

**COMPLETED ACQUISITION OF SUEZ S.A.  
BY VEOLIA ENVIRONNEMENT S.A.**

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**RESPONSE BY VEOLIA TO THE CMA's  
PROVISIONAL FINDINGS**

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**NON-CONFIDENTIAL VERSION**

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**Veolia/Suez Merger Inquiry**  
**Veolia's Response to the CMA's Provisional Findings Report**

This submission to the Competition and Markets Authority (“CMA”) is made by Veolia Environnement S.A. (“Veolia”) in the context of the CMA’s investigation into Veolia’s acquisition of Suez S.A. (“Suez”). It responds to the points raised in the CMA’s phase 2 provisional findings report (the “Provisional Findings”).

**I. Executive Summary**

1. The CMA’s Provisional Findings start from an assumption that the Parties are large companies active across the waste management sector and, therefore, particularly well placed to compete for certain contracts – whether those be ‘complex’, integrated contracts with local authorities or C&I services for ‘national’ customers. The CMA’s assessment is coloured by this assumption: because Veolia and Suez are superficially similar in their range of activities, a merger between them must be anticompetitive.
2. This assumption is neither accurate nor useful. There is no market in which Veolia and Suez are uniquely placed, in which they are each other’s closest competitor, in which they have market shares even approaching a level at which competition concerns typically arise, or in which they lack competitive constraints from a host of other suppliers. The competitors active in each of the relevant markets vary, but are no less relevant. For example, Biffa is not the largest competitor in waste treatment but is uncontroversially the strongest competitor in C&I services.
3. The assumption that Suez is somehow uniquely placed to compete with Veolia – despite compelling evidence to the contrary – infects large parts of the CMA’s Provisional Findings. The CMA frequently cites the Parties’ presence across a range of waste management markets as a reason for concluding that the Merger would result in a substantial lessening of competition (“SLC”) in any one of them.
4. This argument is flawed. It hinges on an outdated view of the market that is not the current or future reality. Veolia’s experience – supported by much of the third-party evidence in the Provisional Findings – is that services are procured individually: there are distinct competitor sets in each market, and each market has unique competitive dynamics. Most of the relevant markets are bidding markets, governed by public procurement rules. And there are at least seven significant suppliers in each market where the Parties both operate.
5. When considering services to local authorities, the central flaw in the Provisional Findings is to establish a notion of ‘complexity’ and apply it wholesale across municipal waste management markets. This is not a recognised concept in the waste management industry, as made clear from the sheer diversity of the third-party responses. Moreover, the definition is unstable and contradictory. The CMA lists nine ‘indicators’ of complexity, which are so broad as to capture practically every contract one could think of. These indicators are then discounted in favour of an arbitrary financial threshold. But however these contracts are defined, the evidence shows that there are numerous credible competitors for even the most ‘complex’ contracts.
6. In C&I services, the CMA sets up a similarly arbitrary notion of ‘national’ customers. These are defined inconsistently and in ways that indicate little about the customers’ geographic footprints. Suez has a tiny presence in this market, however it is defined,

and [REDACTED]. The CMA then reaches a provisional SLC finding by wholly discounting a swathe of competitors who have manifestly competed for and won large national accounts. It concludes that the remaining ‘market’ is already dominated by Biffa (with Veolia a distant second) and so any further concentration of that market would be problematic. Put another way, the CMA has strained to define a market in a way that results in Suez being one of only three meaningful competitors – and even then, with a share of less than 10%. On any reasonable market definition, there is simply no basis for finding an SLC.

7. The CMA also identifies an SLC in a market for the operation and maintenance of water and wastewater treatment facilities for industrial customers (“Industrial Water O&M”). This finding is very difficult to understand. The Parties’ combined turnover in this market is less than £20 million. Each has a small number of customers, compared with the thousands of companies that operate industrial water/wastewater infrastructure. There are many competitors in this market and customers can (and most do) carry out these services in-house.
8. Finally, while Veolia disagrees with the Provisional Findings in relation to mobile water services, its commitments in relation to the European Commission process will resolve any possible competition concerns. Whether the commitments are reflected in the CMA’s assessment of the relevant counterfactual or its competitive assessment, they must be taken into account. There is therefore no basis for the CMA to identify an SLC: the Veolia business will be sold in any event.
9. This Response sets out Veolia’s response to each of the CMA’s provisional findings. Veolia also has the following overarching concerns about the evidence and approach taken in the Provisional Findings.

### *Evidential weight*

10. **CMA has not engaged – at all – with many of Veolia’s submissions.** Much of the evidence in Provisional Findings is repeated from the Working Papers. Although Veolia submitted detailed responses to the Working Papers, the Provisional Findings ignore or dismiss large parts of this evidence without any convincing explanation. For example:
  - The CMA has not engaged with Veolia’s concerns on the CMA’s evidence of 11 ‘complex’ municipal collection contracts.
  - The CMA discounts (or places barely any weight on) Veolia’s bidding datasets, which are substantial and systematically compiled. In C&I services, for example, Veolia’s bidding data is the single most reliable evidence available, and yet it is essentially ignored. In municipal collection, there is not a [REDACTED] in the five years covered by the data, and Suez was [REDACTED] competitor in the bidding data, yet this is not mentioned in the competitive assessment.
  - In Industrial Water O&M, the CMA argues that Veolia’s bidding data overstate the competitive constraint posed by self-supply, but gives no reasons for this view. In contrast, the CMA places weight on Suez’s bidding data in this market, despite its obvious and significant limitations.

- The CMA states that it has not had time to verify the facts in some of Veolia’s submissions following its Working Papers. Veolia had very little time after receiving the Working Papers to respond. Moreover, the Working Papers were the first opportunity given to Veolia (after 18 months of investigation) to see the CMA’s amended theories of harm and (parts of) the evidence on which those theories were based. Veolia therefore trusts that the CMA will give due weight to the evidence provided in its submission in the Final Report.
11. The bidding data is the best available evidence of closeness of competition, which is the factor on which the CMA focuses most heavily. It is irrational to prefer less direct evidence on closeness of competition such as market shares and the stated preferences of a handful of customers rather than the more extensive evidence of revealed preferences in the robust bidding data.

*Customer evidence*

12. The CMA places considerable weight on third-party responses to CMA’s questionnaires. These submissions provide a thin and unreliable basis for the conclusions that the CMA seeks to draw from them.
13. Veolia was refused the opportunity to contribute to this evidence gathering process. Further, the CMA has still not explained its methodology in the Provisional Findings, meaning that Veolia is still unable to comment fully on important issues such as how many potential respondents were contacted, how they were selected, what the response rate was, why such small sample sizes are deemed reliable, whether they were representative of the relevant population as a whole, what their characteristics were, and (other than a handful of footnote references) what the questionnaires contained.
14. **The CMA’s customer sample sizes are inadequate.** While Veolia was not allowed the opportunity to contribute to the CMA’s evidence-gathering process, nor given access to the questionnaire responses, it is clear that the CMA’s market-testing exercise cannot support the conclusions that the CMA seeks to draw from it. The CMA has received only a handful of third-party responses, which are far from representative of the market as a whole. The responses provide a static, incomplete and unbalanced view of the markets in question. For example:
- The sample of local authorities that responded to the CMA’s questions is not representative of the current market for municipal waste contracts. It is likely that at least some of the customer respondents based their responses on a single procurement exercise that occurred many years ago. These local authorities are unlikely to be in a strong position to appreciate or articulate current market dynamics.
  - Only six local authorities provided responses to the CMA’s questionnaire on the factors they consider most important when deciding which supplier(s) should provide operation and maintenance (“O&M”) services for their energy recovery facility (“ERF”) when their PPP contract expires. Just four competitors responded to the CMA’s competitor questionnaire. This narrow sample size is not an appropriate basis from which to draw any conclusions.
  - Only 23 out of the 188 C&I customers surveyed responded to the CMA’s questionnaire on geographical reach, only eight responded to the question on

use and credibility of brokers, and only 14 responded to the question on selection criteria for awarding C&I collection contracts. Furthermore, only 11 out of 66 competitors of the Parties that were surveyed responded to the CMA's questions. Such a small sample size is insufficient to draw any robust conclusions, nor is it representative of the market at large.

- Only eight out of some 300 relevant local authorities in England alone have indicated that they assess bidders for municipal waste collection contracts using the criteria that the CMA provided to them. This sample size of approximately 2% of the relevant group is insufficient to draw any robust conclusions on the criteria that local authorities use to assess bidders.
- The sample of third-party responses that the CMA relies on in its Provisional Findings in relation to Industrial Water O&M consist of only three competitors and five customers. This is not a sufficient sample size from which to draw robust conclusions. Further, the customers that responded to the CMA's questions on Industrial Water O&M do not appear to have properly understood the market identified by the CMA.
- The CMA artificially restricted the sample of internal documents that it relies on in its analysis of Industrial Water O&M to cover only a handful of competitors that it selected.

15. **The CMA's customer evidence suffers from selection bias.** In each relevant market, the CMA focuses its assessment of customer evidence on the Parties' current customers. This is biased. By definition, they are the views of local authorities who have awarded contracts to Veolia or Suez (*i.e.*, they have already rated one or other Party highly, when last awarding a contract). The free text responses in relation to municipal collection contracts offer proof of this bias. Some local authorities named one of the Parties as a credible future supplier simply because "*it is the incumbent*" (paras. 7.87-7.88).
16. There is also a significant asymmetry between what the Parties' customers know about the Parties compared to what they know about other suppliers. By the nature of a competitive tender process – which is exclusively how contracts are awarded in these markets – suppliers submit lengthy, heavily detailed documentation setting out their credentials and why they are well-placed to service the contract. During this process, the local authority is privy to much more information about the potential supplier than in normal circumstances – for example, at the time that they have provided evidence to the CMA. It is possible (in fact likely) that customers' views are based on outdated perceptions of suppliers that they have not had the opportunity to assess in detail. This does not indicate how these suppliers would actually be perceived in future tenders when all the relevant information is available to the local authority.
17. For these reasons, a balanced market test would also need to test the views of other customers who have chosen other competitors (and, by definition, rated them highly) or chosen self-supply or appointment of a Teckal as the most attractive option.
18. **There are numerous flaws in the CMA's questionnaire design.** In some cases, the questions that the CMA posed are overly restrictive and likely to encourage particular responses. In other cases, the CMA's questions appear to have caused confusion, including about which markets were under consideration. For example:

- In relation to C&I services, the CMA has asked suppliers the wrong question entirely. The Provisional Findings explain that the CMA sought comments on “*competitors for integrated contracts*” with C&I customers “*across the waste management supply chain*” (fn. 818, emphasis added). Not only is ‘integrated contracts’ not a relevant concept in C&I services, but the words “*across the waste management supply chain*” prompt respondents to list competitors active in multiple services, unfairly discounting some strong and credible competitors.
- In relation to O&M of ERFs, the CMA asked respondents to rate the criterion ‘Reliability of service (including contingency capacity)’ (para. 9.59). Veolia previously noted its concern that the CMA had conflated reliability with contingency capacity. In the Provisional Findings, the CMA explains that “*analysis of the free-text explanations provided in the local authority responses [...] indicates that contingency capacity was an important feature of this criterion*”. But the phrasing of the criterion clearly leads respondents to consider ‘contingency capacity’ in their free-text explanations. The evidence is not redeemed by this justification.

19. As the CMA recognises in its guidance on third-party survey evidence, “*potential sources of bias [include] restrictive bias, where the question leads the customer to think only of certain options.*”<sup>1</sup>

***Approach to market definition***

20. **The CMA discounts entire sets of competitors, against its own Merger Assessment Guidance.** In its market definition exercises for four waste markets, the CMA excludes certain competitor sets from the relevant market, effectively concluding that they impose no competitive constraint. In relation to municipal collection, it excludes non-home Teckals and self-supply. In relation to both O&M of ERFs and O&M of material recovery facilities (“MRFs”), it excludes merchant operators and self-supply. In relation to C&I services, it excludes brokers and facilities management companies (except Reconomy and Mitie).

21. This approach does not align with the CMA’s Merger Assessment Guidelines, which state that “*there is often no ‘bright line’ that can or should be drawn*” and “*it can be more helpful to describe the constraint posed by different categories of product or supplier as sitting on a continuum between ‘strong’ and ‘weak’*. The CMA will generally not need to come to finely balanced judgments on what is ‘inside’ or ‘outside’ the market”.<sup>2</sup> To exclude the above competitor sets from the CMA’s assessment is irrational and does not reflect the reality of competition in these markets. It leads to the CMA believing that the Parties face less competition than they do in fact face. For example, it leads to distorted share of supply calculations which make the market appear more concentrated than it actually is, and inflate the Parties’ shares:

- **Municipal collection:** the CMA’s estimate of a combined share of [30-40]% excludes in-house supply, even though around half of local authorities manage

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<sup>1</sup> Good practice in the design and presentation of customer survey evidence in merger cases (CMA78), May 2018. See para. 3.11: “*Potential sources of bias [include] restrictive bias, where the question leads the customer to think only of certain options.*”

<sup>2</sup> See Merger Assessment Guidelines (CMA129), March 2021, para. 9.4.

collections in-house. With in-house supply included, the Parties' combined share would be below 15%.

- **C&I collection:** the CMA's estimates of [30-40%], with a small increment of [5-10%], exclude several important competitors (notably Novati) even though they likely meet the criteria in the Provisional Findings for inclusion in the shares of supply.<sup>3</sup> If these competitors were included, the Parties' combined shares of supply would likely be below 30% (even on the Provisional Findings' narrow "national" definition).
- **O&M of MRFs:** the CMA's estimate of a combined share of [40-50]% excludes some operators of merchant MRFs. If these were included, the Parties' shares would be below 25%.
- **O&M of ERFs:** the CMA's estimate of a combined share of [40-50]% excludes certain suppliers even though they currently operate local authority ERFs. If it included all operators of ERFs in the UK, the Parties share would be around [25-35]%.

22. The CMA has not explained why it is appropriate to depart from its own guidance in these markets.
23. Overall, the evidence presented in the Provisional Findings does not support the conclusions that the CMA draws from that evidence. On the contrary, even from the small sample of responses, the evidence presented in the Provisional Findings is consistent with the conclusion that the Merger would not give rise to any SLC.

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<sup>3</sup> See Veolia's Supplemental Response on Large C&I Customers, submitted 13 May 2022. Veolia understands that Novati serves large customers that should be worth more than £250,000 annually (for instance, Marston's pubs).

## II. Competition for Complex Waste Management Contracts

24. The CMA describes some local authority contracts as ‘complex.’ The CMA argues in its Provisional Findings that some waste management suppliers - including Veolia and Suez - are better able to compete for ‘complex’ contracts and that there would be insufficient competition for ‘complex’ contracts after the Merger.
25. At phase 1, and in its Issues Statement, the CMA articulated a different theory of harm from the one set out in the Provisional Findings. The CMA previously sought to identify a discrete set of contracts that were ‘complex’. Veolia explained why this theory was misguided: there is no identifiable subset of contracts that are considered ‘complex’ and certainly no recognised industry definition. Rather, the word ‘complex’ [REDACTED]. It means different things to different people in different contexts. The CMA appears to have accepted this evidence.
26. While the CMA no longer seeks to identify a distinct category of ‘complex’ contracts, it instead argues that ‘complexity’ can be a feature of different waste management markets (e.g., the municipal collection market) and should therefore be taken into account when examining competition in those markets. The CMA lists nine factors that it believes may indicate complexity and finds that the Parties are close competitors for contracts displaying these characteristics, given their “*presence across the full portfolio of services, and possibly their size*” (para. 6.129).
27. By adopting this approach, the CMA is able to assert that there is a segment within each relevant market for which competition is more limited without actually defining that segment. The CMA has not carried out any systematic assessment of demand- or supply-side factors that would justify defining a supposed ‘complex’ market segment.<sup>4</sup> And the list of factors identified by the CMA is so broad as to capture almost any contract that one might think of.
28. In adopting this approach, the CMA relies on an inconsistent and fragmented set of views on what ‘complex’ could mean.<sup>5</sup>
- The CMA sought views from competitors on “*integrated*” contracts.
  - It has calculated shares of supply with reference to a contract value threshold or to “*contracts that Suez internally considered to be complex*”.
  - It analyses competitive conditions using a sample of contracts “*identified as being complex*” in the Parties’ internal documents.
  - It collects views from customers on their “*specific requirements*”.
29. In this context, ‘complex’ loses any meaning and it is difficult to understand the CMA’s case with any degree of precision. What is clear is that the Provisional Findings present an outdated view of competition for local authority contracts. And in any event, there are plenty of credible bidders for even the most complex contracts, *i.e.*, those displaying

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<sup>4</sup> See Merger Assessment Guidelines (CMA129), para. 9.7 - 9.10.

<sup>5</sup> Provisional Findings, para. 6.64.



any or all of the characteristics that the CMA lists as potentially indicative of complexity.

**A. The Provisional Findings present an outdated view of the market**

30. The CMA's merger assessments are forward-looking and the CMA must consider whether and how any lessening of competition will manifest itself post-merger.
31. Integrated contracts for all waste management services, including building and operating facilities, are a thing of the past. The industry has seen two significant developments that radically change how municipal waste contracts are tendered:
  - First, the maturity of the UK waste sector (now that significant local authority infrastructure has been built) coupled with the termination of the PFI scheme mean that new DBFO (design, build, finance, operate) contracts for waste treatment infrastructure are now rare.
  - Second, and relatedly, today's market is characterised by local authorities unbundling waste management procurement and tendering for individual services or small contract lots.
32. These dynamics are not reflected in the Provisional Findings. Rather, much of the evidence on which the CMA relies reflects a backward-looking view of waste management markets. The CMA focuses its analysis on contracts that were entered into more than 10 years ago (see further Section II.D below) and relies on responses from third parties that are also based on their experience tendering for contracts at that time. This does not form a sound basis for assessing how competition takes place now or will in future.
33. A striking example of this is the prevalence of comments about infrastructure. It is one of the factors of 'complexity' that suppliers raised most frequently:
  - Beuparc notes that the "*historical PFI contracts*" were the most complex (para. 6.34).
  - Amey submits that "*bundled contracts that involve the construction of infrastructure tend to be more complex*" (para. 6.35). This essentially describes the PPP/PFI model.
  - Urbaser notes that contracts involving the construction of infrastructure are "*most complex*" (para. 6.37).
  - Biffa comments that "*integrated contracts that can require the acquisition of land, site surveys, planning issues, environmental permits, can be complex.*" (para. 6.36) The acquisition of land, site surveys, planning issues and environmental permits are all linked to the development or construction of infrastructure.
34. In a similar vein, some competitors appear to be discredited as bidders for 'integrated' contracts for reasons that relate to infrastructure. One competitor notes that "*[redacted] has not bid for a major infrastructure project (which it considers complex) since 2011*" (para. 6.85).

35. The CMA claims that evidence from suppliers is relevant because some suppliers may be less willing to bid for certain contracts (para. 6.38). This view is not limited to suppliers. Evidence from local authorities suffers from the same misapprehension. Local authorities mention that complex contracts include “*those contracts involving large capital expenditure*” (para. 6.63(a)) and “*larger contracts where investment in infrastructure is required*” (para. 6.64(1)).
36. This evidence is unreliable. The CMA appears to have asked third parties questions about “integrated” contracts. Many are likely to have interpreted this term as referring to PFI/PPP style contracts, which would have usually have involved the construction of new infrastructure. [REDACTED].
37. In contrast, the empirical evidence that Veolia has provided demonstrates how the market has evolved. For example:
- The Parties’ share of supply for high-value contracts entered into since 2017 is [REDACTED] (see para. 51 below).
  - Veolia’s more recent contracts in the dataset of 11 ‘complex’ municipal collection contracts identified in Chapter 7 of the Provisional Findings comprise [REDACTED] (see para. 42 below).
  - Veolia has presented evidence showing that the award of integrated contracts has become materially less common over the period 2000 and 2020 (see para. 41 below). This trend continues.

