry mixed recyclables
EBIT	Earnings before interest and tax
EBITDA	Earnings before interest, tax, depreciation and amortisation

EC Remedies	Veolia's commitments to divest, accepted by the European Commission in clearing the merger in their jurisdiction.
the Environment Act	The Environment Act 2021
EfW	Energy from Waste
EPC	Engineering, Procurement and Construction
ERF	Energy recovery facility
Essex	Essex County Council
ETS	Suez's Environmental Technology and Services business
FCC	FCC Environment
FM	Facilities Management
FMN	Final Merger Notice
FSA	Fuel supply agreement
GMCA	Greater Manchester Combined Authority
the Guidelines	CMA's Merger Assessment Guidelines (CMA129)
HMT	Hypothetical monopolist test
HWRC	Household waste recycling centres
IEO	Initial Enforcement Order
Inquiry Group	The group of independent members appointed by the CMA to investigate and report on the Merger in accordance with section 36(1) of the Act
IVC	In-vessel composting
IWE	Veolia's UK&I's Industrial Water & Energy business line
Issues Paper	CMA Issues Paper of 11 November 2021
Kensington & Chelsea	Royal Borough of Kensington & Chelsea
ktpa	kilo-tonnes per annum

LA	Local authority
LATCos	Local Authority Trading Companies; entities which are wholly owned by a local authority or by a group of local authorities
Merchant ERF	An ERF which, upon PPP expiry, is privately owned (as opposed to reverting to local authority ownership)
Merged Entity	Veolia and Suez, for statements referring to the future
the Merger	the Completed Acquisition and the Anticipated Acquisition, together
MESE	MES Environmental
MIC	CMA mergers intelligence committee
MRF	Material recovery facility
MWS	Mobile water service
NAWDO	National Association of Waste Disposal Officers
New Suez Consortium	The consortium of investors which purchased the New Suez Divestment Business. The New Suez Consortium comprises Meridiam SAS, Global Infrastructure Partners LLC, Caisse des Dépôts et Consignations and its subsidiary CNP Assurances.
the New Suez Divestment Business	Under the EC Remedies, the divestiture of almost all of Suez's activities in the non-hazardous and regulated waste management markets and the municipal water market in France
OFT	Office of Fair Trading
OFWAT	The Water Services Regulation Authority
OWC	Open-windrow composting
O&M	Operation and maintenance
Parties	Veolia and Suez

Parties' Initial Submission	The Parties response to the Phase 1 decision and issues statement
Phase 1 Decision	The CMA's phase 1 decision, of 7 December 2021
The Plan	DEFRA's January 2021 'Waste Management Plan for England'
PRF	Plastic recovery facility
PFI	Private Finance Initiative
PPP	Public-Private Partnerships
PPP/PFI	Public Private Partnership/Private Finance Initiative
P&L	Profit and loss account
the Regulations	the Public Contracts Regulations (2015)
Residual waste	Residual waste is the portion of non-hazardous, solid, combustible waste that cannot be recycled and can include household waste and commercial and industrial waste
RCBs	Relevant customer benefits
RDF	Refuse Derived Fuel
RMS	Relevant merger situation
RFI 1	First Request for Information
RFI 2	Second Request for Information
RFI 3	Third Request for Information
R&I / R&D	Research, development and innovation
RWC	Regulated Water Company
RWS	DEFRA's Resources and Waste Strategy for England
SLC	Substantial lessening of competition
Solihull	Solihull Metropolitan Borough Council
SoS	Share of supply

Suez	Suez S.A.
Surrey	Surrey County Council
Teckal	A Teckal company (or Teckal) is a term for an organisation, such as a local authority trading company, that is wholly owned and controlled by a parent body and does most of its work (more than 80%) for that body. It is named after the Teckal exemption which, in simple terms, covers circumstances where a local authority or authorities set up arrangements, including wholly owned companies, to supply services back to those authorities, in the same manner as an in-house arrangement. In these cases, the EU procurement rules do not apply to those arrangements.
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
UK	United Kingdom
UAs	Unitary authorities
Veolia	Veolia Environnement S.A
Veolia EEA MWS Divestment Business	Under the EC Remedies, the divestiture of almost all of Veolia's activities in the mobile water services market in the European Economic Area
Veolia UK&I	Veolia UK and Ireland
VERI	Veolia Recherche et Innovation
VWT	Veolia Water Technologies
Waste disposal	Waste recovery and waste disposal services
Waste Management Supply Chain	All stages of the non-hazardous waste management supply chain, including collection, sorting, recycling and final disposal via landfill or incineration
the Waste Regulations	The Waste (England and Wales) Regulations 2011
WCAs	Waste collection authorities



Westminster	Westminster City Council
Wigan	Wigan Council
WTS	Suez's Water Technologies & Solutions subsidiary