**B. There is sufficient competition for ‘integrated’ contracts**

38. The Provisional Findings state that bundled or integrated services are a “*useful indicator*” of complexity (para. 6.127(c)). They note that local authorities perceive that “*few providers are able to bid for bundled contracts*” (para. 6.63) and competitors view Veolia as the strongest supplier of integrated contracts (para. 6.127(c)). The CMA also cites third-party responses as evidence that the Parties are “*able to handle the full range of waste processes*” (para. 6.65) or “*are providing fully integrated Local Authority services*” (para. 6.64(h)).
39. There are several other suppliers with similar capabilities and a success history of competing for ‘integrated’ contracts. In particular, Biffa, FCC, Viridor, Serco, Urbaser, Hills Waste and Countrystyle have experience winning and operating contracts with a broad range of waste management services:
- **Biffa** has extensive experience in operating complex contracts, including an ongoing complex PPP contract for Leicester City Council which it has run since 2002 and which involves both waste collection and waste disposal elements. Biffa is currently developing two ERFs with Covanta and GIG, thereby underlining its intention to increase its waste disposal capacity.
  - **FCC** was mentioned by other suppliers as a credible supplier for integrated contracts as many times as the Parties (six). FCC has extensive experience operating several “complex” PFI contracts with collection and disposal elements. In February 2021, FCC won an integrated contract for

Buckinghamshire County Council worth £26 million,<sup>6</sup> and Veolia understands that it has recently bid for the Tees Valley waste management contract.

- **Viridor** has an extensive network of treatment facilities across the UK (in particular a network of eight ERFs and treatment facilities focussing on plastics recycling and reprocessing), notwithstanding the recent sale of some of its assets to Biffa. Viridor already has a strong track record of bidding for “complex” integrated contracts with partners that can meet the collection needs of a “complex” contract. For example, Viridor bid as part of a consortium with Serco for the “complex” Isle of Wight contract in 2015: under this arrangement, Viridor would have met the local authority’s treatment needs, and Serco its collection needs.
  - **Urbaser** has a joint venture with FCC for an integrated contract with Herefordshire County Council, which includes residual waste disposal through an ERF, recycling through MRFs, HWRC services, and waste transfer station management. Urbaser has a number of other non-collection contracts. Furthermore, Urbaser is rapidly expanding its treatment capacity: in addition to the ERF that it part-owns with FCC, it recently acquired J&B Recycling (including four MRFs), thereby signalling its intention to become more active across multiple waste management streams.
  - **Serco** has bid for – and won – ‘complex’ contracts that contain a mix of collection and disposal elements (such as the Sandwell contract), despite its relative lack of processing facilities.
40. This is also reflected in CMA’s evidence from suppliers. Suppliers named four credible suppliers for integrated contracts other than Veolia and Suez.
- FCC was listed by all six respondents. Competitors submitted that FCC is “*strong in disposal*”, “*has a large number of contracts across the UK*” and a “*strong track record*” (para. 6.76).
  - Biffa was listed by four of the six respondents. Competitors said that Biffa “*has the second largest number of local authority contracts and has a significant presence across the UK*” and “*has a large commercial, disposal, and municipal portfolio*” (para. 6.77).
  - Competitors submitted that Urbaser “*has the breadth and scale to offer integrated services*” and “*has a growing municipal portfolio and access to disposal infrastructure*” (para. 6.79).
  - Viridor was listed by half of the respondents (para. 6.78).
41. Nowhere in the Provisional Findings does the CMA explain why the number and nature of competitors (in addition to the other competitive constraints in each market) is insufficient in aggregate to constrain the Parties post-merger. Nor does it explain why the merger is capable of resulting in a substantial lessening of competition in the context of strict bidding processes and long term contracts.

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<sup>6</sup> See Let’s Recycle, [FCC Environment wins £26m Bucks contract](#) (10 February 2021).

42. In addition, other suppliers compete for contracts by subcontracting any elements of the service that they cannot provide themselves. Indeed, some degree of subcontracting is usual, [REDACTED]. The CMA argues that suppliers typically subcontract only ‘non-core’ services (para. 6.71). This is incorrect. For example, [REDACTED]:
- [REDACTED].
  - [REDACTED].
  - [REDACTED].
43. Further, the Provisional Findings cite comments from local authorities on the potential risks of subcontracting and the costs resulting from double margins (para. 6.70). [REDACTED].
44. Moreover, any risks that might arise from subcontracting are mitigated by the fact that there are many strong suppliers to choose from, including in specialist areas. [REDACTED].
45. **In any event, local authorities are increasingly unbundling services.** In response to Veolia’s evidence on unbundling, the CMA argues that local authorities have discretion whether to bundle services. It presents evidence from local authorities to suggest they will continue to bundle services in future. The evidence does not support this conclusion:
- Of the 24 local authorities that considered their current contracts to be bundled, five authorities did not express a preference for bundling or unbundling and eight agreed that they would unbundle. This is highly unscientific because ‘bundling’ could mean anything. It could mean, for example, combining street cleansing with grounds maintenance services. In any event, the majority of respondents expressed a clear view that they were prepared to unbundle their contracts (para. 6.33).
  - Customers described benefits of unbundling contracts, commenting that unbundling could “*attract more competition, especially from smaller waste management companies*” and “*remove the effect of local asset control distorting competition, for example, by separating the provision of lower cost services (e.g. provision of waste transfer stations) from higher cost services (e.g. treatment of waste)*” (para. 6.32). They also noted that bundling services can be difficult because “*different services use capital over different life cycles.*”
  - The CMA notes that the Public Contracts Regulations do not oblige local authorities to unbundle services, and the “*decision not to subdivide into lots is at the discretion of the local authority*” (para. 6.43). But the clear implication of the Regulations is that separating services is presumptively more favourable for local authorities, otherwise there would be no requirement to set out reasons when deciding not to do so.
  - The comment in Suez’s internal document about an apparent trend toward integrated contracts (para. 6.47) is not supported by the evidence of actual tenders coming to market and should carry little weight. Veolia has provided evidence showing a decline in the award of waste management contracts that

include at minimum the provision of treatment and disposal services for two or more different waste streams between 2000 and 2020.<sup>7</sup>

46. In addition, evidence from 11 of the Parties' municipal collection contracts identified as 'complex' in Chapter 7 of the Provisional Findings Report shows that bundling is becoming less common: the five most recent Veolia contracts in the table bundle collection with just one other (simple) service, in contrast with the three contracts starting in 2001, 2007 and 2008 that bundle five or more services (Table 7.7).

**C. The CMA's own contract analysis shows there are many credible suppliers competing for 'complex' contracts**

47. The CMA analyses a sample of 13 of the Parties' contracts that are "*identified as being complex in the Parties' internal documents*" and draws the provisional conclusion that, for complex contracts, the Parties are "*seen as among the most credible and most highly rated suppliers looking forward*" (para. 6.121). In fact, this evidence shows that there are as many as 17 suppliers for contracts the CMA has deemed 'complex'.
48. **It is inappropriate to focus only on the Parties' own customers.** The CMA notes that the contract data "*is likely to reflect a segment that has a relative preference for the Parties*" and are therefore "*likely to be most affected by the Merger*" (para. 6.121-6.122). As Veolia explained in response to the CMA's Working Paper on Services for Complex Municipal Contracts, however, the Parties' customers will not be affected in the short term because they are protected by contracts with set durations, defined prices and detailed KPIs. The CMA's theory of harm applies equally (if it applies at all) to all local authorities in their next tender process, and all of their views should be taken into account.
49. **The basis on which these contracts have been selected is opaque.** [REDACTED]. For example, it is entirely unclear why Cory's contract with the Western Riverside Waste Authority, or FCC's and Urbaser's joint venture to serve Herefordshire & Worcestershire, were omitted. As submitted in Veolia's Response to the Working Paper on Services for Complex Municipal Contracts, Veolia believes there are at least 54 current contracts worth £100 million or above held by the Parties' competitors.
50. **This evidence is not forward-looking.** Most of these contracts are too old to be relevant to future procurement. As acknowledged by the CMA, 10 of 13 contracts started before 2017. In fact, nine of the 13 contracts started in 2010 or earlier. They cannot be taken as representative of contracts that will be procured in the future: most of them were awarded many years ago and would not be re-procured in a similar form; and most of them do not expire for seven or more years, so these local authorities cannot reasonably be expected to have a well-informed view on how they will be procured or who will be a suitable bidder.
51. If there is a significant period left to run on contracts that the CMA deems relevant to its merger assessment, the CMA must consider whether, and if so how, there is an opportunity for the Parties to increase their prices or degrade their service in the foreseeable future (a period which the CMA must define).

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<sup>7</sup> See [REDACTED].

52. **This evidence demonstrates there is strong competition for ‘complex’ contracts.** Even taken at face value, the analysis of these 13 contracts does not support the provisional conclusions drawn by the CMA.

- The Parties bid against each other in only around a third of these 13 tenders. This suggests that around two thirds would not have been affected by the transaction, and that there were other credible bidders (probably at least two or three) in each of those who could also have bid in the remainder.
- Local authorities identified an average of 3.7 bidders in the last procurement process, with a maximum of 8 (para. 6.113).
- Local authorities collectively identified 20 credible suppliers other than Veolia and Suez for these contracts (Tables 6.5 and 6.6). The CMA cannot simply discount the ‘tail’ of 17 competitors with five or fewer mentions. The fact that a supplier is mentioned by only a small number of local authorities does not undermine its credibility when competing for future contracts offered by that local authority. The fact that some of these are “*specialist*” and “*smaller*” suppliers (para. 6.120) demonstrates that a wide range of competitors are able to compete for ‘complex’ contracts. In an exercise intended to determine who are credible competitors, it would be entirely circular to dismiss evidence that a particular supplier is credible on the basis that CMA thinks ‘smaller’ suppliers should not be considered credible. The CMA should consider the cumulative constraint posed by these competitors.

53. The CMA should bear in mind that these 13 contracts have been selected in the area that its theory of harm posits to be most adversely affected by the merger, and even then the evidence is mixed (at best) as to whether the Parties are close competitors. The Provisional Findings make no attempt to explain why the alleged loss of competition in this small sub-segment is sufficient for a substantial lessening of competition in any relevant market as a whole.

**D. There are numerous credible bidders for the highest value contracts**

54. The CMA calculates shares of supply based on contracts won with an annual value over £10 million (paras. 6.101-6.102). This share of supply evidence contributes to the CMA’s provisional conclusion that the Parties may be particularly close competitors for customers of complex contracts (para. 6.127(d)). These shares of supply are meaningless and there are, in any event, a host of credible suppliers competing for contracts of the highest value.

55. The decision to use an annual total contract value of £10 million departs from the approach in the Working Paper on Services for Complex Contracts, which used a £10 million *total* contract value threshold. Assuming that each municipal contract is an average of five years in duration, the CMA has effectively raised the threshold by five times between the Working Paper and Provisional Findings. The CMA has not explained its reason for raising the threshold. This is further indication that the definition of ‘complex’ is unstable and the basis for quantifying shares of ‘complex’ contracts is arbitrary.

56. As Veolia explained in response to the Working Paper, the CMA’s use of a value threshold is a poor proxy for complexity as it ignores all the qualitative factors that the

CMA believes indicate complexity. It directly contradicts the statement in the Provisional Findings that “[s]ince contractual complexity is varied it would be misleading to attempt to introduce any threshold” (para. 6.9). The CMA’s provisional conclusion is not meaningful as there is no basis for creating a market that consists solely of the highest value contracts.

57. The [REDACTED] in the Parties’ share of supply when looking at more recent contracts is a strong indication that competition for municipal collection contracts (including the largest of these) is becoming more fierce. This is in line with Veolia’s submissions in relation to the rapid development of the municipal waste management sector.
58. Furthermore, Veolia’s advisers believe that the Provisional Findings are using the wrong value figure for estimating Suez’s share of supply for contracts with an annual value greater than £10 million (Tables 6.2 and 6.3). Veolia’s advisers understand that the Provisional Findings used a figure of [REDACTED] for the annual value of Suez’s current contracts with an annual value greater than £10 million. This figure is higher than the total turnover of Suez UK’s waste business, and so cannot be correct.
59. Veolia’s advisers understand that the total contract value of Suez’s contract, with an annual value greater than £10 million, is [REDACTED]. This can be verified by filtering Suez’s Annex 85.1 for contracts with an annual value above £10 million. As noted by Suez in Annex 85.1, [REDACTED].<sup>8</sup>
60. The contract values in Veolia’s Annex Q85 refer to what the local authorities will pay Veolia for the delivery of services. On this basis, Suez’s revenue would be even lower. Veolia’s advisers understand that it likely would be no higher than in the region of [REDACTED]. Veolia therefore urges the CMA to ensure that it has collected data from third parties on a consistent basis, and that it is using a consistent metric for both Parties and Third Parties when calculating shares of supply.
61. In any event, there is ample competition from credible bidders for even the highest value municipal contracts and the Parties do against each other very often. Of the 11 contracts with a total contract value above £100 million identified by the CMA in its Working Paper on Services for Complex Contracts, the Parties competed for only [REDACTED]. The CMA found that “*the other bidders for the largest contracts are often Viridor, Biffa, FCC and Serco*” (slide 6). Even for the “largest” contracts, this would be a “six to five” merger. The Provisional Findings make no attempt to explain why this represents insufficient competition post-merger, and whether and how an SLC would arise or play out.

**E. Veolia’s internal documents do not support the CMA’s provisional conclusion**

62. The CMA cites a number of Veolia’s internal documents to support its provisional conclusion that the Parties are two of only a small number of suppliers who can compete for ‘complex’ contracts. Many of these documents do not support the CMA’s conclusions and some are not relevant to the CMA’s theory of harm at all.

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<sup>8</sup> The note in Suez’s Annex 85.1 reads [REDACTED].

- [REDACTED]. They provide no evidence in support of the CMA’s theory of harm that Veolia and Suez are particularly well placed to win ‘complex’ contracts because they are active across different waste management markets.
- It is misleading for the CMA to state that “*Veolia’s internal documents show that it actively seeks out more complex contracts as part of its internal strategy*” (para. 6.56). The documents identified do not suggest that Veolia places any special emphasis on complexity. Rather, these documents show that [REDACTED].
- This evidence does not assist the CMA’s conclusions on the factors that inform complexity, as the documents provide no explanation of what ‘complex’ (or ‘basic’) signifies. The fact that [REDACTED] “*Veolia has found the term/concept useful in characterising and prioritising contract opportunities*” [REDACTED].
- Most of the evidence on Veolia’s success ratio, cited at para. 6.57, does not relate to ‘complexity’. The CMA says that Veolia’s documents “*demonstrate that it actively measures its success ratio in respect of contracts it considers to be complex*” (emphasis added). This is not true. [REDACTED]. To characterise this as an example of Veolia measuring success rate for ‘complex’ contracts is inaccurate and circular.
- The CMA relies on just two internal documents in relation to [REDACTED] to support its conclusion that Suez would be one of the only other competitors that is able to compete for ‘complex’ contracts (para. 6.59). The evidential weight of these two documents is low: they are two documents out of the many thousands provided to the CMA and are now outdated, being from [REDACTED]. The CMA has not identified any more recent or more persuasive evidence from the considerable file of materials it has collected, and Veolia would be amazed if it could.

63. [REDACTED]. To seek evidence from Veolia’s internal documents to support the CMA’s theory of harm would be a fruitless exercise. These documents can carry only marginal evidential weight.

**F. Conclusion**

64. For the reasons set out above, the CMA’s second attempt to define a subset of ‘complex’ contracts is as flawed as the first. The picture painted in the Provisional Findings is of a waste management market that might have existed 10-20 years ago, but not today.
65. Veolia responds specifically to the CMA’s comments in relation to competitive conditions for ‘complex’ contracts in each of the waste markets in the relevant sections below.



### **III. Supply of Non-Hazardous Municipal Waste Collection Services**

66. The CMA has provisionally found that the Merger will give rise to an SLC in the supply of municipal waste collection services, with the effect on competition arising more strongly in relation to ‘complex’ municipal collection contracts (para. 7.147).
67. The theory of harm underlying this provisional finding cannot be sustained. The CMA provisionally concludes that, according to its own estimates, the Merger would create the largest supplier in the market (para 7.70) and that the merged business would not be constrained by other competitors in the market. The evidence summarised in the Provisional Findings Report - including responses from third parties - cannot sustain this conclusion on its own terms and is also flawed in many respects.
68. The simple truth is that municipal waste collection is a straightforward, undifferentiated service. Suppliers “fetch and carry”, picking up the waste and taking it to an appropriate treatment facility, dictated by the local authority. They need little more than a fleet of collection vehicles and employees to operate them. There is no need for upfront investment in assets or employees, given that collection vehicles are purchased or leased after a contract has been won and employees transfer via TUPE. Barriers to winning a contract are therefore extremely low.
69. Unsurprisingly, therefore, competition in this market is fierce and local authorities can choose from at least six commercial operators, in addition to the merged entity, as well as Teckals – if they choose not to perform this service in-house. Even for contracts that the CMA considers to be ‘complex’, there are more than enough credible bidders to guarantee healthy competition in the context of bidding markets that are subject to strict public procurement rules. Veolia responds in detail to the CMA’s Provisional Findings on municipal waste collection below.

#### **A. Self-supply and Teckals impose a meaningful competitive constraint**

70. The CMA provisionally concludes that the relevant product market excludes self-supply (para. 7.38). This is based on the following:
- Local authorities may choose not to self-supply for various reasons (para. 7.35).
  - In the parties’ internal documents, the competitor set is generally limited to out-sourced suppliers and sometimes Teckals (para. 7.30).
  - Evidence from Suez, local authorities and the parties’ internal documents does not suggest there will be a “*radical shift*” toward self-supply; there is movement of customers both towards and away from self-supply (para. 7.36).
  - Self-supply acts as a “*ceiling*” on the cost of outsourcing and this price ceiling, or benchmark, is not equivalent to a direct competitive constraint (para. 7.37).
71. Even if each of the above points were true - which Veolia disputes - this would be no basis to conclude that self-supply should be excluded from the relevant market entirely. It is not necessary to show that *all* local authorities would consider self-supply, that they would perceive no associated risks, or that there’s a “*radical*” movement toward in-sourcing, in order to conclude that self-supply or home Teckals impose a meaningful competitive constraint on commercial operators. In circumstances where Veolia has provided evidence that [REDACTED] of its municipal collection contracts have been

taken back in-house, demonstrating a real-world constraint from self-supply, it is irrational to maintain that self-supply poses no material constraint on commercial suppliers.

72. **The majority of local authorities in the CMA’s sample have considered self-supplying collection services.** Of 19 local authority respondents who currently outsource collection, 14 have considered self-supplying collection services (para. 7.19). This number would likely have been even higher had the CMA asked whether local authorities *would* consider self-supplying waste collection services, which is more relevant to competition for upcoming contracts.
73. Nevertheless, the responses to the question as phrased suggest that self-supply will be a credible option for most local authorities when their current contracts come to an end - including for St Albans City and District Council, [REDACTED] (para. 7.25). This is consistent with Veolia’s evidence/understanding of the market.
- Local authorities do not need substantial resources or expertise to self-supply or use Teckals. As explained above, municipal waste collection is a simple “fetch and carry” service.
  - Local authorities tend to own collection vehicles even when they outsource the service contract to commercial operators, because they have access to low-cost prudential borrowing. This is the case in [REDACTED] of Veolia’s municipal waste collection contracts. In almost all cases, no other waste management infrastructure is otherwise needed to perform these contracts.
  - Self-supply is used by both large and small local authorities, including eight of the 15 largest authorities and nine of the 20 smallest local authorities.<sup>9</sup> There is no defined subset of local authorities that cannot or would not take these services in-house.
  - Government guidance encourages local authorities to consider the benefits of supplying services in-house.<sup>10</sup> The National Procurement Strategy states that local authorities should assess “*whether to outsource, insource or pre-procure a service through evidence-based analysis*”.<sup>11</sup> The Local Government Association recommends that “*major procurement should always be preceded by an assessment of the relative merits of procuring a solution in the market versus delivering the solution in house*”.<sup>12</sup>
74. The fact that self-supply is commercially justifiable, and provides value for money, is evidenced by the fact that [REDACTED] of households are served by local authorities in-house, and a further [REDACTED] through Teckals. This would not be the case if self-supply were significantly more costly than outsourcing.

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<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> See HM Government, [National Procurement Policy Statement - GOV.UK](#), para. 19.

<sup>12</sup> See Eunomia Research & Consulting Ltd, [The Effects of Competition on Municipal Waste Collection Performance](#), Table 1, at p. 2.

75. The Provisional Findings cite examples from local authorities of some perceived downsides to self-supply. This does not show (as the CMA suggests) that there are some local authorities that would never consider self-supply. There are ‘pros’ and ‘cons’ to every commercial decision. Evidence of potential downsides to self-supply is not persuasive in this context. For the same reason, the CMA lacks a basis for the provisional conclusion that local authorities would not switch to self-supply in the event of a 5-10% increase in the price of outsourced services. The CMA would need economic evidence, not qualitative comments from local authorities about the potential risks of self-supply, to support this assertion. Local authorities have not been asked to comment on the risks of outsourcing services, meaning that the CMA’s evidence is one-sided.
76. **Local authorities frequently move from outsourcing to insourcing.** Veolia is aware of [REDACTED] contracts that have switched from external supplier to Teckal since 2014, demonstrating a real-world constraint from Teckals. As submitted by Veolia, [REDACTED] of Veolia’s municipal collection contracts have been taken back in-house or awarded to a Teckal over the last five years. The Provisional Findings states, however, that “[t]he only instance we have found of a local authority bringing collection services back in-house was where performance issues with the current supplier combined with a lack of interest from alternative suppliers meant in-house supply provided value for money” (para. 7.28). This evidence is incomplete, highlighting the general inadequacy of the evidential base for the Provisional Findings.
77. **The threat of self-supply and Teckals is relevant to third-party bidders in the procurement process.** At the time of procurement, local authorities have a choice to take services in-house or appoint a Teckal. In this context, the CMA’s doubts as to whether there is a “radical shift” toward self-supply are not relevant. The market has seen a gradual increase toward the use of self-supply, but even if the proportion were to remain stable this would not imply that self-supply is no longer a constraint on commercial operators. Each individual local authority has a choice between appointing a third-party, a Teckal or performing services in-house - and commercial suppliers know this. For the same reason, the CMA’s observation that “*there are also instances where local authorities have switched from in-sourcing to outsourcing*” does not mean that the competitive constraint from self-supply should be discounted (para. 7.34).
78. **Self-supply is not a mere “benchmark,” it is a genuine constraint on bidders.** In-house supply is a constraint on suppliers during the tender process. The cost of self-supply is not a ceiling, because bidders do not know what that cost would be. Bidders must therefore submit competitive bids. The cost of self-supply is, like the bidding price of other competitors, an unknown quantity. Each bidder must therefore submit a competitive bid in order to beat it.
79. The Provisional Findings do not set out any evidence for the assertion that “*the fact that a tender has been launched may provide a signal to suppliers that self-supply is an unattractive alternative, and therefore may exert a weak constraint.*” Local authorities also engage with suppliers during the soft-market testing phase. Local authorities can directly weigh the benefits of appointing a commercial supplier as opposed to a Teckal or performing the service in-house. If local authorities decide that they are not achieving value for money through the tender process, they can decide not to award the contract to a private company, and instead take the contract in-house or award it to a Teckal.

80. **The Parties' internal documents show that [REDACTED].** The CMA notes that the Parties' internal documents sometimes include Teckals when discussing their competitors for municipal collection (para. 7.30). This confirms that they impose a genuine constraint on commercial suppliers. The fact that the documents do not list 'self-supply' as a 'competitor' cannot be taken as evidence that self-supply is not a constraint on commercial suppliers; the ability for local authorities to in-source is not a 'competitor' as this decision is not taken as part of the tender process. Both Parties' internal documents show that they track the growth of self-supply (para. 7.29). This demonstrates that they view it as an important part of the competitive dynamics of municipal collection.

**B. The evidence in the Provisional Findings paints a consistent picture of strong competition for municipal collection services from a wide range of rivals**

81. The CMA's "overarching observation" is that "*the Parties are close competitors*" and "*face some competitive constraint from Biffa, Serco, Urbaser and FCC*" (para. 7.100). This observation hugely understates the extent of competition in the market. Evidence on past tenders, market shares, third-party responses, and internal documents consistently portrays a fiercely competitive market with at least five strong suppliers other than Veolia and Suez. In the context of bidding markets operated under strict public procurement rules, it is sufficient that there are enough credible bidders for each bid to be competitive; it should not matter whether there are five, six, or seven credible bidders.

82. **Bidding data show at least five strong competitors other than Veolia and Suez.** Veolia's evidence on past tenders demonstrates clearly that this is a competitive market where Parties do not compete closely. Given that CMA has cross-checked this data with evidence from other suppliers, it forms a sound basis on which to conclude that there cannot be an SLC in the supply of municipal waste collection services, and for this reason it should place a lot of weight on this evidence. According to the CMA, the data show that:

- Across the 30 tenders during 2017-2020, Veolia faced Suez in [REDACTED] tenders. Veolia competed more often with Serco ([REDACTED]), Biffa ([REDACTED]), and Urbaser ([REDACTED]), followed by FCC ([REDACTED]), and Amey [REDACTED]; and
- Of the 30 tenders analysed, Veolia did not win [REDACTED] (an additional [REDACTED] were not awarded). Veolia lost most frequently to Serco and Urbaser [REDACTED] occasions each respectively, followed by FCC on [REDACTED] occasions and Suez and Biffa on [REDACTED] occasions each.

83. In summary, Suez is at best a moderate constraint on Veolia and Biffa; Serco, Urbaser, and FCC are stronger competitors. There are six frequent bidders other than Veolia and Suez. The bidding data is the best available and most direct evidence of closeness of competition between the Parties and the CMA has several sources of reliable bidding data available to it. Closeness of competition is central to the CMA's analysis and it is irrational to prefer weaker, indirect evidence such as market shares and a handful of customer responses.

84. **Share of supply data show six viable suppliers other than Veolia and Suez.** The CMA's share of supply estimates indicate that the Parties' combined share of supply by

number of households served in the UK is [30-40%], with an increment of [5-10]% (Table 7.2). Suez is smaller on this metric than FCC, Biffa and Serco, each of which has a “*significant share of supply*” (para. 7.66), and comparable in size to Urbaser. Shares based on the number of contracts currently held are broadly similar (para. 7.68).

85. Veolia estimated that the Parties’ combined share of outsourced municipal waste collection contracts (excluding Teckals and self-supply) is [30-40]% by number of local authorities served and [30-40]% by number of households. When considering contracts that have started since 2019 – which is more relevant to current and future competition – [REDACTED] [30-40]% by number of households and [30-40]% by number of local authorities. The increment from the Merger is just [0-5]% on the basis of the number of local authorities served. This [REDACTED] demonstrates how competition has been intensifying over the past five years.
86. For the reasons set out at Section III.A above, Veolia believes that shares of supply should also reflect the constraint from Teckals and self-supply. Calculated on this basis, Veolia estimates that the Parties’ combined share is only [10-20]% based on the number of households served (with Veolia’s share being [0-10]%, and Suez’s share [0-5]%).
87. Whichever estimates are used, the Parties’ combined share is below the level at which competition concerns generally arise, and the increment from the Merger is small.
88. **Competitor responses identify eight competitors other than Veolia and Suez, including in-house supply.** Biffa is identified as having “*lots of know-how*”, Serco as winning “*numerous new and large contracts*” and Urbaser as “*increasing its presence in the UK*” (para. 7.97). The CMA says that no respondents mentioned non-home Teckals (para. 7.98). This cannot be interpreted in the way the CMA does, *i.e.*, that competitors do not view Teckals as rivals. The Provisional Findings do not reveal how the question was put to respondents, but based on the summary in the Provisional Findings Report, it appears likely that respondents interpreted the CMA’s question to be asking specifically about other waste management companies (and only those). Moreover, the CMA does not appear to have contacted any non-home Teckals for their views.
89. **The Parties’ internal documents refer to the “*same or similar pool of competitors*”** (para. 7.99). The Provisional Findings cite four of the Parties’ internal documents. Collectively, these documents mention Serco, Biffa, Urbaser, FCC, [REDACTED]. These documents corroborate and add further weight to the evidence on the number of strong rivals in this market.
90. Taken together, this evidence paints a picture of healthy competition for the supply of municipal waste collection services. It makes the CMA’s theory of harm untenable.
- C. **There are numerous credible competitors for ‘complex’ municipal collection contracts**
91. The CMA states that there is a “*subset of collection contracts with characteristics associated with greater complexity*” for which competition may be more limited. The CMA bases this predominantly on an analysis of 11 of the Parties’ contracts, which it has identified (from a sample of just 14) as having certain ‘complex’ indicators.
92. For the reasons set out in Section II above, Veolia disagrees with the CMA’s provisional finding that there is a certain subset of ‘complex’ contracts for which fewer suppliers

can compete. With respect to municipal collection more specifically, the CMA's analysis at paragraph 7.108 onwards is flawed in terms of both its methodological approach and the provisional conclusions drawn. Even on the narrowest definition of a 'complex' municipal collection contract, there are numerous credible bidders and no prospect of an SLC.

93. Veolia has already submitted detailed arguments addressing the CMA's methodology in response to the Working Paper on Municipal Collection. The CMA has not engaged with these submissions whatsoever in the Provisional Findings. It is unclear from the Provisional Findings whether (and if so, why) the CMA has discounted Veolia's submissions. Veolia refers the CMA to its Response to the Working Paper on Municipal Waste Collection and sets out further arguments below.

*i) The CMA's contract evidence suffers from serious limitations*

94. **First, the CMA only selects “three indicators of complexity”** (para. 7.109). This is on the basis that these could be identified from the data available. It is necessarily, then, a partial view of competition for what the CMA labels 'complex' contracts.
95. **Second, each indicator of complexity has limitations.** As to the factors chosen:
- “*Large in value*” is a poor indicator for 'complexity' because it ignores the qualitative factors that Provisional Findings state contribute to complexity and could capture contracts that are simply long in duration. Furthermore, it is not surprising that the 11 of the 12 contracts that are identified in the Provisional Findings' contract analysis (para. 7.109) have an annual value above £5 million. The Provisional Findings selected these contracts because they are “bundled” or considered “complex” by customers. That 11 of the 12 contracts identified in the Provisional Findings have an annual value above £5 million therefore does not evidence that valuable contracts (in general) are “complex”, but only that “complex” contracts (according to the view of local authorities) are valuable.
  - “*Bundled*” has a spectrum of meanings. Many of the contracts in the table include [REDACTED], which are closely linked and often contracted together. For example, [REDACTED].
  - “*Whether the customers themselves considered that their requirements were complex*” is vague. It is impossible to test, based on this description, whether these 'requirements' increase the complexity for suppliers. For example, some local authorities may consider that their contracts are 'complex' on the basis that they serve a large number of households, [REDACTED].
96. **Third, these data relate exclusively to the Parties' customers.** This is inappropriate: the Parties' customers will not be affected in the short term because they are protected by contracts with set durations, defined prices and detailed KPIs. The CMA's theory of harm applies equally to all local authorities in their next tender process, and all of their views should be taken into account.
97. This evidence also suffers from selection bias, which becomes particularly acute when asking customers to “*identify suppliers that they would consider to be credible if the customer re-tendered the services covered by the contract in future*” (para. 7.117).

Unless the local authority had serious concerns with service supplied by Veolia or Suez, they would almost certainly list the incumbent as a credible supplier.

98. **Fourth, these contracts give only a partial picture of competition.** The CMA’s analysis only covers a fraction of the relevant market. While it is not transparent to Veolia how these contracts were selected, Veolia notes that there are likely to be a number of similar contracts that were not considered in the CMA’s analysis:
- Veolia believes that these 11 contracts have a total contract value above £100 million. Veolia has identified at least 24 other such contracts, held by Biffa, Serco, Urbaser, FCC, and Countrystyle, as well as the Parties.
  - Veolia believes that at least 10 of these 11 contracts are combined with services other than street cleansing. Veolia has identified at least 54 other contracts that combine collection with services other than street cleansing.
99. **Fifth, this analysis is backward-looking.** At least seven of these 11 contracts started before [REDACTED] (Veolia cannot comment on the start date of Suez’s contracts). At least four of the 11 contracts started in [REDACTED]. The analysis therefore contains limited information about current and future competitive conditions. It also means that, since many of these customers have not tendered for a number of years, they may not have a clear view of the market, which is evolving quickly.

*ii) The CMA’s evidence on contracts does not support its provisional conclusion*

100. Even setting aside the flaws identified, the evidence in the Provisional Findings demonstrates that there are multiple credible bidders for these contracts and does not support the CMA’s provisional conclusion that such contracts would attract fewer bidders – whether on the basis of bundling services, high value, or the nebulous ‘any other complex requirements’.
101. Given the bias inherent in reviewing only contracts held by the Parties, the following facts are all the more striking:
- **The Parties bid against each other in just three tenders.** For eight of these contracts, the incumbent (whether Veolia or Suez) did not compete with the other merging party. This demonstrates that the Parties cannot be close competitors. There is no basis for CMA’s assertion that “*absent the Merger this would be likely to occur in a significant proportion of complex contracts*” (para. 7.116)
  - **Local authorities identify seven suppliers other than Veolia and Suez as credible bidders** if they were to re-tender these contracts in future (Table 7.8). Biffa and Serco received more mentions than Suez.
  - **Seven local authorities did not have concerns**, even though these contracts were selected on the basis that they fall into one of the CMA’s ‘complex’ categories and should therefore be in the sub-segment that raises the greatest competition concerns.
  - **Both Parties are only listed as credible for six contracts.** The fact that Veolia and Suez both appear only in six contracts underlines that they are not particularly close competitors for these 11 contracts.

- **Few customers had concerns about the Merger.** Only 4 of 11 customers expressed any concerns about the Merger and even fewer about collection specifically. None of these 4 customers expressed concerns about ‘complex’ collection contracts specifically. Almost double *i.e.* 7 of 11 indicated they did not have concerns. As the CMA will be aware, customers are most likely to respond when they are concerned about a merger (the relatively low response rate overall is a good indication that local authorities are very busy and do not have time to respond to every inquiry, especially if they are not concerned about this transaction).
102. The CMA notes that local authorities identified fewer than four credible suppliers on average (para. 7.115(e)) but the CMA does not explain why more than this amount of bidders is necessary for a competitive market. As the CMA appears to recognise, a low number of bidders is a function of the tender process, often due to narrowing by the local authorities themselves (para. 7.114). Local authorities will engage in pre-discussions (or soft market testing) with a number of bidders and usually identify four or fewer suppliers with whom they wish to engage in more meaningful negotiations. As a result, several suppliers do not participate at the bidding stage.

**D. The likelihood of new entry imposes a constraint on suppliers**

103. The CMA unfairly dismisses the constraint from potential new entry and includes inaccurate statements as to market exits. In reality, the market for municipal collection services is characterised by low entry barriers given its simplicity and low capital requirements. This is proven by recent examples of market entry.
104. **The market for municipal waste collection services has seen four new entrants in recent years:** Urbaser, Countrystyle, Panda and Remondis. It is therefore inaccurate for the CMA to conclude that there are “*few examples of entry*” (para. 7.146).
- Remondis is the largest municipal waste collector in Germany and has a global presence (*e.g.* it is also present in Australia). Although it has not yet been a successful bidder it has the resources and know-how to grow into a strong constraint.
  - Countrystyle won the London Borough of Bexley municipal waste collection contract involving 99,000 households.
  - Beuparc (Panda) serves approximately 265,000 households in Ireland and has begun to bid for contracts in England. Beuparc is pursuing an aggressive expansion strategy in the UK and has acquired a number of waste management companies.
  - Urbaser is a recent entrant that already has a market share of 10%.
105. Track record is not a meaningful barrier to entry, and competitor responses to the contrary are inconsistent with actual market events. The Provisional Findings cite a response from Grundon that “*reputation and track record are fundamental to municipal service contracts*” and it was “*therefore not eligible ... since it has not undertaken a collection contract within the last 5 years*” (para. 7.144). If this were the case then Countrystyle – a new entrant with no track record – could not have won the London Borough of Bexley contract. Urbaser notes that Countrystyle is an “*exception*” (para. 7.145), but it is unclear why the case of Countrystyle should be disregarded as an



exception rather than simply cited as evidence that successful new entry can, and does, occur.

106. Some competitors' responses are irrelevant to municipal collection contracts. As noted in Veolia's response to the Working Paper on Municipal Collection, in the context of municipal collection services, the comment that Countrystyle is a "*regional player ... unable to provide national coverage*" is misplaced (para. 7.140). Given that municipal collection services centre around a local authority, national coverage is not important. The CMA should not place any weight on this comment.
107. **The "recent exits" do not result in any weakening of competition.** As explained in Veolia's response to the Working Paper on municipal collection:
- There is no "*recent exit*" by Viridor. Viridor sold its C&I collections business to Biffa along with two household waste recycling centre contracts; this is not relevant to competition in the market for municipal collection services. To the best of Veolia's knowledge, Viridor has not been active in the municipal collections market for many years.
  - Veolia understands that at least part of Amey's municipal collections business has been sold to Urbaser. This acquisition has enhanced Urbaser's existing offering for municipal waste collection services, strengthening an already active competitor in this market. The same can be said of the sale of Cory's municipal collection business to Biffa.
108. These events do not demonstrate any trend of market exit. A sufficient number of credible suppliers remain in this market to ensure healthy competition.

**E. Conclusion**

109. There is no prospect of an SLC in the market for municipal waste collection services. The evidence in the Provisional Findings portrays - across the board - a competitive bidding market where local authorities can choose from at least eight credible suppliers, appoint a Teckal, or in-source services. The CMA's attempt to carve out a subset of 'complex' municipal collection contracts for which the Parties may compete more closely is methodologically flawed, and is not supported by the evidence. Veolia has shown that there are sufficient bidders for municipal collection contracts no matter how they are packaged.

#### IV. Operation and Maintenance of Material Recovery Facilities

110. The CMA provisionally finds that the Merger is likely to give rise to an SLC as a result of horizontal unilateral effects in the supply of O&M services for MRFs to local authorities in the UK.
111. This theory of harm is underdeveloped and insufficiently researched. Veolia has had no meaningful opportunity to consider or respond to a theory of harm concerning an O&M of MRFs market. This theory (and indeed this “market”) was not even mentioned in the phase 1 decision nor in the CMA’s Issues Statement. The first (and only) time Veolia was made aware that the CMA was developing this new theory of harm was in the form of two short slides issued as part of the CMA’s Working Paper on Complex Contracts. Veolia has not been asked, nor had any realistic opportunity, to provide evidence in relation to this theory. Nor, it appears, have third parties.
112. It is unsurprising, therefore, that the CMA has misunderstood this “market”, effectively approaching it from the wrong angle. The Provisional Findings essentially replicate the analytical approach that the CMA has applied to considering the O&M of ERFs. Whether or not that approach is correct as regards ERFs, the Provisional Findings fail to recognise fundamental differences between the operation of ERFs and competition for sorting contracts (which sometimes involve operation of a MRF). This misunderstands what local authorities need and what suppliers compete to offer.
113. Local authorities need suppliers to sort their waste and sell recyclates. Competition in this market is to win sorting contracts from local authorities – not to operate machinery. Suppliers may service these contracts using third-party MRF capacity, their own MRF capacity, by operating the local authority’s MRF (if any), or a combination of the above. There is no difference in the bidders competing for contracts that involve operating a municipal MRF compared with those that do not. There is no distinct market for the O&M of MRFs. On top of this, there is a large degree of uncertainty about whether and in what form MRFs will be needed in future, given upcoming legislative changes. In short, it is far from likely that such a market will develop and no certainty as to whether and how local authorities will tender contracts to operate and maintain MRFs as PPP/PFI contracts come to an end.
114. Even if a market for the O&M of municipal MRFs does emerge, there will be a host of credible bidders with the experience necessary to operate the MRF and manage the subsequent material sales. In particular:
- **Merchant operators will - and already do - compete for local authority contracts.** The CMA has no justification for discounting at least 27 experienced MRF operators from the relevant competitor set. Merchant suppliers have the necessary skills and experience to successfully bid for local authority contracts. Today, merchant operators contract directly with local authorities to sort their waste at merchant MRFs. The CMA should take into account the competitive constraint from merchant operators in its share of supply estimates.
  - **The Provisional Findings wrongly dismiss the constraint from self-supply.** MRFs are uncomplicated assets and local authorities can and do operate MRFs in-house. Given the small size of the CMA’s sample, opinions from a slight majority of five out of eight local authorities do not provide a basis to provisionally conclude that self-supply is not a relevant constraint.

- **Even excluding merchant operators, at least seven credible competitors will impose a sufficient constraint on the merged entity.** The Provisional Findings list seven non-merger rivals that currently service local authority contracts: Biffa, Kier, FCC, Hills Waste, Cory, Renewi and Severn Waste. Each of these operators has the necessary ability and experience to successfully bid for O&M of MRF contracts when they come to market.
- **The share of supply estimates in the Provisional Findings dramatically overstate the Parties’ ability to win O&M of MRF contracts.** Shares based on capacity of local authority MRFs reflect historical competition for DBFO contracts. These contracts demanded different expertise and often combined more than one service, so cannot be taken as a proxy for competitive strength in bidding for O&M of MRF contracts. The shares in the Provisional Findings also take an inconsistent approach to merchant capacity. This flawed methodology does not support the CMA’s provisional conclusion on the Parties’ market shares nor that the market is “*highly concentrated*”.
- **The Provisional Findings’ third-party evidence on O&M of MRFs has serious limitations.** It is not clear how many local authorities or suppliers provided information to the CMA. It is not always apparent whether the CMA gathered evidence specifically in relation to contracts for the O&M of MRFs, or whether it used information received in the context of other areas of assessment (such as ‘complex’ contracts). The CMA should not draw provisional conclusions from third-party evidence if it has not been collected on a clear and consistent basis.

115. Veolia provides further detail on each of these points below.

**A. Merchant MRF operators exercise a competitive constraint on the Parties**

116. The Provisional Findings exclude 27 suppliers from the relevant competitor set on the basis that they do not currently provide services to local authority MRFs. This is a disproportionate reaction based on limited evidence from local authorities and just one supplier.

117. **In reality, merchant operators are well-positioned to compete for local authority contracts.** Sorting contracts have two principal elements: operating the equipment itself and managing the resale of the materials. In each case, merchant suppliers have the same experience as suppliers that hold local authority contracts. There are no technical differences between local authority and merchant MRFs. Merchant operators are accustomed to procuring offtakers for materials sorted at MRFs and are exposed to the same materials pricing risks as suppliers to local authority MRFs.

118. **Merchant MRF operators already serve a large number of local authorities through sorting contracts.** For instance, the Crayford MRF (recently acquired by N+P from Viridor), serves 28 local authorities using one of the largest MRFs in the UK.<sup>13</sup> The MRF is operated on a fully merchant basis without any locked capacity. Merchant operator HW Martin also has contracts directly with local authorities. There are also examples of local authorities that previously had their own MRF, who are now instead procuring sorting services on the merchant market. For example, Kent County

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<sup>13</sup> See Let’s Recycle, [Viridor sells Crayford MRF to Dutch firm N+P - letsrecycle.com](https://www.letsrecycle.com) (14 January 2022)

Council's MRF at Hearsden ceased to operate around 2016 and it moved its tonnages to the merchant Crayford MRF.

119. **The CMA lacks credible evidence to exclude merchant operators from the relevant market.** The findings on merchant operators appear to be based on two pieces of evidence. First, the responses from local authorities that *“it was important for their O&M provider to be large to mitigate against the risk associated with the volatile prices from the materials markets”* (para 8.17). Second, Grundon's submission that it would not be willing to bid for 'sorting' contracts due to pricing risks (paras. 8.25-8.26).
120. As an initial matter, it is unclear (i) in what context customers and suppliers provided this information, (ii) what specific questions the CMA asked these suppliers and customers, (iii) how many suppliers or customers the CMA contacted, or (iv) how many suppliers or customers responded.
121. As to the evidence itself:
- **The ability to take on materials pricing risks is becoming less relevant.** There is a trend toward sharing risks with local authorities. [REDACTED]. This is consistent with Tolvik's evidence that *“risk sharing has become increasingly common as suppliers are unwilling to bear the full risk of material pricing volatility”* (para. 8.19).
  - In this context, the ability and/or willingness to take on material pricing risk is not an important competitive parameter, and given the direction of this trend it is likely to become less relevant in future (*i.e.* when these O&M contracts could potentially begin to come to market). In terms of risk profile, the difference between operating a merchant MRF in comparison to a local authority MRF is not significant. Merchant operators manage the same commodities and are exposed to exactly the same risk.
122. **Local authorities actually identified merchant operators as potential suppliers.** Local authorities identified seven merchant operators when listing *“suppliers that they would consider as credible suppliers for the provision of O&M of their MRF”* (para. 8.52): MVV, Grundon, Enva, Amey, Countrystyle, Serco, and HW Martin. These merchant operators received broadly similar ratings to local authority operators like Biffa, FCC and Viridor. Local authorities clearly expect a similar level of service from merchant operators.
123. **At the very least, the CMA should consider the constraint from merchant operators within the framework for assessing new entrants.** The Merger Assessment Guidelines state that *“[i]n cases where firms do not currently shift their capacity across different products as a matter of routine, it may be more appropriate for the CMA to consider the prospect that they may start doing so using the CMA's framework for assessing entry by rivals”*.<sup>14</sup> Even if the CMA considers that merchant operators do not exercise a strong competitive constraint on the Parties today, it should take into account the fact that there are 27 potential entrants in the market for the supply of sorting services to local authorities. This is all the more important given that this market does not yet exist and it is too early to draw conclusions about its competitive dynamics. The Provisional Findings do not explain the reason for the provisional

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<sup>14</sup> See Merger Assessment Guidelines (CMA129), March 2021, para. 9.10.

conclusion that the entry of merchant MRF operators will not constrain the Parties (para. 8.67).

**B. Self-supply exercises a competitive constraint on the Parties**

124. Local authorities have the option to operate their MRF in-house, and a number of them already do, both directly themselves (10 MRFs in the Tolvik databook) and through Teckals (7 MRFs in the Tolvik databook). MRFs are simple, low-tech assets and no particular expertise is required to operate them. Existing staff under contracts with third parties would transfer to the local authority via TUPE (consistent with evidence from a local authority at para. 8.30). The Provisional Findings are incorrect to place no weight at all on the constraint from self-supply.
125. **The Provisional Findings have insufficient evidence to exclude self-supply.** The CMA received responses on this topic from just eight local authorities (of which all are customers of the Parties) (para. 8.30). Only five – a very slight majority – indicated that they would not consider self-supply. This represents under a third of the total number of local authorities that currently outsource the operation of their MRFs. This is no basis on which to draw the provisional conclusion that “*the majority have neither the willingness nor ability to self-supply O&M services*” (para. 8.30).
126. **A significant proportion of customers would likely consider self-supply.** The Provisional Findings state that, since 31 out of the 48 MRFs that are operated under PPP/PFI contracts use a third-party operator to supply O&M services, “[*t*]he majority of local authorities have ... revealed their preference to outsource their O&M services at the time of the contract” (para. 8.31). However:
- This is not a significant majority. Over a third of MRFs in the CMA’s sample are operated by the local authority. It is disproportionate to provisionally conclude from this that self-supply exercises zero constraint.
  - The preference of the local authority at the time that the PPP/PFI contract was let does not dictate the preference of the local authority in the future, if and when that authority tenders a sorting (or ‘O&M of MRF’) contract. Since the PFI regime has ended, and it is unlikely that there will be any significant number of PPP contracts given that the infrastructure already has been constructed, historical data on the popularity of in-house supply does not reflect the future.
127. The CMA should therefore take into account the fact that self-supply exercises a constraint on private operators at the bidding stage.

**C. Shares of supply in Provisional Findings dramatically overstate the Parties’ competitive strength**

128. The Provisional Findings’ share of supply estimates are flawed and lead the CMA to the wrong provisional conclusion on market concentration and the Parties’ competitive presence. This is for at least four reasons.
129. **First, these shares reflect competition for historic PPP/PFI contracts.** Many of these contracts represent historic PFI/PPP contracts that involved the DBFO of a MRF awarded more than 20 years ago. This does not reflect competition for sorting contracts today or in the future.

130. Veolia made this criticism in its response to the CMA’s Working Paper on Complex Contracts. In response, the Provisional Findings note that “*suppliers that won the initial PPP/PFI contracts were selected in part for their O&M capabilities, as those contracts include the O&M of the MRF in addition to the design, finance and build elements that Veolia identifies*” (para. 8.43). But the Provisional Findings cite no evidence on the relative importance in the bidding process of the O&M element compared to other elements, like construction of the asset and any other services included in the scope of the (often integrated) PPP/PFI contract. Any connection between share of MRF capacity today and ability to bid for sorting contracts is therefore tenuous.
131. **Second, these shares take an inconsistent approach to merchant capacity.** The Provisional Findings exclude merchant operators from the relevant competitor set but include suppliers’ merchant capacity in the share of supply calculations. In doing so, the CMA accepts that experience operating merchant MRFs is relevant to suppliers’ ability to bid for local authority contracts. The CMA should therefore include merchant operators in its calculations. On this basis – even excluding self-supply – the Parties’ combined shares would be [20-30]%.

**Table 1 - Shares of Supply by Capacity at All MRFs (Excluding In-House Supply and Teckals)**

Operator	Share of capacity
Veolia	[10-20%]
Suez	[0-10]%
<b>Merged entity</b>	<b>[20-30]%</b>
Biffa	[20-30]%
Viridor	[10-20]%
Grundon	[5-10]%
UPM	[0-5]%
Levensat	[0-5]%
Beauparc	[0-5]%
H W Martin	[0-5]%
G A E Smith	[0-5]%
Others	[20-30]%

132. **Third, the CMA assumes that all “local authority” MRFs will be reverting, whilst some are non-reverting.** The CMA considers that all MRFs marked “DBFO” in the Tolvik Databook are local authority owned (in addition to those marked as “Local authority”) and thus will revert to the local authority at the end of the contract. [REDACTED]. These will therefore not revert to the local authority, and are effectively

equivalent to merchant MRFs.<sup>15</sup> In addition, the economic lifetime of an MRF is limited (and shorter than that of an ERF). Even if the site where the MRF is located might revert to the local authority, the MRF itself might be obsolete at that time. The CMA's theory of harm is irrelevant both for those MRFs that will not revert, and for those that will revert but will be obsolete.

133. **Fourth, the CMA appears to have excluded relevant competitors.** Veolia cannot replicate the CMA's figures from the Tolvik MRF databook. Veolia believes that the CMA has used 2019 volumes, and the operator identified for 2020, and has presented shares on this basis. However, the CMA appears to have excluded Amey and CWM Environmental and some Teckals (Cumbria Waste Management, Cynon Valley Waste Disposal, Tor2 Ltd and Yorwaste; but not Norse or Bristol Waste Co). Veolia believes that combined shares are below 40% on any basis.<sup>16</sup>

**D. The Parties face numerous credible rivals**

134. The Provisional Findings state that the Parties face competition principally from Biffa, Viridor and FCC. Veolia agrees that these suppliers exercise a strong competitive constraint on the Parties when bidding for municipal sorting contracts. But the CMA unduly dismisses the constraint posed by numerous other rivals, even though the evidence in the Provisional Findings shows that these are credible bidders.
135. **'Smaller' MRF operators have substantial experience and a demonstrated history of winning local authority contracts.** The Provisional Findings provisionally conclude on the basis of this share of supply evidence that a number of suppliers with shares below 5% will exert a weak competitive constraint on the Parties (para. 8.62). According to the Provisional Findings, however, local authorities said that "*experience and track record were among the most important factors when deciding which supplier to select as their next O&M provider*" (para. 8.43). The number of MRFs or total capacity under operation is not a good proxy for experience or track record. Although Hills, Kier, Severn Waste, Cory, and FCC operate fewer or smaller MRFs than the Parties, they have substantial relevant experience operating MRFs. For example:
- Hills has operated the Lower Compton MRF since the early 2000s;<sup>17</sup>
  - Kier has operated a MRF in Ettington, Warwickshire since its acquisition of Pure Recycling in 2011;<sup>18</sup>

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<sup>15</sup> By way of example, Veolia understands that [REDACTED]. See Let's Recycle, [Multi-million pound upgrade for Viridor's Masons MRF - letsrecycle.com](#) (19 February 2019) and Let's Recycle, [Suffolk councils sign 10-year recycling contract - letsrecycle.com](#) (10 March 2004).

<sup>16</sup> As explained to the CMA in [REDACTED], the Tolvik MRF databook was prepared by Tolvik using only publicly available data for Suez, as the databook was prepared at a time when Veolia's advisors did not have access to Suez's actual data. Table 25 of the Final Merger Notice lists the number of Suez MRFs based on Suez's actual data. Veolia's advisors consider this to be a more accurate representation of the number of MRFs operated by Suez, and their capacities. Similarly, Table 6 of the Final Merger Notice provides the most up-to-date figures of capacity for MRFs operated by Veolia.

<sup>17</sup> See Hills Group, [Planning Application for Lower Compton Materials Recycling Facility](#) (2013). Planning permission for the MRF was granted in 1997.

<sup>18</sup> See Kier Group PLC, [Preliminary Results for the year to 30 June 2011](#) (15 September 2011).

- Severn Waste has operated its MRF in Norton, Worcestershire since 2010;<sup>19</sup>
  - Cory has operated the Western Riverside Waste Authority MRF since 2011;<sup>20</sup> and
  - FCC has operated multiple MRFs since 2013.<sup>21</sup>
136. The Provisional Findings have failed to take this into account when considering the competitive constraint that these rivals exert.
137. **Evidence in the Provisional Findings shows that local authorities consider they have numerous options.** Local authorities identified a total of 11 suppliers other than the Parties (Table 8.3). The Provisional Findings state that “[t]hose other O&M operators received low ratings from local authorities” (para. 8.62). This is incorrect. In fact, all but one of these suppliers received an average score of 3 or above. These ratings only appear low if non-mentions are given a rating of zero. This is inappropriate because the CMA should not expect respondents to be exhaustive. A customer may simply have less knowledge of some suppliers and prefer not to rate them, or may have completed the questionnaire quickly and forgotten one.

**E. The CMA’s third-party evidence has serious limitations**

138. It is unclear how the CMA gathered evidence in relation to this theory of harm. The CMA began investigating this market at a late stage of its investigation and has apparently not had time to gather comprehensive evidence from the Parties or third parties. In places where the CMA’s evidence-gathering procedure is made clear, it suffers from significant limitations.
139. **The CMA gathered evidence on the wrong basis.** For the reasons explained above, the relevant market is not for the operation of a MRF but for sorting services. The CMA should have sought evidence from any local authority that will procure sorting services in future – not just those that own a MRF under a PPP/PFI contract. By focusing its enquiries on the operation of the asset, the CMA has missed the opportunity to receive evidence on the myriad ways that sorting contracts can be serviced, including through third-party capacity or the supplier’s own MRF. The evidence in the Provisional Findings speaks only to a fragment of the relevant market.
140. **The Provisional Findings provide little indication of how many suppliers and customers it sought views from, and why.** The Provisional Findings are often opaque when it comes to the CMA’s sample sizes. It is not clear, for example, whether the CMA sought evidence from more than one merchant operator (Grundon) on willingness to bid for local authority contracts. Veolia also has concerns about the framing of the CMA’s questions. The fact that Grundon references ‘sorting’ contracts rather than contracts for the O&M of MRFs raises a question as to what (if any) questions the CMA posed to third parties in order to gather evidence on this theory of harm. The CMA

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<sup>19</sup> See Let’s Recycle, [Official opening for 10m Worcester MRF](#) (22 March 2010).

<sup>20</sup> See Machinex, [Machinex Industries Inc. Announces its most automated Material Recycling Facility in London, UK](#) (18 March 2011).

<sup>21</sup> See Let’s Recycle, [FCC opens 11m Oxfordshire MRF](#) (7 November 2013) and Waste Today, [FCC Environment Opens New UK MRF](#) (29 April 2013).



should provide further information so that Veolia can properly understand and respond to the case against it.

141. **The Provisional Findings’ evidence from local authorities on the strength of suppliers suffers from selection bias.** The Provisional Findings state that the CMA “sent out questionnaires to all of the local authorities that currently outsource the supply of O&M services to the Parties” (para. 8.50). Six local authorities responded (out of 10). This is in the context of 26 local authorities who outsource the operation of MRFs to third parties.
142. By definition, these are the views of local authorities who have awarded contracts to Veolia or Suez (*i.e.*, they have already rated one or other Party highly, when last awarding a contract). The results of this questionnaire are an unreliable basis to draw conclusions that local authorities consider the Parties to be the strongest suppliers.
143. **The CMA cannot place weight on customer views regarding contracts that may not come to market for many years.** Some of the Parties’ contracts with local authorities involving the operation of a MRF still have [REDACTED] left to run. The competitive situation at that time will not be the same as it is today, especially given the anticipated legislative changes surrounding recyclables. This approach also fails to take into account the possibility of new entry.

#### **F. Conclusion**

144. The CMA’s theory of harm cannot be sustained. By introducing a new theory of harm at this late stage - around 18 months after it began its investigation - the CMA has not been able to gather evidence or test that evidence. As a result, the description of this “market” in the Provisional Findings reveals significant misunderstandings. Veolia [REDACTED]. This market does not yet exist and it is not possible to tell with any certainty what form it will take. For this reason alone, the CMA has insufficient basis to conclude that an SLC is more likely than not to occur as a result of the transaction. In addition:
  - If and when contracts for the O&M of MRFs come to market, local authorities will have a choice of over 30 experienced providers, including merchant operators. They also have the option to take services in-house.
  - In today’s market, merchant operators already contract directly with local authorities to sort their waste. There is no reason this should not continue in future.
  - Particularly given that local authorities are starting to take on more of the risk of material price volatility, there is no reason why merchant operators should be unwilling or unable to bid for these contracts. This also reduces the benefits for local authorities of outsourcing as opposed to self-supply.
  - Calculated on an appropriate basis, the Parties’ share of supply is around [20-30]%. In any event, shares of supply reflect historic competition based on different parameters and are a poor predictor of success for these contracts.

145. Veolia does not consider there is any prospect of an SLC in the market for the supply of sorting services – or O&M services to local authority MRFs – as a result of the Merger.

V. **Operation and Maintenance Services for ERFs to Local Authorities**

146. The CMA provisionally finds that the Merger is likely to give rise to an SLC as a result of horizontal unilateral effects in the supply of O&M services for ERFs to local authorities in the UK.
147. Veolia strongly disagrees with the Provisional Findings. The market for the O&M of ERFs for local authorities in the UK is only just emerging and there is little evidence at present on how these contracts will be tendered and the suppliers that will bid for them. The CMA should place minimal weight on market shares and third-party responses that reflect competition for contracts involving DBFO and other services.
148. [REDACTED].
149. The CMA's theory of harm is that Veolia and Suez will be well placed to win O&M of ERF contracts tendered by local authorities in future. It bases this conclusion on the following main arguments:
- Veolia and Suez have extensive experience in O&M of ERF contracts compared to other suppliers.
  - Operators of merchant ERFs would not be able to compete for municipal contracts and therefore pose a weak competitive constraint on the Parties.
  - Existing operators of ERFs have a competitive advantage due to being the incumbent.
  - Access to contingency capacity is an important factor to local authorities when selecting an O&M provider.
150. The evidence does not support these conclusions. The market for the O&M of municipal ERFs is only just beginning to develop and neither Veolia nor Suez has any contracts of this type. The provisional SLC finding is therefore based on highly speculative assumptions about future market dynamics. The market to win future contracts for the O&M of ERFs will be highly competitive, with operators of merchant ERFs and new entrants as significant rivals to existing operators of local authority owned ERFs, [REDACTED].
151. More specifically:
- **There are many companies capable of winning O&M of ERF contracts.** Evidence in the Provisional Findings indicated that Paprec, FCC and Viridor have a similar profile of expertise and experience to the Parties. In particular, FCC and Viridor were rated highly by local authorities. Cory, Paprec and MVV also have experience supplying O&M services for ERFs in the UK.
  - **Merchant ERF operators will exercise a significant competitive constraint on the Parties.** There is no difference between operating merchant ERFs as opposed to local authority-owned ERFs. Third-party evidence cited in the Provisional Findings supports Veolia's view that experience gained from providing O&M services to merchant ERFs is relevant and valuable to local authorities.

- **Access to contingency capacity is not an important competitive parameter.** Suppliers can easily access contingency capacity, including by using landfill and refuse-derived fuel (“RDF”) export. The evidence cited in the Provisional Findings does not suggest that the need for contingency capacity restricts suppliers from bidding for and winning contracts.
- **The Provisional Findings misunderstand the nature of any incumbency advantage.** The Provisional Findings state that the Parties are likely to be closer competitors in respect of the ERFs they currently operate. But the merger does not change the incumbency advantage at any one facility. In any event, being the incumbent operator does not significantly affect the likelihood of winning the O&M contract. This is supported by evidence in the Provisional Findings that “*firms like Viridor*” plan to bid for contracts where they are not the incumbent (para. 9.94).
- **The third-party evidence on which the CMA relies has serious limitations.** It is not clear how many local authorities or suppliers provided information to the CMA, particularly relating to the types of competitors that the CMA dismisses.

152. Veolia responds in detail to this section of the Provisional Findings below.

**A. The Provisional Findings do not reflect that O&M of ERFs is a nascent market**

153. A market for O&M of ERFs is only just emerging in the UK. [REDACTED] and there are a large majority of PPP/PFI contracts involving ERFs that are yet to expire.

154. Veolia’s experience [REDACTED].

155. In France, a wide range of suppliers – including operators of merchant ERFs – began to compete for contracts for the O&M of local authority ERFs when they came to market. France has seen several new suppliers enter the market in recent years, including Urbaser, FCC, Remondis, EWW, Indaver, Viridor, Hera Ambiente and Iren. These new entrants now hold a significant share of contracts – more than a third of the market.

**Table 2 - Shares of Supply of New O&M of ERF Entrants in France in 2020**

Competitor	Market share <sup>22</sup>	Number of Facilities
Paprec	[10-20]%%	[10-20]
Urbaser	[5-10]%	[0-5]
Idex	[5-10]%	[5-10]
Séch�	[0-5]%	[0-5]
CNIM	[0-5]%	[0-5]
Semardel	[0-5]%	[0-5]

<sup>22</sup> Shares of contracts for O&M of local authority ERFs in terms of regulatory capacity.

Competitor	Market share <sup>22</sup>	Number of Facilities
Altawest	[0-5]%	[0-5]
Engie	[0-5]%	[0-5]

156. [REDACTED].

157. The competitor with the largest market share in France, Paprec, has grown significantly over the last thirty years. Paprec entered the UK market in 2021 through its acquisition of Tiru (formerly Dalkia Wastenergy). It now operates two merchant ERFs in the UK, in addition to more than 20 ERFs in France.

158. [REDACTED]. Idex has won numerous other tenders in recent years, including for the O&M of the Toulon ERF in 2013 for 18 years (jointly with Pizzorno) and the Dinan ERF and Thonon ERF in 2015.

**B. There will be numerous strong competitors for O&M of ERF contracts**

159. Since the PPP/PFI contracts were originally tendered, a significant number of additional rivals for ERF O&M contracts with experience operating merchant ERFs have entered the market. These rivals did not exist or operate in the UK at the time these PPP/PFI contracts were tendered, but would now be strong competitors for any O&M contracts for local authority-owned ERFs.

160. The Provisional Findings set out views from just six local authorities and four competitors on competition for upcoming O&M tenders. It is not clear when the six authorities' contracts will next be tendered and therefore whether they would be affected in practice by the merger in the foreseeable future. Notwithstanding the issues with the CMA's competitor sample size, even from the Provisional Findings' scoring metric, FCC and Viridor are considered to be strong competitors by local authorities (para. 9.107).

161. Third-party evidence provided in the CMA's Working Paper on the O&M of LA-Owned ERFs shows that third parties perceive a competitive landscape with many competitors capable of winning contracts:

- Three competitors in addition to Veolia and Suez are described as having a “*strong track record, financial standing and UK presence*”: FCC, Viridor, and enfinium (slide 19).
- enfinium is described as having an “*increasing portfolio in the UK*”, which is important in the context of a theory of harm that relates to future contracts (slide 19).

162. In analysing the ratings of suppliers by local authorities and competitors, the Provisional Findings treat non-mentions as scores of zero (Tables 9.3 and 9.4). This is inappropriate because the CMA should not expect respondents to be exhaustive. Most of these suppliers in fact received a score of 3 or above.

163. **Plenty of suppliers have significant experience operating ERFs.** The Working Paper on the O&M of LA-Owned ERFs showed that local authorities identified six suppliers with experience of operating ERFs other than the Parties: FCC, Viridor, Cory, enfinium,

Amey, Covanta, and MVV (slides 15-16). The Provisional Findings acknowledge that Viridor, FCC and Paprec have extensive experience in operating ERFs. Viridor and FCC currently operate 10 and six ERFs, respectively. Notwithstanding the limitations of the ‘total plant years’ metric in the Provisional Findings (see further below), it is clear that Cory, Environpower, WTI (now enfinium) and MVV also have significant experience.

164. The Provisional Findings give undue significance to the total years a supplier has operated its ERFs. The CMA uses this metric to determine which O&M operators have a similar management and expertise to the Parties. It finds that “*Veolia and Suez will have a combined total of 214 plant years, which is nearly triple the experience of the closest suppliers*” (para. 9.67). This is despite its own acknowledgement that (i) there are likely to be diminishing returns to experience, and the relative differences between the Parties and other operators may not represent a significant competitive advantage (para. 9.67); and (ii) “*total plant years*” is not a metric used by local authorities (para. 9.66).
165. This aggregation of total years a supplier has operated its separate ERFs is incoherent. A supplier’s experience operating one ERF cannot be aggregated with its experience operating another ERF, particularly given that the timeframes of its experience will be overlapping or parallel.
166. Even if the total plant years metric may be indicative of relative experience, the Provisional Findings lack evidence that the metric relates to success in bidding. The CMA does not indicate whether a rival such as Viridor, with 50 total plant years, is considered meaningfully less experienced than Veolia or Suez. It acknowledges that Viridor, FCC and Paprec have gained extensive management and technical expertise through their provision of O&M services over a period of time.
167. **Many contracts have been awarded to operators with little or no experience of operating local authority ERFs.** Data on historical contract awards shows that authorities frequently awarded contracts that included O&M of ERFs to operators with no previous experience of operating local authority ERFs in the UK. Historically, these contracts often included elements of designing, building, and financing. These elements will not be required in the future, as the infrastructure already exists. Thus, if companies with little or no experience of local authority ERFs were awarded DBFO contracts, they should be credible competitors for contracts that only include O&M.
168. Veolia’s advisors have compiled a dataset that lists, for each ERF in the Tolvik ERF databook, the year the ERF became operational. Based on this, experience in “total plant years” can be calculated at any given point in time, and in particular at the point when the local authority actually made its decision to award the contract. The dataset also lists the year of award of the contract (or an estimate where the data is not available).<sup>23</sup> The dataset is provided as Annex 1. It shows that:

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<sup>23</sup> Where available, Veolia has used the year in which the preferred bidder was announced. If information on this was not publicly available, Veolia has used the year the PPP contract was signed. For six ERFs, neither of these dates could be found. In those cases, it is assumed that the local authority made its decision 6 years before the ERF became operational (this is the average amount of time from the announcement of the preferred bidder to the site becoming fully operational, for the PPP ERFs where both these dates are known).

- [REDACTED] different companies were awarded contracts that included O&M of ERF by local authorities in the UK. By definition, each of these companies represent an occasion where a contract was awarded to a company with no previous experience of operating ERFs for local authorities in the UK.
- An additional [REDACTED] contracts were awarded to competitors with more than zero but less than seven years of experience.
- [REDACTED] of these [REDACTED] contracts have been awarded since 2010.
- In the remaining [REDACTED] instances, contracts were awarded to a provider with more than seven years of experience.

169. Table 3 below summarises the relative experience (measured in “plant years” of operating ERFs for local authorities in the UK) of the winning bidder at the time of the contract award. It shows that only once was the contract awarded to the operator who at the time had the most experience. Frequently, the contract was awarded to operators who at the time of contract award had only the second, third, fourth, sixth, or even eighth most experience of operating local authority ERFs in the UK.

**Table 3 – Summary of Experience at Time of Contract Award for Local Authority Contracts in the UK**

Winning operator’s rank by experience of operating LA ERFs in the UK	Number of occasions
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

*Note:* Rank 1 means that the contract was awarded to the operator with the most experience at that time; Rank 2 means that the contract was awarded to the operator with the second most experience; and so on.

170. The dataset also shows several examples, even in recent years, of contracts awarded to competitors with no or little experience of operating local authority-owned ERFs in the UK. For instance:

- In 2013, Amey was awarded a PPP contract that included the Milton Keynes ACT, without any previous experience.

- Also in 2013, Viridor was awarded the contract for the Trident ERF in Cardiff, even though at the time it had only 4 “plant years” of experience. It was awarded this contract ahead of Veolia, MESE, Suez, and FCC, who each had between 20 and 52 “plant years” of experience.
  - In 2019, Indaver was awarded the O&M component for the Aberdeen ERF, without any previous experience of operating local authority ERFs in the UK.
171. A full overview of the estimated experience of each competitor, at the time the contract was awarded for each PPP ERF, is included in Annex 1. For completeness, the annex also provides an analysis that includes the operation of merchant ERFs in the UK as relevant experience. The conclusion that local authorities often awarded contracts to operators with little or no experience remains unchanged when considering experience from merchant ERFs.
172. **Self-supply exercises a competitive constraint on third-party bidders.** The Provisional Findings do not consider self-supply to be a “*viable alternative to the provision of O&M services by specialised third party operators*” (para. 9.35). This is based on the submissions of seven local authorities that experience and expertise in operating ERFs is an important selection criterion. However, no local authority submitted that it would not consider self-supply, and the strongest evidence is that two local authorities already choose to own and operate their own ERFs (Coventry and Solihull Waste Disposal Company, and London Energy). The balance of the evidence does not support the preliminary conclusion in the Provisional Findings.
173. **There are numerous competitors for any contracts involving O&M of ERFs.** The Provisional Findings state that “*complexity therefore exists in relation to O&M services whether or not they are bundled with other services*” (para. 9.142), and provisionally conclude based on this “*complexity*” that “*Veolia and Suez are likely to compete particularly closely*” (para. 9.43). This is illogical. If all contracts for O&M of ERFs are “*complex*,” as the Provisional Findings suggest, it would be inconsistent for the CMA either to identify a subset of O&M contracts as being complex or to identify certain suppliers of O&M services as incapable of bidding for an O&M contract because it is “*complex*”. There is accordingly no basis to assert that Veolia and Suez are likely to compete any more closely than the numerous other suppliers of O&M services for ERFs.

**C. The CMA overlooks the constraint posed by merchant ERF operators**

174. Operators of merchant ERFs are well suited to operating local authority-owned ERFs. Third-party evidence in the Provisional Findings supports this view but is not reflected in the CMA’s preliminary conclusions.
175. Third parties submitted that there are “*limited technological differences between merchant and local authority owned ERFs*” (para. 9.18). Evidence from customers and competitors also support the view that merchant operators could use their existing assets to supply O&M services to existing merchant ERFs and local-authority-owned ERFs. The CMA nevertheless dismisses these low technological barriers and the existing capabilities of merchant operators. Instead, the Provisional Findings focus on submissions from two competitors currently operating merchant ERFs (enfinium and Covanta) that suggest they are unlikely to bid for standalone contracts.



176. The Provisional Findings’ third-party evidence supports Veolia’s view that management and technical expertise gained at merchant or local authority-owned ERFs, including overseas ERFs, is equally valuable. A local authority submitted that “*it was not essential that the expertise was gained from providing O&M services to local authority owned ERFs*” (para. 9.53).
177. The CMA provisionally concludes that merchant ERF operators as a group may have limited incentives to bid for standalone O&M contracts. The CMA reaches this view from evidence provided by enfinium and Covanta only, two competitors of Veolia and Suez, dismissing without explanation the far broader third-party evidence that is inconsistent with this theory of harm:
- Most competitors confirmed that merchant operators would be viable competitors for O&M services supplied to local authorities. Some competitors identified current merchant ERF operators as potential rivals (para. 9.20(c)).
  - Indaver, one of the merchant ERF operators identified by Veolia, has in fact won a contract to carry out the O&M for the new PPP Ness ERF in Aberdeen.
  - Two of the four merchant operators currently present in the UK – Viridor and enfinium – also supply O&M services to local authorities. Viridor is the second biggest operator of local authority ERFs and it submitted that it would bid for future ‘O&M only’ contracts (para. 4.20(a)).
  - Evidence from third parties supports that there are limited technological barriers for merchant ERF operators to supply O&M services to local authority owned ERFs.
  - Local authorities indicated they would consider using a merchant ERF operator when they tender for O&M services when their existing PPP/PFI contracts expire.
  - “*While previous experience was ‘absolutely crucial’, it was not essential that the expertise was gained from providing O&M services to local authority owned ERFs*” (para. 9.53, emphasis added).
178. The CMA dismisses these views. Despite this strong supporting evidence, the CMA considers that merchant ERF operators likely pose no or only a weak constraint on the Parties, primarily because they have less experience of operating local authority or merchant ERFs than other competitors.
179. In doing so, the Provisional Findings also fail to consider dynamic competition in the context of the threat posed by merchant operators in the forthcoming contracts for O&M of ERFs. As stated above, the Provisional Findings provide evidence that most competitors believe that merchant operators would be viable competitors in the nascent market. In addition, Veolia has told the CMA that [REDACTED].<sup>24</sup> This means that, when these contracts come up for tender, most competitors will bear in mind the threat

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<sup>24</sup> See, for example, [REDACTED].

of competition from merchant operators and compete more aggressively as a result.<sup>25</sup> This is true whether or not enfinium and others actually intend to bid for a specific contract when the time comes. This is potentially sufficient to defeat any post-merger price rises, and in any case the CMA has failed to consider whether it is sufficient (in combination with all the other competitive constraints on the merging parties).

**D. Contingency capacity is readily available and does not limit suppliers**

180. **The CMA misunderstands the relevance of contingency capacity.** The CMA provisionally concludes that contingency capacity is an important consideration for local authorities in selecting an O&M supplier. This is based on a small sample of responses to a leading question. Of six local authorities that provided narrative responses in relation to the criterion ‘Reliability of service (including contingency capacity)’ (para. 9.59):
- Three submitted that contingency capacity is ‘important’.
  - Two submitted that they may consider procuring contingency capacity separately from their O&M services contract.
  - One submitted that they would accept a bid if the company was able to build relationships with third-party ERFs nearby (but that a supplier with access to its own capacity was a bonus).
181. The CMA’s evidence does not suggest that suppliers are restricted from bidding due to the need for contingency capacity. Three local authorities that responded to the CMA’s question submitted that they would readily accept other options and three responded that contingency capacity is *important*, but did not suggest that this leads to a smaller pool of credible bidders.
182. The Provisional Findings dismiss Veolia’s concern that the phrasing of the criterion gave an in-built bias. The CMA explains that “*analysis of the free-text explanations provided in the local authority responses [...] indicates that contingency capacity was an important feature of this criterion*” (para. 9.58). This does not, however, address the concern. The phrasing of the criterion would have focused local authorities on this topic. The CMA therefore should not infer from local authorities’ scoring or responses that access to contingency capacity carries any special weight in the tender process.
183. **The evidence in the Provisional Findings shows that local authorities view RDF export as an attractive option.** Five of the six local authorities that responded said they would consider RDF export as an adequate contingency, with three of these noting that RDF is less desirable than an ERF solution.
184. Notwithstanding the limited evidence set, responses indicate that local authorities have a large number of alternative disposal outlets. As submitted in Veolia’s [REDACTED]. The CMA can therefore have no concerns that the merger will create or strengthen any supposed advantage for the Parties from the other ERFs that they operate.
185. **The Provisional Findings provide no basis for the view that operators with a large network of ERFs will have a competitive advantage in dealing with outages.** The

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<sup>25</sup> See Merger Assessment Guidelines, paragraph 5.3

CMA argues that such operators face a lower risk to their business if one of their ERFs is closed for a period of time, as that operator will be more likely than a smaller operator to use its network of ERFs to access contingent capacity and the impact of an ERF shutdown will be low relative to the absolute size of its business. The Provisional Findings conclude that larger network operators will therefore benefit from scale advantages. But this conclusion is not based on any evidence or third-party views.

186. Moreover, the Parties' treatment capacity is [REDACTED].

**E. The Parties do not have any relevant incumbency advantage**

187. The Provisional Findings misunderstand the nature of any incumbency advantage. The Provisional Findings conclude that (i) *"for a large proportion of contracts that will revert to local authorities at the expiry of PPP contracts, Veolia and Suez will have a competitive advantage and will therefore be a stronger competitive constraint for all other suppliers bidding for the contract"* (9.101) and (ii) *"the Parties' breadth of experience means that they may be more likely than other bidders to be able to overcome incumbency advantage where another operator is the incumbent"* (para. 9.96). This is incorrect:

- To the extent any such incumbency advantage did exist, the merger would not change the incumbency advantage at any one facility. For any given ERF operated by, say, Veolia, the merged entity will have the same incumbency strength (regardless of how large this is) as held pre-merger by the party operating the ERF. Any incumbency advantage would also imply that Suez was a weaker competitor for that ERF in the counterfactual.
- The Merger will not benefit the Parties when they compete for the contracts they currently operate and it will not *"make them stronger and closer competitors to each other in a subset of contracts"* (para. 9.128). Suez is not a close competitor for contracts where Veolia is the incumbent and *vice versa*.
- The CMA has calculated shares based on the Parties' current operation of local authority-owned ERFs that will revert to the relevant local authority upon expiry of the PPP contract. This is misguided. Reverting assets are contestable whereas non-reverting assets are not. Suppliers operating non-reverting assets (notably Viridor and FCC) will continue to operate those assets for the foreseeable future, *i.e.*, they will definitely continue to have reference facilities. In contrast, incumbent operators of reverting assets may lose their contracts at renewal. The Provisional Findings use these shares to conclude that *"the Merged Entity would benefit from incumbency advantage on five times the number of facilities as the next largest suppliers (Paprec and Viridor)"* (para. 9.98). This has nothing to do with incumbency advantage and, as described below, these shares are not meaningful.
- Other competitors such as Paprec, FCC and Viridor have a similar profile of expertise and experience to the Parties. The CMA does not consider the ability of these competitors to 'overcome' incumbency advantage in its analysis.
- The view that the CMA's market shares do not take into account plant-specific incumbency advantages is mistaken (para. 9.128). The market share analysis suffers from the same deficiencies as the concept of incumbency advantage, as

they are based on the Parties' historical shares in past contracts. Plant-specific incumbency advantages are built into the figures automatically.

188. The Provisional Findings make no attempt to analyse which of the Parties' contracts are likely to be retendered within a reasonable timeframe following the merger, and therefore whether any alleged incumbency advantage will in fact arise post-merger.

**F. The CMA should not place weight on shares of supply**

189. Veolia previously submitted that weight should not be placed on shares of supply given that they are based on contracts tendered five to 25 years ago and focused on design and construction, therefore not reflective of the future of the market. While the CMA acknowledges these concerns, it nevertheless asserts that in "*markets where experience matters, market shares are a relevant indicator of strength and ability to win future contracts*" (para. 9.115). While this may be true of static markets, market shares cannot be reflective of relevant experience and competitive strength in markets that are set to change significantly in the next few years.
190. The shares of supply in the Provisional Findings only take into account ERFs that were operational in 2020. As the CMA is concerned with future competition, it should also take into account facilities that will come online in the next few years. When including in the calculation all ERFs where O&M services are outsourced, the Parties' combined share is only [20-30]% by number of facilities and [20-30]% by capacity. [REDACTED].
191. In addition, the share of supply estimates should include merchant-only operators. Otherwise, these estimates exclude at least four credible competitors that are well-placed to operate local authority-owned ERFs: Covanta, enfinium (formerly WTI), Bouygues, and Indaver.
192. **The Provisional Findings draw broad conclusions from a narrow set of evidence.** Similar to the CMA's treatment of evidence in relation to the constraint of merchant ERF operators, the CMA excludes the constraint posed by technology suppliers on the basis of the view of one competitor, enfinium. [REDACTED].

**G. The CMA does not assess whether an SLC could arise in practice**

193. The markets affected by the merger are often subject to long-term contracts. If there is a significant period left to run, the CMA must consider whether, and if so how, there is an opportunity for the parties to increase their prices or degrade their service in the foreseeable future (a period which the CMA must define). This is a flaw common across the Provisional Findings, but it is particularly pertinent to the O&M of ERFs.
194. The Provisional Findings note that only six contracts are likely to arise in the next five years in the provision of O&M services for ERFs (para. 9.43). There is no further information provided about the nature of these contracts.
195. Even assuming an SLC could manifest itself in the six contracts, there is no analysis of whether a segment of the market constituting only six contracts over five years is sufficiently significant to be capable of representing an SLC. In order to find a legally robust SLC, the CMA must analyse those six contracts and consider how they would be affected by the merger. In the Provisional Findings, there is no discussion of which supplier currently holds the contracts, which suppliers are the likely bidders next time,

or what the likely contingency capacity situation would be. It is also not clear whether the CMA believes that the remaining 36 contracts are covered by the provisional finding of an SLC. There is no analysis of whether such an SLC could manifest itself in those 36 contracts, so the Provisional Findings do not provide sufficient reasoning for such an SLC. There is no analysis of whether there will be other new contracts outside the 42 existing contracts (for which the Parties would obviously not enjoy an incumbency advantage).

196. If the CMA wishes to find an SLC in this market, it would need to reissue its Provisional Findings to give the merging parties the opportunity to comment on the analysis.

#### **H. Conclusion**

197. The Provisional Findings do not take into account the nascent nature of the market for O&M services to local authority ERFs and base their preliminary conclusions on highly speculative assumptions about future market dynamics. The evidence from the Parties and third parties shows:

- There will be many competitors for contracts for the O&M of local authority ERFs, including merchant operators.
- The “*incumbency advantage*” described in the Provisional Findings is conceptually flawed.
- Shares of supply in past contracts are misleading and not reflective of competitive dynamics for any upcoming contracts for O&M of ERFs. And even on that basis, applying a more appropriate calculation that includes all ERFs where O&M services are outsourced, the Parties’ combined share is only [20-30]% by number of facilities and [20-30]% by capacity.

198. For the reasons explained above, the evidence does not support the conclusion in the Provisional Findings that there is an SLC in the market for the supply of O&M services to local authority ERFs.

## VI. Supply of Waste Disposal Services by Incineration

199. The CMA provisionally finds that the Merger will give rise to an SLC in the supply of non-hazardous waste incineration services in the local areas around Suez's Wilton 11 and Teesside ERFs.
200. Suppliers compete to win local authority treatment contracts across the country. These contracts can take two forms: (i) treatment of a local authority's waste at the authority's own ERF (*i.e.* an O&M contract), or (ii) treatment of a local authority's waste at an external ERF (where the authority does not have its own ERF).
201. The Provisional Findings focus on the excess capacity at suppliers' ERFs that is not reserved to the local authorities under PPP/PFI contracts or long-term fuel supply agreements. The ERF operator can use this excess capacity internally (for either municipal or C&I waste) or sell it to other waste management companies or aggregators (waste brokers).
202. Selling controlled merchant capacity ("CMC") in local markets [REDACTED].
203. In contrast, merchant ERF operators depend on selling all of the capacity at their ERFs to be viable. [REDACTED]. In general, [REDACTED].
204. **The CMA's analysis of the supply of incineration services in the North East is not adequately explained.** The CMA dismisses Veolia's submissions in relation to the competitive dynamics specific to the local areas around Suez's Wilton 11 and Teesside ERFs (para. 9.203).
  - [REDACTED].
  - The CMA excludes Amey's ERF from its assessment of weighted shares of supply.
  - The competitive constraint posed by Spencer's Energy Works ATC near Hull is excluded on the basis that the ERF is [REDACTED].
  - The CMA dismisses the competitive constraint posed by RDF export, on the basis that RDF export is not a demand-side substitute to disposal by incineration.
  - The CMA notes that its weighted shares of supply analysis takes into account Veolia and Suez's share at Ferrybridge.
205. The CMA's reasoning for dismissing these submissions remains unclear. In particular:
  - The CMA provides only a redacted reason for excluding Amey's ERF. This is the closest facility to the Teesside and Wilton 11 ERFs and is located next to the A1(M) road north of Leeds. The justification for this exclusion is unclear, given that the [REDACTED].
  - Spencer's Energy Works ACT is located [REDACTED]. By comparison, Ferrybridge is [REDACTED]. This is a new facility that came online in 2021 with an estimated CMC of 182,000 tonnes.

- No justification is provided for dismissing the constraint posed by [REDACTED] ports in the catchment areas of the Teesside and Wilton 11 ERFs that exported RDF in 2021: [REDACTED]. The CMA does not report whether it has asked customers in this local area about their appetite for RDF export.
  - While the CMA’s shares of supply analysis may include shares at Ferrybridge, it [REDACTED].
  - The number and size of competitors within and just outside the catchment areas suggest that the Merger will not lead to an SLC in incineration services in the North East.
206. **Third-party evidence on competitive constraints is thin.** It is inappropriate for the CMA to reach provisional conclusions based on such a small sample of customers. Out of the 120 or so relevant local authorities in England alone, the CMA received only six responses to its questions on landfill and RDF export, and only seven to its question on the importance of distance. Veolia made the same criticisms in its response to the CMA’s Working Paper on Incineration, but the CMA has not made efforts to strengthen its third-party evidence.
207. **The Parties face credible rivals.** As acknowledged in the Provisional Findings, WTI (now enfinium) is a major competitor to both Teesside and Wilton 11. WTI has [REDACTED].
208. **The evidence in the Provisional Findings has significant limitations.** The CMA again draws provisional conclusions from a very narrow set of evidence to find that RDF export is not an adequate disposal method for customers. It provides evidence from five of the Parties’ customers that indicated that RDF export was not used or used to a very limited extent. As previously submitted in [REDACTED].
209. **The Provisional Findings’ evidence from customers suffers from selection bias.** The Provisional Findings state that the CMA “*sent questionnaires to 13 of the Parties’ customers asking whether landfill was an adequate substitute for incineration services; and to indicate the amount of waste it had disposed via landfill*” (para. 8.157). Six customers responded. By definition, these are the views of local authorities who have awarded contracts to Veolia or Suez and therefore have not opted to use landfill for contingency reasons. The results of this questionnaire are an unreliable basis from which to draw conclusions on the competitive constraints on disposal by incineration. In any case, [REDACTED]. The views of local authorities are therefore not significant.

### **Conclusion**

210. The CMA’s provisional conclusion ignores the reality of competition to sell ERF CMC in the North East. It focuses exclusively on a simplistic share of supply calculation that is, by its nature, unable to capture the nuances of this market. Not only does the CMA fail to take all the relevant evidence into account, but its own evidence for discounting RDF export and landfill is narrow and unreliable, and does not appear to be based on responses from customers in the relevant geographical area.
211. A forward-looking analysis taking into account new capacity that will come online soon would show large volumes of dedicated merchant capacity in the area. More

fundamentally, this entire theory of harm relates to an activity that is [REDACTED], and there is accordingly no prospect that the Merger could give rise to harmful effects.



## VII. Supply of Non-Hazardous Commercial and Industrial Waste Collection Services

212. The CMA provisionally finds that the Merger will give rise to an SLC in the supply of non-hazardous C&I waste collection services because – even though Suez exercises only a weak constraint – the market is “*highly concentrated*” and Veolia is the second largest competitor after Biffa. The CMA’s logic is essentially that because Biffa is such a large competitor (partly as a result of its recent Viridor acquisition), even the acquisition of a relatively weak competitor like Suez should not be permitted.
213. This provisional conclusion is based on the premise that there is a subset of customers that are ‘national’, which the CMA defines variously as customers which “*operate[] in two or more regions of the UK*” (para. 11.3) and customers with contracts with an annual value above £250,000 (para. 11.80). The CMA believes that these customers have certain needs that can only be met by particular suppliers: notably, Biffa and Veolia (with Suez being a far distant competitor).
214. The CMA concludes that Biffa and Veolia are uniquely placed to service ‘national’ customers because they have extensive geographic reach and do not need to “*rely*” on brokers. Suez is, by the CMA’s own admission, considerably smaller. The CMA determines that facilities management (“*FM*”) companies and brokers should not be included in the “*relevant competitor set*” besides Reconomy and Mitie (para. 11.44). Having defined an artificially narrow set of competitors, it then estimates market shares based on incomplete data that arbitrarily excludes a number of brokers and FM companies – even those that uncontroversially provide services to national customers.
215. This approach fundamentally misunderstands the nature of competition in C&I services. The C&I services market has always been characterised by high levels of subcontracting, including because large C&I customers typically split their waste collection into different waste streams. This trend is only increasing as the C&I services market evolves to meet customer demand for greater disaggregation of waste streams and digitalisation. Brokers are not only able to compete for and win national customer contracts, they are often better placed to do so than ‘traditional’ waste management companies. As a result, brokers have grown rapidly [REDACTED]. They provide customers with a single point of contact and enable them to reduce costs and derive value from their waste. Rather than considering whether brokers can compete with ‘traditional’ waste management companies, Veolia has been forced to evolve to operate more like a broker.
216. In response to the CMA’s Working Paper, which provided an overview of the CMA’s theory of harm, Veolia provided considerable evidence showing how the market operates and which suppliers had been winning ‘national contracts.’ The CMA explains that it has not yet had sufficient opportunity to test this evidence. This is unsatisfactory, but Veolia trusts that the CMA will do so before issuing its Final Report. Veolia provides further supporting evidence to assist the CMA in testing its previous submissions below.
217. Against this background, the CMA’s theory of harm cannot be sustained. The remainder of this section explains why the evidence base that the CMA relies on to support its theory of harm is unreliable. It also supplements Veolia’s previous submissions, to provide the CMA with greater comfort as to the robustness and reliability of that evidence, which the CMA has so far largely dismissed.

**A. The Provisional Findings unduly dismiss Brokers and FM companies**

218. The CMA “*exclude[s] brokers and FM companies from the relevant competitor set*” (para. 11.44) with the exception of Reconomy and Mitie. It does so on the basis of responses of just four customers who said they would not consider using brokers or FM companies, as well as responses from fewer than 10 respondents asked to identify competitors. The CMA has also found that only a few brokers and FM companies win national C&I contracts.
219. **The CMA’s approach to market definition is wrong.** The CMA’s Merger Assessment Guidelines explain that the CMA should not draw bright-line distinctions between what is and is not in the relevant market, but will consider the relative strength of different competitive constraints.<sup>26</sup> In relation to C&I services, it has abandoned that approach entirely. Despite the fact that (i) a variety of brokers and FM companies compete for and win contracts with ‘national’ customers, and (ii) they are identified as credible suppliers by customers, the CMA excludes all except Reconomy and Mitie from the relevant market. In doing so, it effectively determines that they present zero competitive constraint. This is far removed from the reality of the market:
- Brokers are more likely to be able to meet a customer’s specifications, no matter how niche the waste streams in question, because they can leverage the fragmented and diverse market of local providers in each area while still allowing customers to deal with a single supplier.
  - The Provisional Findings state that “*large waste management companies...operate a different business model from intermediaries such as brokers and FM companies*” (para. 11.31) but the increasing industry trend has been to adopt the ‘broker model’. [REDACTED].
  - Veolia’s tender data clearly indicate that brokers and FM companies are able to compete for national customers and should form part of the relevant market. Brokers have repeatedly won national contracts in recent years, and exert a much more significant competitive constraint on Veolia than Suez does. Indeed, Veolia has lost to each of [REDACTED] as or almost as frequently as it has lost to Suez (these losses also being higher in value than losses to Suez).
  - The CMA should consider the cumulative constraint from competitors in the market, rather than excluding individual competitors from consideration. Veolia believes that it competes against brokers in almost every national tender (even if it does not know which ones).
220. **Third-party evidence in the Provisional Findings shows that Brokers and FM companies are strong competitors.** The CMA’s own evidence base demonstrates this.

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<sup>26</sup> See Merger Assessment Guidelines (CMA129), March 2021. See para. 9.4: “*In many cases, especially those involving differentiated products, there is often no ‘bright line’ that can or should be drawn. Rather, it can be more helpful to describe the constraint posed by different categories of product or supplier as sitting on a continuum between ‘strong’ and ‘weak’. The CMA will generally not need to come to finely balanced judgments on what is ‘inside’ or ‘outside’ the market*”.

- Two thirds of the customers who responded to the CMA’s question on whether they would consider using a broker or FM company in the future agreed that they would.
  - Four customers noted that they would use brokers “*if it made commercial sense*” or “*if service levels could be guaranteed*” (para. 11.33). This is blindingly obvious and also meaningless. No rational company would appoint any supplier where it did not make commercial sense or where they expected a poor service. This provides no evidence on the relative competitiveness of brokers, FM companies, or anyone else.<sup>27</sup>
  - Brokers, including Novati, DS Smith and Reconomy were listed as credible suppliers by customers, with one customer ranking Novati ahead of Biffa and Suez. Customers stated that DS Smith was “*competitively priced*” and Reconomy “*provided national coverage and access to additional consultancy services; and, as a broker, can access many local suppliers through a cost efficiency aggregated model.*”
221. In this context, the CMA’s comment that SWRnewstar and Simply Waste have been acquired by Biffa and therefore do not pose an independent competitive constraint is irrelevant. This comment does not go to market definition. [REDACTED]. Veolia’s tender data show that [REDACTED] worth of tenders in which Veolia participated. In comparison, Suez has won tenders worth just [REDACTED]. It is also relevant that Biffa continues to operate these companies on a broker model and under the same brands.
222. Clearly, it is not necessary for every customer to prefer brokers for them to pose a competitive constraint on the Parties. The availability of different business models for customers to choose from should be seen as evidence of a healthy market.

**B. The bidding data is unduly downplayed**

223. It is striking that the CMA places so little weight on the tender data submitted by Veolia, purely on the basis that the outcome for 55 (of 338) tenders was not known (para. 11.103). Veolia’s tender data identifies the winner in 283 competitive tenders and is therefore a far larger dataset than used by the CMA elsewhere in the Provisional Findings. It contains the best information available to the CMA and the only direct, reliable evidence on the extent to which the Parties compete against each other and win contracts from each other. This evidence is dismissed in favour of spurious market share estimates and highly ambiguous responses from a tiny fraction of third parties who responded to the CMA’s questionnaires.
224. The Provisional Findings fail to consider at any point whether the loss of competition in four out of 283 cases (i.e. the number of contracts won by Suez) is sufficient to represent an SLC in the C&I collection market, bearing in mind that these 283 contracts

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<sup>27</sup> Even the minority of customers who said they would not consider a broker or an FM company did not seem to hold that opinion irretrievably. Two of the four respondents merely said that that had “*not found it necessary*” to use a broker, which indicates that they may do in future, and one respondent had found “*brokers to be more expensive*”, which indicates that they had in fact considered brokers in the past and there is no reason given as to why they would not choose a broker in future if the price was right (para. 11.34).

related to the segment of customers (national customers) where the CMA’s theory of harm claims the competitive interaction between the merging parties is closest.

**C. Subcontracting is common and widely accepted in the C&I market**

225. The CMA provisionally concludes that some national customers prefer a single supplier who can entirely or substantially ‘self-perform’ contracts. As a result, the CMA has found that providers who subcontract less may have an advantage over those who subcontract most or all of their services. The CMA also believes that brokers and FM companies that subcontract all of their services will not be able to cater for national customers.

226. **The Provisional Findings misunderstands the nature of competition in C&I services.** Subcontracting is ubiquitous in C&I contracts; no supplier has national coverage or the ability to collect all (or even most) waste streams across the country. Almost all large customers accept – and many welcome – subcontracting as part of the service they procure. Self-performance was a scoring element or success criterion in only [REDACTED] for new national customers that Veolia competed in during 2021.

227. Moreover, large C&I customers tend to disaggregate their waste collection into several specific waste streams which they award to a number of different suppliers. For example, [REDACTED].

228. Veolia has also submitted evidence using publicly available data to identify some of the largest C&I customers (such as grocery, restaurant and pub chains) and the waste provider for each such customer; however, the CMA has not taken this evidence fully into account. In particular:

- The CMA says that it has not been able to verify the sources underpinning this evidence and so has disregarded it in reaching its provisional findings. The CMA is obliged to investigate this evidence and take it into account in its Final Report. Veolia has gathered further information using public sources where possible to assist the CMA in doing so. See Annex 2 to this Response.
- The CMA also says it is unclear whether customers split tenders into lots or whether their suppliers subcontract certain regions or waste streams. Although Veolia cannot confirm the answer to this in every instance, whatever is the case, this evidence clearly shows that there are many suppliers able to compete for these customers, either by subcontracting parts of the collection service or bidding for individual lots.

229. **Customer evidence in the Provisional Findings does not support the CMA’s conclusion.** The Provisional Findings rely on comments from just two customers to support its finding that some customers prefer suppliers that self-perform contracts (para. 11.27). Neither withstands even superficial scrutiny. Both comments acknowledge that any concerns about self-performance are outdated (being relevant “*four or five years ago*”) given the improvement in data and technology tools. One of the customers stated that the broker model has become more effective “*as data and technology improves*” and the other accepted that “*the use of real time data allows [brokers] to demonstrate...that [they] can monitor service levels which has helped to alleviate the concerns of some customers.*”

230. **The Provisional Findings rely on just two of Veolia’s internal documents to support the finding that national customers prefer self-performance of contracts.** These two documents discuss just two customers and their specific contracts (para. 11.29). This highly selective approach to the many thousands of documents submitted during the CMA’s investigation cannot be used to infer any general conclusion on the importance of self-supply. In any case, reliance on these documents is misplaced:
- Veolia’s internal document [REDACTED].
  - The Provisional Findings imply that [REDACTED].
231. As explained above, and in Veolia’s previous submissions, the truth is that [REDACTED]. There can be no more compelling evidence that [REDACTED].
232. **The Merger will not lead to a reduction in choice for intermediaries that need to subcontract their services to other waste management companies.** Contrary to the suggestion in para. 11.91 that brokers are highly dependent on the Parties and Biffa, Veolia believes that brokers prefer to subcontract to suppliers at local and regional levels, where there is highly active competition (as found in phase 1, since the CMA had no concerns about local or regional customers). For example, [REDACTED].

**D. The Provisional Findings’ share of supply estimates are flawed**

233. The Provisional Findings state that the C&I market when considering national customers is highly concentrated (para. 11.85). Although the CMA acknowledges that Suez accounts for only a small share of the market (particularly in comparison to Biffa and Veolia), it still finds that the Merger would result in an SLC as it would lead to further consolidation of an already concentrated market. The CMA’s calculations of the shares of supply in C&I collection are spurious and artificially overstate the market shares of Biffa and the Parties in a way that bears little scrutiny. The CMA’s methodology also excludes competitors that have uncontroversially won the types of ‘national’ contracts under consideration.
234. **The estimates are based on an incomplete and illogical contract sample.** Although the CMA defines ‘national’ customers as those having sites in more than one region in the UK, the CMA goes on to use customers with an annual contract value greater than £250,000 as a proxy. Not only is such a threshold seemingly arbitrary, but it also serves as a poor proxy for ‘national’ customers.
235. The CMA has also failed to provide an explanation of the methodology it has used to set the materiality threshold at £250,000, stating only that it has been selected on the basis that 70% of Veolia’s multiregional contracts lie above this threshold (fn. 796). This is inappropriate for the following reasons:
- It conflates customers with high value needs and short contracts with customers having lower value needs and longer contracts.
  - It excludes relevant suppliers. More than [REDACTED] of Veolia’s revenue from multiregional C&I contracts (*i.e.* contracts covering two or more regions) come from contracts with an annual value less than £250,000, and [REDACTED] of revenue from multiregional contracts comes from contracts with an annual value less than £125,000 but are excluded from the CMA’s data

set. Adopting an arbitrary threshold effectively excludes suppliers with contract values just below the threshold, who otherwise satisfy the CMA's criteria.

- It includes those customers that produce large volumes of waste (and therefore contracts of high value) but are essentially 'local' while excluding customers that produce small volumes spread over many locations. [REDACTED].
- It does not account for the fact that large C&I customers often use different suppliers for different waste streams [REDACTED]. These customers will have smaller contract values with each supplier than a customer that single sources, even if their geographic profile is identical.

236. As a result, the methodology significantly understates market size and inflates the Parties' shares. The Provisional Findings present shares of supply on the basis of data provided by just seven suppliers who hold contracts with a value exceeding £250,000. Not all suppliers responded to the CMA's data request. This means that the market share estimates are likely to omit a number of contracts with a value exceeding £250,000.
237. It is implausible that the combined shares of Biffa, Veolia and Suez sum to more than 90%, with Suez having more than 5%. The CMA's calculations imply that other companies have virtually no contracts worth more than £250,000 over their lifetime. However, as submitted by Veolia previously, Reconomy alone had a UK C&I turnover of more than £150 million in 2020 (with the company announcing that its group-wide consolidated revenues had increased to around £800 million following its recent acquisitions of Eurokey Recycling and Casepak). These shares are also likely to understate the share of specialist providers, who usually handle smaller parts of contracts with value exceeding £250,000.
238. **The estimates are methodologically unsound.** Table 11.2 purports to show shares of self-performed collections, by taking the total contract value and netting off the revenue which is subcontracted to other waste management companies. This is a meaningless measure. For example, if Veolia only self-performs half of a £1 million contract for a given customer, the table assigns Veolia £500,000. But if that customer strongly valued self-performance, it would not give Veolia the contract. Therefore the table is not even instructive about a hypothetical market for national customers with a strong preference for self-performance. If, instead, the CMA were to try to estimate shares of contracts that are entirely self-performed, it would find that both Veolia and Suez have very few such contracts for national customers. If, alternatively, Table 11.2 is trying to establish who physically performs collections for national customers, it omits the many local and regional collection companies to whom Veolia, Suez, and every other supplier subcontract.
239. **There is no rational basis for the Provisional Findings to use the shares of supply based on the value of work performed.** [REDACTED]. Presenting the shares of supply in this manner discounts the broker model and unfairly dilutes their market presence. What is relevant is the ability of brokers to win contracts, and this is corroborated by the CMA's own evidence as well as the Parties' tender data.

**E. Access to disposal infrastructure is irrelevant and cannot be merger-specific**

240. The CMA argues that suppliers who own and operate disposal infrastructure have a competitive advantage over those suppliers that have to access third-party disposal infrastructure; therefore, the Parties and Biffa are best placed to win C&I contracts. These concerns are unfounded and largely irrelevant to the CMA's theory of harm in C&I collection. Indeed, Biffa has built the strongest market position in C&I collection without owning or operating ERFs.
241. **The Merger will not confer any competitive advantage to the Parties by increasing the volume of disposal infrastructure that the Parties have access to.** As Veolia has previously submitted, the Parties do not have any significant advantage by owning disposal infrastructure. The Parties themselves [REDACTED] rely on third-party disposal facilities for a [REDACTED] of C&I waste they collect. Veolia estimates that in 2021, [REDACTED]. Equally, Suez is estimated to have treated or disposed of [REDACTED] of all C&I waste it collected in 2021 (including where Suez subcontracted collections) at third-party facilities.
242. This also means that the Parties will not gain any further advantage as a result of the Merger merely due to an increased volume of disposal infrastructure owned by the Merged Entity. This will be matched by a proportionate increase in contracts that could be serviced by such disposal capacity (effectively maintaining levels of access to disposal infrastructure at pre-Merger levels). Moreover, the [REDACTED]. Like every other ERF operator, the Parties use all available capacity to ensure the plants operate efficiently. They cannot reserve unused capacity just in case it may be needed in future.
243. Meanwhile, Veolia has submitted an analysis showing that every area of the country has numerous disposal options. For example, in each UK region except London, there were [REDACTED] active landfills in 2020, excluding those operated by the Parties. [REDACTED]. This ensures that local disposal markets are and will remain competitive. The CMA dismisses this evidence.
244. **The CMA overstates the environmental advantages of owning and operating treatment and disposal infrastructure.** The CMA finds that owning disposal infrastructure is an important factor to being competitive in C&I collection. In the CMA's view, this gives suppliers greater ability to provide certainty and transparency to customers about meeting their environmental commitments, which it says access to third-party infrastructure cannot provide.
245. The CMA overstates the concerns of a very small number of customers to draw its conclusion on this point. Even putting aside the small number of customer responses received by the CMA, only approximately [REDACTED] of Veolia's national accounts contracts have specific restrictions regarding the use of landfill.
246. In any event, the CMA misunderstands the range of treatment or disposal options that are available through third parties (e.g., spot arrangements, mid- to long-term FSAs etc) and fails to appreciate that suppliers are receptive to customers' commercial goals. Competitors like Grundon, Biffa, FCC, Bagnall and Morris (now part of the Beuparc group), First Mile, Reconomy, and Mitie commit to a 100% diversion from landfill for residual waste collection services and/or operate zero waste to landfill policies. They are able to achieve these objectives while owning no or minimal waste management infrastructure. For example, DS Smith, a packaging and recycling specialist, acted as a

broker for Tesco to help them divert 100% of its waste from stores, offices and distribution centres away from landfill.

247. **The CMA’s conclusions on access to own disposal infrastructure contradict market reality.** First, the Parties themselves use third-party disposal facilities for [REDACTED] of C&I waste they collect. Second, Biffa and brokers could not be successful if this was the case. Biffa has built the strongest market position in C&I collection without owning or operating ERFs and having a limited geographic footprint of active landfills. Similarly, brokers have grown rapidly and achieved a significant market share without owning or operating any disposal infrastructure. This fact is simply inconsistent with the proposition that control of disposal facilities, and especially ERFs, is important to win national contracts.

**F. The CMA’s third-party evidence has significant limitations**

248. The CMA places significant weight on third-party evidence to support its provisional finding of an SLC in C&I collection even though this is an unreliable basis from which to draw conclusions. The CMA received only a handful of third-party responses to its questionnaires which are not representative of the market as a whole. Even setting aside concerns about the reliability of the CMA’s evidence base, the evidence presented in the Provisional Findings does not support the conclusions that the CMA appears to be drawing from that evidence.

249. **The CMA’s questions shape the responses.** The CMA appears to have asked suppliers about “*competitors for integrated contracts (i.e. contracts that include several services)*” (emphasis added) of C&I customers “*across the waste management supply chain*”. This is inappropriate for two reasons:

- ‘Integrated contracts’ is not a relevant concept in the context of C&I collection services.
- The phrase “*across the waste management supply chain*” prompts respondents to list competitors that are active across the waste management supply chain. Such an approach suffers from restrictive bias which the CMA recognises in its own guidance on third-party survey evidence.<sup>28</sup>

250. **The CMA relies on evidence drawn from a very small sample size.** Very few third parties responded to the CMA’s questionnaires. The CMA received responses from typically 8-14 out of the 188 customers surveyed (rising to 23 responses for just one question), and from only 11 out of 66 competitors surveyed. This is an insufficient sample size. It is not representative of the market and cannot support the conclusions that the CMA has attempted to draw. This remains true even when adjusting the number of respondents for the CMA’s materiality threshold of £250,000 (which still leaves 143 potential respondents).

- Only 13 customers responded to the CMA’s question on the importance of having a single supplier to provide waste collection services across all their sites, of which nine respondents agreed.

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<sup>28</sup> Good practice in the design and presentation of customer survey evidence in merger cases, CMA78, May 2018. See para. 3.11: “*Potential sources of bias [include] restrictive bias, where the question leads the customer to think only of certain options.*”



- Only 14 ‘national’ customers responded to the CMA’s question on having a preference for a single supplier collecting all of their waste streams over multiple suppliers, of which eight respondents agreed.
  - Only 10 competitors responded to the CMA’s request for contract data.
  - Only 14 ‘national’ customers responded to the CMA’s question on selection criteria considered important by customers when awarding C&I collection contracts.
  - Only nine ‘national’ customers responded to each of the CMA’s questionnaire on credible suppliers for re-tender of current contracts and competitor ratings.
251. **The respondents are not representative of the markets in question.** The CMA has gathered evidence only from the Parties’ customers with a contract value above £250,000. First, by focusing on the Parties’ current customers, there is an in-built bias in the results, as they are the views of customers who have already awarded contracts to Veolia or Suez and therefore already rate them highly (and rated them highly when last awarding a contract).
252. Second, this by definition excludes customers who chose other waste management service providers, including brokers, FM companies, or the many regional competitors. A balanced market test would also need to test the views of such customers who have chosen other competitors (and, by definition, rated them highly).
253. **Some responses are contradicted by the facts.** For example, Reconomy said that it does not believe it is competitive for the largest national customers. As far as Veolia is aware, Reconomy, through its subsidiary Eurokey Recycling, serves Tesco, Sainsbury's, Aldi, Lidl and Waitrose. Another example is Reconomy’s recent contract with Karbon Homes for waste services for approximately 30,000 properties covering both the North East and Yorkshire.<sup>29</sup>
254. **The third-party evidence does not support the conclusions drawn in the Provisional Findings.** The CMA acknowledges that a majority of customers did not express concerns about the Merger and some customers believed it could lead to efficiencies, drive down costs and offer opportunities in the form of more innovative waste management solutions.

**G. The CMA’s approach is inconsistent with its decision in *Biffa/Viridor***

255. Veolia has made submissions to the CMA explaining why its approach to the assessment of the *Biffa/Viridor* transaction is inconsistent with its approach to its assessment of the C&I services market in the present case. This is not merely a technical point; the logic of the CMA’s approach means that it would be inconsistent or unlawful to find an SLC in the C&I services market from the present transaction.
256. The CMA’s response to Veolia’s submission is that the Mergers Intelligence Committee examining *Biffa/Viridor* had to assess that transaction against the market conditions at that time. This response entirely misses the point.

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<sup>29</sup> See Let’s Recycle, [News in brief \(23/05/2022\) - letsrecycle.com](https://www.letsrecycle.com/news/23/05/2022) (23 May 2022)

257. [REDACTED]<sup>30</sup>
258. [REDACTED]<sup>31</sup>
259. [REDACTED].
260. [REDACTED].
261. [REDACTED].

## **H. Conclusion**

262. The CMA's theory of harm in relation to C&I collection cannot be sustained. It is based on a fundamental misunderstanding of the C&I services market. It ignores the prevalence of subcontracting in C&I contracts and the competitive constraint of brokers who frequently compete for and win contracts. The evidence from the Parties and third parties shows:
- There is strong competition in C&I collection with there being nine or more suppliers including Biffa, DS Smith, Reconomy and Novati.
  - Suez is not a strong constraint on Veolia. Customer evidence and Veolia's bidding data suggest that Suez is generally not a strong competitor in the C&I collection market.
  - Brokers and FM companies frequently compete and win large C&I contracts. Subcontracting is a common feature of the C&I market. Far from being a weak constraint (or no constraint at all), brokers and FM companies have stolen a march on 'traditional' waste management companies, who are responding by adopting a similar model.
263. There is no prospect of an SLC in the market for the supply of waste collection services to C&I customers as a result of the Merger and the Provisional Finding should therefore be reversed.

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<sup>30</sup> See Guidance on the CMA's intelligence function (CMA56 revised), para. 1.2.

<sup>31</sup> See CMA Merger Assessment Guidelines (CMA129), para. 3.12.

## **VIII. Operation and Maintenance of Water and Wastewater Treatment Facilities**

264. The CMA provisionally finds that the Merger is likely to give rise to an SLC as a result of the horizontal unilateral effects in the supply of O&M services for water and wastewater treatment facilities to industrial customers. This is on the basis that (i) the Parties compete closely for a subset of customers, (ii) large customers consider that Veolia and Suez are two of a small set of credible competitors, (iii) the fragmented nature of the market means that other players impart only a weak constraint on the Parties, and (iv) entry and/or expansion from other players would not be timely, likely and sufficient to prevent an SLC from arising as a result of the Merger.
265. This provisional finding is contradicted by the evidence:
- Self-supply is an important competitive constraint. Customers can and do switch between self-supply and outsourcing; [REDACTED].
  - There is no category of contracts for which the Parties are the only credible competitors.
  - The Parties face strong competition from many credible suppliers in the market for Industrial Water O&M, including through entry and expansion.
  - The tender data analysis cited by the CMA overstates the closeness of competition between the Parties.
266. In addition, the feedback from customers, on which the Provisional Findings rely, strongly suggests that the customers who responded misunderstood the CMA’s questionnaire and/or were confused as to which market was being considered. For example, they name competitors who are not active in O&M services at all (while not mentioning the largest competitors who are).
- A. Self-supply is a significant competitive constraint**
267. In the CMA’s product market analysis, it provisionally concludes that self-supply is unlikely to pose a strong constraint on commercial (outsourced) suppliers of O&M services: “*We do not consider that self-supply is a viable option for all customers and consider that suppliers are typically able to identify which customers are able to self-supply*” (para. 12.34). The evidence does not, however, support this conclusion.
268. **Customers can and do switch between outsourcing and self-supply.** As acknowledged in the Provisional Findings, Veolia and Suez have both identified examples of customers switching between outsourcing and self-supply. [REDACTED]:
- [REDACTED].
  - [REDACTED].
269. **Customers agree that self-supply is viable.** The Provisional Findings refer to the CMA’s phase 1 market testing exercise, which identified just one customer that would not consider moving to self-supply, and even that response is ambiguous. As noted in the Provisional Findings, out of the five customers that responded to the CMA’s questions at phase 1 on whether they considered switching from outsourcing to self-supplying, two “*were positive regarding their ability to switch to self-supply*” (para.

- 12.18(b)). Only three customers suggested there could be any difficulty in switching to self-supply, and two of these said that it “*may be possible [to self-supply] if staff would transfer under TUPE*” (which they would) (para. 12.18(a)).
270. It is common for on-site O&M employees to transfer under TUPE when contracts change hands and when customers switch to in-house supply. These employees are the ones that have the necessary “*technical expertise*”. As Suez explained in its Main Party Hearing, [REDACTED]<sup>32</sup> Customers switching to self-supply can [REDACTED] benefit from the site specific “*expertise*” and “*innovation*” that has been carried out by a supplier’s staff for their particular site.
271. The CMA identified five customers at phase 2 who submitted that they were not considering self-supply. This is again a very small number of customers, compared with the thousands of companies in the UK that have industrial water/wastewater infrastructure. [REDACTED]. For example:
- One customer told the CMA that it would be able to self-supply “*at a cheaper CAPEX cost*” (para. 12.20) but had decided to outsource for reasons that are not disclosed in the Provisional Findings.
  - One customer suggested that it did not want to absorb any financial risk associated with self-supplying such a critical service (para. 12.58(a)).
  - One suggested that it was unwilling to self-supply because it would then have to provide round the clock support to staff and arrange for the analysis of materials from a third party (paras. 12.20 and 12.58(b)).
  - Another customer states that it is not self-supplying because it “*deliberately chose to outsource this contract to focus on its core business*” (paras. 12.20 and 12.58(c)).
272. The strong constraint of self-supply on the Parties is evidenced in an internal document cited in the Provisional Findings, [REDACTED].
273. **There is no distinct customer group that has to outsource.** The Provisional Findings suggest that the Parties are able to identify which customers cannot or will not self-supply, meaning that there is a small subset of customers for which self-supply cannot act as a constraint. This is not the reality.
274. The Parties are not able to predict which customers are not willing or not able to self-supply, and the possibility of in-sourcing is a strong constraint for all industrial customers. [REDACTED]. As noted in Suez’s Main Party Hearing, [REDACTED].
275. Self-supply is not only a constraint at the initial tender stage, but acts as a strong competitive constraint for the full duration of their contracts. Customers can always internalise “*an outsourced activity if they consider that this would result in cost savings.*”<sup>33</sup>

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<sup>32</sup> See Suez Main Party Hearing transcript, p. 107.

<sup>33</sup> See Case COMP/M.5934, Veolia Water UK and Veolia Voda/Subsidiaries of United Utilities Group, 28 October 2010, para. 70.

**B. Customer Heterogeneity is Due to the Bespoke Nature of Industrial Water O&M**

276. The CMA provisionally concludes from customer heterogeneity that the market is differentiated and that the effect of the Merger therefore may vary between some customers. The Provisional Findings cite [REDACTED]. Veolia does not dispute that customers have different needs. The evidence in the Provisional Findings does not, however, identify any distinct category of customers for which Veolia and Suez are particularly close competitors.
277. **There is no material differentiation between contracts on the basis of industry.** The CMA refers to third-party views that suggest there is heterogeneity between customers on the basis of their industry. The essential elements of Industrial Water O&M requirements are, however, similar between customers, and technical requirements do not differ across industries.
278. While the five customer responses discussed in the Provisional Findings state that references or experience in their sector is an important factor in selecting a provider, this does not preclude competitors without such experience. If that were the case, there would be clearly defined competitor sets by industry. This is not the reality of the market and the CMA has not identified any evidence for a distinct set of competitors.
279. [REDACTED]. Further, in relation to the competitor feedback that there are three broad categories on the basis of risk, Veolia again notes that [REDACTED].
280. **There is no material differentiation between competitive conditions for small and large contracts.** A few third parties referenced in the Provisional Findings suggest that Veolia and Suez are “*two of a limited number of competitors*” that can service “*large*” contracts (para. 12.24(c)). This is not correct.
- The solutions offered by the Parties and their competitors are tailored to the specific requirements of the customer’s effluent or clean water requirements, and the type and nature of the water or wastewater treatment facility to be operated, not its size.
  - There are no legal requirements (like certifications or insurance) to service industrial customers that smaller companies cannot meet.
  - Site owners generally hold applicable licences and permits.
  - In contrast with the characterisation of Veolia as a player that is particularly well placed for “higher risk” contracts, [REDACTED].
281. **Competitors are capable of servicing the full range of customers.** Because each customer has different requirements, O&M suppliers have to be flexible in the solutions they offer. Customers have access to a wide range of potential suppliers regardless of their specific size, requirements or industry. These competitors include Acwa, Alpheus, Business Stream, Costain, Envirogen Group, EPS, Grissan Energy, John F Hunt Regeneration Limited, Jacobs UK Limited, MWH Treatment and Saur (Nijhuis), amongst others. There is no group of customers with a limited choice of suppliers. [REDACTED].
282. There are no significant or consistent differences in the conditions of competition in the UK between different industries or size of contract based on “risk”. There are examples

of competitors serving both small and large clients [REDACTED]. To the extent that some competitors have had a historical focus on particular customer groups, these competitors would remain well-placed to compete for and supply other types of customers.

283. In its Provisional Findings, the CMA relies on qualitative evidence from only five customers who identify themselves as having complex requirements. The evidence does not support a conclusion that “complex requirements” are linked to the size of the contract or the customer’s industry. The CMA itself states that it could not draw clear linkages between customers. Heterogeneity of customers does not mean, as the CMA suggests, that some customers will be more or less affected by the Merger. Rather, the evidence supports Veolia’s views of the market as one where all competitors are able to respond to the bespoke requirements of the customers, which depend on the risk profile of that particular customer and its plant.

**C. The Parties Face Strong Competition from Other Players in Industrial Water O&M**

284. The overlap between the Parties is in the supply of Industrial Water O&M. In this market, the Parties face strong competition from many credible rivals.

- Customer evidence that could suggest otherwise is based on responses that suggest the customers have not properly understood the market identified by the CMA.
- Rivals do not require D&C experience to compete effectively.
- [REDACTED].
- The Parties are constrained by players entering and expanding in the market.

285. **Customer concerns are not directed at the Industrial Water O&M Market.** The customer evidence that the CMA seeks to rely on suggests that customers have not properly understood the market identified by the CMA. As Veolia explained in its response to slide 12 of the Water O&M Working Paper, the competitors identified by customers did not seem to be involved in the supply of Industrial Water O&M services and many were based in Northern Ireland [REDACTED].

286. The Provisional Findings do not acknowledge Veolia’s concerns with that evidence, but present a new list of competitors identified by customers. There is no overlap between the list that Veolia commented on in the Water O&M Working paper and the list presented at Table 12.3 of the Provisional Findings, which is a summary of customer scoring of the strength of suppliers. Veolia therefore did not have the opportunity to comment on the evidence being relied on by the CMA in its Provisional Findings at the working papers stage.

287. Veolia also understands from footnote 961 of the Provisional Findings that the CMA is relying on the evidence gathered by the phase 1 case team, which consists of responses from only five of the Parties’ customers. The list of competitors identified by the five customers that responded to the CMA outreach at phase 1 includes a few additional competitors for Industrial Water O&M, compared to those in the Water O&M Working Paper, however again the vast majority are not Industrial Water O&M suppliers. [REDACTED].

288. Of the competitors named in Table 12.3 of the Provisional Findings, [REDACTED] Evoqua [REDACTED] a competitor in Industrial Water O&M [REDACTED] and Kee is involved in the maintenance and operation of “*all types*” of wastewater treatment plants, backed by “*over 350,000 installations worldwide.*”<sup>34</sup> The other players named do not appear to offer any Industrial Water O&M services:

- **Welsh Water.** As far as Veolia is aware, Welsh Water does not provide Industrial Water O&M services. Welsh Water is a Regulated Water Company, providing households, businesses and developers with water and sewerage services.<sup>35</sup> RWCs are able to enter, and have entered, the Industrial Water O&M market through commercial arms of their business, but Veolia is unaware of Welsh Water having done so.
- **Quaker Houghton.** Quaker Houghton is a “*global leader in industrial process fluids*”, providing can making lubricants, die casting process fluids, greases, hydraulic fluids, metal removal fluids, surface finishing products, among others.<sup>36</sup> Quaker Houghton also offers QH FLUID INTELLIGENCE™, which is a fluid optimisation solution for industrial customers. As far as Veolia is aware, Quaker Houghton does not provide pure O&M services for water or wastewater treatment facilities for industrial customers.
- **D2O.** d2O is a provider of real-time performance management tools.<sup>37</sup> Veolia does not understand that this company is involved in Industrial Water O&M.
- **FCC Environmental.** Veolia understands that an affiliate of FCC Environmental, Aqualia, offers water management services in 17 countries (including France, Italy, Portugal, Romania and Spain in Europe).<sup>38</sup> As far as Veolia is aware, however, it is not active in the UK in Industrial Water O&M (or any other water management services).
- **Cory Environmental.** Cory is a leading waste management and recycling company in the UK.<sup>39</sup> As far as Veolia is aware, it is not active in Industrial Water O&M.

289. A common feature of the phase 1 and phase 2 customer outreach referred to in the Provisional Findings seems to be that customers have not properly understood the market identified by the CMA. The CMA should therefore place little weight on customer evidence. Both the phase 1 and phase 2 responses strongly suggest that the customers have not properly understood which market they are being asked about. This evidence is not relevant to the CMA’s provisional SLC conclusion.

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<sup>34</sup> See Kee Services, [Plant Operation - KEE Process](#)

<sup>35</sup> See Welsh Water, [About us | Dŵr Cymru Welsh Water](#)

<sup>36</sup> See Quaker Houghton, [Quaker Houghton - Product Lines - Industrial Process Fluids](#)

<sup>37</sup> See Deadline2Online (d2o), [About d2o | Productivity Technology for Hospitality | PMI by d2o](#)

<sup>38</sup> See Aqualia, [Who we are - Aqualia](#)

<sup>39</sup> See Cory Group, [At a glance | Cory Group](#)

290. Further, the CMA should place no weight on the scores that treat non-mentions as zero: the CMA states that they should put more weight on this type of score “*if you think the average customer knows who’s out there*” (fn. 960). This is not accurate based on the list of competitors identified by customers both in the Water O&M Working Paper and in the Provisional Findings.
291. As in the Water O&M Working Paper, the findings from customer outreach are inconsistent. Table 12.3 shows the list of relevant competitors considered by customers, but does not include Nalco or Solenis, who are identified by a customer as main competitors at para. 12.58(d) of the Provisional Findings, or Acwa, IWJS or Mitie who were mentioned by another customer at paragraph 12.59. There is also overlap with the competitors identified by customers in the Water O&M Working Paper, which suggests inconsistency in the customer evidence.
292. Finally, the Provisional Findings rely on evidence from only five of the Parties’ customers. The CMA should not draw robust conclusions from such a small sample size.
293. **D&C experience provides no advantage for suppliers of Industrial Water O&M.** One customer referred to the Parties’ “D&C” experience (para. 12.95(b)). The CMA notes that the Parties also provide services for the design and construction (“D&C”) of equipment and solutions used in water and wastewater treatment facilities. This covers the provision of products, equipment and technology, which typically comprise water and wastewater treatment equipment, designed and manufactured off-site prior to being incorporated into a facility (largely comprising “off the shelf” process products). [REDACTED]. This business provides no advantage for an Industrial Water O&M supplier - it is the customer, not the O&M supplier that selects the technological equipment and solutions.
294. **The Parties do not have any particular technical expertise or wider support that confers an advantage.** A number of third parties suggest that Veolia and Suez have particular technical expertise and access to back-office support. On this basis, the CMA provisionally concludes that the Parties are “*strong in terms of their technical expertise and that customers particularly value Veolia and Suez’s ability to draw on wider support from their organisations*” (para. 12.60). As explained in Veolia’s response to the Water O&M Working Paper, [REDACTED] of course Industrial Water O&M requires some “technical” expertise, [REDACTED].
295. Further, as explained at Suez’s Main Party Hearing, [REDACTED]<sup>40</sup>
296. In terms of back-office support, Veolia notes that [REDACTED] third-party laboratory services are widely available. As noted by Suez in its Main Party Hearing, [REDACTED]<sup>41</sup> In terms of the specific customer reference to Suez having a call with technical experts to resolve an issue, Suez noted in its Main Party Hearing that [REDACTED].

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<sup>40</sup> See Suez Main Party Hearing transcript, page 105.

<sup>41</sup> See Suez Main Party Hearing transcript, page 106.



297. [REDACTED], many [REDACTED] competitors have extensive technical experience in Industrial Water O&M, such as Aquabio, Alpheus Environmental, Nalco, Saur (Nijhuis), Envirochemie, Envirogen Group, Ancala and STS.
298. Veolia notes the CMA's acknowledgement that it can place only limited weight on the quantitative results from its competitor questionnaire, given that it received only three responses (para. 12.99). Veolia does not see how the CMA can place any weight on such evidence.
299. **Barriers to entry are low.** Not only do the Parties face strong competition from existing competitors, they are further constrained by entry and expansion of players in Industrial Water O&M.
300. The CMA provisionally concludes that barriers to entry are high and most customers would not switch to a new entrant. This is inconsistent with Veolia's experience of the market.

- First, in relation to RWCs, Severn Trent Water correctly notes that RWCs can enter the market through a commercial subsidiary and some have done so in the past. As referenced in the Provisional Findings, it states that RWCs have moved back to focusing on their core services in recent years (para. 12.120(a)). Veolia has not seen such a shift. In addition, although customers stated that they would not consider using an RWC for their O&M needs, Veolia notes that Alpheus Environmental (the commercial arm of Anglian Water) and Horizons (a commercial arm of Scottish Water) both have contracts for Industrial Water O&M.

The CMA states at paragraph 120(c) of the Provisional Findings that no third party identified RWCs as competitors to the Parties. That is not accurate: two competitors (out of the three responses received by the CMA) identified Alpheus Environmental as a competitor at paragraph 12.98(a) of the Provisional Findings.

- Second, although some customer respondents referenced in the Provisional Findings said that they would not consider suppliers for the design and construction of water and wastewater treatment facilities for their Industrial Water O&M needs due to the need for a track record and knowhow [REDACTED].
  - Finally, as in the Water O&M Working Paper, although customer respondents referenced in the Provisional Findings submitted they have not considered using a joint venture, these already exercise a competitive constraint in the market. Veolia is aware of several partnerships and joint ventures successfully competing for contracts for Industrial Water O&M, as set out in Veolia's response to slide 24 of the Water O&M Working Paper.
301. The evidence does not support a conclusion that the Parties compete particularly closely or that they are two of the strongest players in the market. The Parties face many strong competitors in Industrial Water O&M, gain no advantage from D&C activities, do not have unique technical expertise or wider support, and are constrained by continued entry and expansion in the Industrial Water O&M market. The customer evidence presented in the Provisional Findings suggests that customers have not properly

understood the market identified by the CMA, meaning that the quantitative and qualitative evidence relied on may not be relevant to the Industrial Water O&M market.

**D. The Parties' Combined Share is Low, with a Small Increment**

302. The Provisional Findings state that “*the lack of transparency in this market makes estimating shares difficult*” and that it therefore has placed “*limited weight*” on market shares (para. 12.105). The CMA further notes that it “*has not received sufficient competitor data to reliably reconstruct market shares*” (para. 12.54).

303. The Provisional Findings suggest that, outside of Veolia’s shares of supply analysis, third party and industry reports suggest that the Parties are the two largest players in the market. This is not supported by the evidence.

- In relation to the competitor who estimates that the Parties have a combined share of supply of over 50% and were especially strong in high-risk industries, Veolia still has no information as to how the competitor has estimated this figure and it is unclear whether this customer was referring to O&M for industrial Customers.

[REDACTED].

- Veolia notes that the CMA has acknowledged that it can place only limited weight on competitor evidence in the Provisional Findings, given that it received responses from only three competitors to its phase 2 questionnaires. No weight at all should be placed on unsubstantiated evidence from a single competitor to suggest that the Parties’ combined share is “over 50%”.
- In this same report GWI states that [REDACTED]<sup>42</sup> This is inconsistent with the CMA’s provisional finding that industry reports demonstrate that Veolia and Suez are the two biggest players in the market.

**E. The Provisional Findings Bidding Data Analysis Overstates the Closeness of Competition between the Parties**

304. The CMA’s bidding data analysis in the Provisional Findings overstates the closeness of competition between the Parties. [REDACTED].

305. The CMA states that it believes that Veolia’s tender data “*overstate[s] the strength of self-supply*” (para. 12.79). For example, it states that two instances where self-supply was the ultimate outcome in a tender, the ‘wins’ were part-awarded to third-party suppliers. In the case of the tender that was for D&C and O&M, with the O&M to be self-supplied, the CMA suggests that the [REDACTED] value of the tender is therefore overstated in the data. The participation and loss analysis conducted by the CMA are, however, by number of tenders. The value of the contract is irrelevant.

306. Further, customers do have the option to take some of their O&M activities in-house, whilst continuing to outsource others - this does not remove the competitive constraint

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<sup>42</sup> See 3.7.6.4 of GWI report, Industrial Water Services & Chemicals.

of self-supply, rather it means that suppliers must be price-competitive in respect of each element of the bid.<sup>43</sup>

307. By excluding self-supply from its provisional conclusions on the Parties' tender data, the CMA's assessment does not reflect the reality of the Industrial Water O&M market. The tender data evidences that Veolia competes with self-supply, [REDACTED].
308. [REDACTED].
309. The CMA's diversion ratio overstates the closeness of competition between the Parties for the same reason. In particular, it includes a diversion ratio that removes "*all 13 of the tenders where Veolia listed self-supply as a competitor, regardless of whether self-supply ultimately won*" (fn. 945). There is no basis for excluding these tenders from the diversion ratio.
310. As set out in Veolia's supplemental submission of 7 March 2022, and acknowledged by the CMA, Suez's bidding data [REDACTED]. The CMA should therefore place little weight on this data, including its own participation and loss analysis of such data.

**F. The CMA's third-party evidence has serious limitations**

311. The CMA relies heavily on third-party evidence in its analysis of the Industrial Water O&M market. This evidence is an unreliable basis from which to draw conclusions, as (i) it is apparent that the CMA received only a handful of responses, (ii) the customers that did respond appear not to have properly understood the market identified by the CMA, and (iii) the CMA artificially limited its internal document review.
312. **The CMA received few responses to its questionnaires.** As noted in Veolia's supplemental response on the evidence in the working papers, submitted to the CMA on 13 May 2022 ("Evidence Response"), the CMA acknowledges in the Provisional Findings that it has received very few competitor responses, and states that it will therefore place limited weight on that evidence. It is not apparent from the CMA's assessment and conclusions that it has done so.
313. The CMA received only a few more responses from customers; the Provisional Findings focus on the data gathered from only five customers at phase 2. The CMA cannot place any significant weight on a quantitative or qualitative analysis of only five customer responses.
314. **The customer concerns are not relevant to the Industrial Water O&M market.** As in the Working Paper, the competitors identified by customers are largely not active in Industrial Water O&M in the UK. The CMA's questionnaire does not appear to have enabled third parties to understand the relevant market identified by the CMA, as explained further in the Evidence Response.
315. In the Provisional Findings, the CMA presents a new list of competitors identified by customers, that has no overlap with the list provided at the Working Papers stage. There is no clear explanation of this difference, Veolia infers that this is because the list in the Working Paper was produced from the responses to the CMA's phase 2 investigations, whereas the list presented in the Provisional Findings is compiled from customer

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<sup>43</sup> See [REDACTED]

responses at phase 1. Customers at each stage of the investigation appear not to have properly understood the market under consideration. The CMA therefore cannot rely on the resulting quantitative analysis, or the qualitative analysis that accompanied those responses. If customers were not able to understand the market, their comments likely apply to activities other than Industrial Water O&M, and create an unreliable evidence base.

316. As the CMA presented different underlying evidence at the Working Papers and Provisional Findings stage, Veolia did not have the opportunity to respond to the customers' identification of competitors that the CMA has ultimately relied on in the Provisional Findings at the working papers stage.
317. **The CMA has artificially limited the scope of internal documents relied on in the Provisional Findings.** The CMA states that “[o]wing to the volume of internal documents received from the Parties,” it focused its analysis on specific competitors, namely Nijhuis, Alpheus, Severn Trent, Solenis, Aquabio and Acwa (para. 12.82). There is no basis for its list of suppliers, [REDACTED].
318. The Parties submitted internal documents as requested by the CMA, with the aim of providing the CMA with a full picture of the markets under consideration. By restricting its analysis to only those competitors, the evidence that the CMA is relying on presents a partial view of the market.
319. Finally, out of the five Veolia internal documents analysed in the Internal Documents section of the Industrial Water O&M chapter of the Provisional Findings, two are not relevant to the market:
  - The document referred to at para. 12.85(d) [REDACTED].
  - The document referred to at para. 12.85(e) [REDACTED].
320. Together these flaws in the evidence gathered by the CMA for its investigation result in an unreliable evidence base for the CMA's decision-making in relation to Industrial Water O&M. The CMA cannot place significant weight on the customer, competitor or internal document evidence presented.

## **G. Conclusion**

321. The CMA's provisional conclusion that the Merger is likely to give rise to an SLC in Industrial Water O&M is based on a handful of third-party responses that are inconsistent and demonstrate a misunderstanding as to which market they are being asked about. Self-supply is dismissed as a competitive constraint despite clear evidence to the contrary, and the various competitors identified by the Parties are also dismissed without basis. The Parties' combined turnover in this market is less than [REDACTED], and each has a small number of customers compared with the thousands of companies that operate industrial water/wastewater infrastructure.

## **IX. Mobile Water Services**

322. The CMA has provisionally found that the Merger is likely to give rise to an SLC in the supply of mobile water services in the UK.
323. It provisionally concludes that the Parties are the largest players in the market, compete closely, and are not constrained by other small suppliers or alternatives such as activated carbon technology or tankering.
324. Veolia disagrees with these conclusions. There is no prospect of an SLC for the supply of mobile water services:
- The Parties are constrained by existing suppliers.
  - Customers are sophisticated and use a range of substitutable technologies.
  - The Parties are constrained by entry and expansion in the mobile water services market.
325. In any event, while Veolia disagrees with the Provisional Findings in relation to mobile water services, its commitments in relation to the European Commission process will resolve any possible competition concerns. There is therefore no basis for the CMA to identify an SLC: the Veolia business will be sold in any event.

### **A. The Parties are constrained by existing suppliers and potential entrants**

326. Veolia does not agree with the Provisional Findings' characterisation of the Parties as close competitors that are not constrained by competitors or entry into the market. This view of the market is not supported by the evidence.
327. **The market shares in the Provisional Findings overstate the Parties' shares of supply in mobile water services.** At Table 13.1 of the Provisional Findings, the CMA estimates combined market shares of 80-90%, and further states at para. 13.23 that the Parties are "*over 6 times larger than the next largest supplier.*"
328. As previously submitted, the Parties' shares are significantly lower than those presented in the Provisional Findings, at 20-30% [REDACTED]. While the Provisional Findings acknowledge that there can be difficulty in assessing market shares for the supply of mobile water services, it does not provide a clear explanation for the significant discrepancy between its estimates and those from this third-party report, or the estimates provided by Veolia and Suez.
329. **Fleet size is not a good indicator of competitive strength.** At para. 13.22 of the Provisional Findings, the CMA suggests that fleet size is a relevant indicator of market power. Veolia does not consider this to be a useful metric. In phase 1, the CMA received mixed feedback from third parties on the importance of fleet size for providing mobile water services across a range of customer industries, length and size of contracts.
330. **The Parties are not close competitors; their services are largely complementary.** The Provisional Findings conclude that the Parties are close competitors. As previously submitted, Veolia's and Suez's activities in mobile water services are largely complementary, with Veolia focusing on emergency situations and Suez more active in multi-year services (in addition to offering build-own-operate services). A customer supports this, noting that "*it does not have concerns about the Merger*" on the basis that

*“Suez is more focused on long term solutions/contracts whereas Veolia focuses on emergency solutions, and that these are different markets that do not conflict with each other”* (para. 13.30(c)).

331. **The Parties face a number of competitors in the UK.** The Provisional Findings suggest that the Parties are the two main suppliers of mobile water services in the UK. As previously submitted, the Parties in fact face a number of competitors, for example [REDACTED]. A competitor supports this, identifying Siltbuster as a constraint on the Parties, in particular in biological treatments for wastewater markets (para. 13.35(c)).
332. Further, Veolia notes that one customer states there are “*not many*” local companies that could offer the services it requires (para. 13.30(b)). As Veolia stated in response to this same customer feedback in para. 9.3 of its Issues Paper Response, this suggests that there are still a number of local companies competing with Veolia in this segment.
333. **The Parties are constrained by alternative technologies.** The Provisional Findings suggest that the Parties are not constrained by customers’ use of activated carbon and water tankering. However:
- In relation to activated carbon technologies, this is an area of innovation by new players including [REDACTED].
  - In relation to tankering, Veolia notes that the Parties’ mobile water businesses are constrained by water tankering services for short- to medium-term water treatment solutions. Veolia agrees with customers that water tankering may not be suitable for every customer seeking mobile water services (para. 13.43). As set out at para. 9.9 of the Issues Paper Response, however, mobile water services do compete with water tankering on a regular basis.

**B. Customers are sophisticated and use a range of substitutable technologies**

334. Customers of mobile water services are sophisticated buyers, both due to their position as large companies or public authorities with extensive experience, and also due to the trend for shorter contracts meaning they can switch suppliers frequently and easily.
335. **Customers have significant expertise.** Veolia’s customers are large companies that carry out multiple projects annually. They play an active role in the mobile water services market and influence it through their behaviour and demands.
336. **Customers change suppliers easily and often.** Some third party feedback in the Provisional Findings suggests that switching suppliers may be difficult and require long testing periods (para. 13.31 and para. 13.44(c)). This is not consistent with Veolia’s experience in this market. Customers are not loyal to a single supplier and may choose to purchase from Veolia’s and Suez’ competitors; price is an important factor; and the cost to customers of changing suppliers is negligible (given that mobile solutions are designed to adapt quickly and easily to all types of facility). Further, mobile water services contracts are usually short term contracts, meaning that customers are not locked into long contracts, and competitors have the opportunity to compete for services on a regular basis. This view is supported by a customer cited in the Provisional Findings as stating that “*in an emergency situation they will easily be able to switch in order to use whichever supplier is able to deliver the services at that time*” (para. 13.32).

**C. The Parties are constrained by entry and expansion**

337. The Provisional Findings conclude that entry or expansion would not be sufficient to prevent an SLC from arising in the supply of mobile water services in the UK as a result of the Merger. This is not supported by evidence of low barriers to entry in this market.
338. **Legal barriers to entry are low.** While some customers may prefer to engage with more experienced suppliers, there are no legal barriers to the mobile water services market. It is subject to little regulation.
339. **Financial and technical barriers to entry are low.** While entry requires initial investment in the form of a purchaser of a water treatment trailer, the technologies used in the segment are mature and have been available for a long time. They can easily be supplied by various players: membranes and resin are manufactured by a wide range of providers, and can be purchased separately and packaged into a mobile water solution. Membranes and resin technology are generally interoperable with mobile assets from different suppliers, and in any case customers do not typically express a preference for a type of technology – they are focused only on the outcome of the services.
340. Barriers to expansion are also low. Players wishing to increase their presence in mobile water services can choose to lease or purchase mobile units rather than creating their own, which lowers any capital requirement.

**D. Conclusion**

341. The Parties face constraints from a variety of sources; it is not accurate that there is no meaningful constraint on Veolia and Suez in the supply of mobile water services. The Parties are constrained by competitors in the UK, a sophisticated customer base, and continued entry and expansion in this market. There is no prospect of an SLC in the supply of mobile water services.
342. While Veolia disagrees with the Provisional Findings in relation to mobile water services, its commitments in relation to the European Commission process will resolve any possible competition concerns. There is therefore no basis for the CMA to identify an SLC: the Veolia business will be sold in any event.