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

RESPONSE TO CONFIDENTIAL PROVISIONAL FINDINGS

NON-CONFIDENTIAL VERSION

29 June 2022

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VEOLIA / SUEZ MERGER INQUIRY
Response to Confidential Provisional Findings

1. This Response is submitted to the Competition and Markets Authority (the "CMA") by the external advisers of Veolia Environnement S.A. ("Veolia") in relation to the CMA's investigation into Veolia's acquisition of Suez S.A. ("Suez", together with Veolia the "Parties").[1] It responds to the additional material in the confidential Provisional Findings (the "Additional Material") that was disclosed by the CMA into a confidentiality ring on 22 June 2022.

I. Introduction

2. In its 9 June response to the CMA's Provisional Findings Report, Veolia identified a number of significant flaws in the CMA's provisional conclusions. Among other things, Veolia explained that the assumptions underlying the Provisional Findings were incorrect; that the CMA's evidence-gathering suffered from serious shortcomings; and that the evidence in the Provisional Findings Report did not support the CMA's conclusions, even on its own terms. Nothing in the Additional Material undermines Veolia's previous submissions. Rather, the Additional Material reinforces Veolia's position.

3. Disclosure of the Additional Material, however, is nowhere near sufficient to meet the CMA's duty to consult with parties who may be affected by its decisions, nor its obligations to disclose the evidence on which it intends to rely.[2] The CMA's market testing forms part of its reasoning, and so ought prima facie to be disclosed to the companies affected.[3]

4. In fact, the Additional Material gives almost no meaningful insight into the submissions made by third parties, other than excerpts that have been specifically cited. Veolia is in no position to judge whether these excerpts are representative of the submissions received – far less whether they represent the body of evidence as a whole. The CMA has not disclosed the questions that were asked of third parties, their responses, nor any notes of meetings or hearings held with third parties. Veolia therefore has significant concerns that even the confidential version of the Provisional Findings fails to meet the CMA's consultation obligations or protect its legitimate rights of defence. Moreover, the small amount of Additional Material that has now been disclosed (and which was previously withheld from Veolia and its advisers) is evidence that supports Veolia's submission that the merger would not result in an SLC.

5. Veolia's ability to make meaningful submissions on the Additional Material is not only hindered by the fact that the information has been disclosed only to external advisers,

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1 This submission contains confidential business secrets that are protected from disclosure under Part 9 of the Enterprise Act 2002.

2 Enterprise Act 2002, section 104.

3 *See Meta Platforms, Inc. v CMA* [2022] CAT 26, para. 157(3).

it is also hindered by the extremely late stage of the process at which the Additional Material has been disclosed, around three weeks before the end of the statutory phase 2 deadline. At this stage, when the CMA has already publicly announced its opposition to the merger and large parts of its Final Report are already written, it is implausible that the CMA might significantly change its views.

6. It is impossible at this point of the review process for the CMA to revise its evidence base, even if Veolia makes valid criticisms. Veolia requested involvement in the information-gathering approach and access to the evidence on which the CMA proposes to rely several times during the CMA's investigation. As early as January 2022, Veolia asked the CMA to disclose third-party responses, subject to whatever confidentiality protections the CMA felt necessary, to allow it to make more meaningful submissions. These requests were refused.

7. The remainder of this Response is structured as follows:

- Section II sets out our concerns regarding the CMA's approach to the balancing test required to be under Part 9 of the Enterprise Act. In particular, Veolia's advisers are severely hindered in their ability to comment meaningfully on the Additional Material as they cannot take instructions.
- Section III explains how the Additional Material supports Veolia's previous submissions.
- Section IV identifies specific errors in the CMA's Report that are apparent only from reviewing the Additional Material.

II. The CMA Has Applied the Balancing Test Improperly and Inconsistently

8. The CMA is required to balance the need to disclose information on which it proposes to rely (to achieve a fair process) with the need to avoid causing "*significant harm*" to the legitimate business interests of the undertaking to which such information relates.[4] This is a "*necessary part of a fair process*".[5] We have concerns about whether and how the CMA has applied this balancing test, both in terms of its decisions to redact information in the Provisional Findings and its continued approach to disclosure.

9. First, the basis on which third-party responses have been redacted is unclear. Competitor comments in relation to [Redacted for Confidentiality] could have been disclosed anonymously, consistent with the CMA's approach to other third-party comments. It is troubling that this evidence, which manifestly supports Veolia's submissions, was not disclosed (even in a generalised and anonymous way) whereas comments opposing the merger have been quoted liberally.

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4 Enterprise Act 2002, section 244.

5 *See Meta Platforms, Inc. v CMA* [2022] CAT 26, para. 157(11).

10. Second, as noted above, much of the evidence gathered in the CMA's market testing is still not disclosed, even within the confidentiality ring.

11. Third, the nature of (at least some of) the information revealed in the Additional Material is such that Veolia's external advisers cannot meaningfully respond without taking instructions. [Redacted for Confidentiality] It is virtually impossible for Veolia's external advisers to comment on this without taking instructions from Veolia itself. As explained by the Competition Appeal Tribunal in the *Meta* case, this could be solved by allowing one or more member of the Veolia team access to the information, subject to the same confidentiality-ring protections.

12. To provide some an indicative examples of where this contextual knowledge would be important: [Redacted for Confidentiality]

13. There are also unknown unknowns, where it is impossible for Veolia's advisers to know what additional context would be relevant without being able to take instructions.

14. In order to achieve a fair process, the CMA should have allowed an individual from Veolia itself to join the confidentiality ring. The CMA's approach is disproportionate absent an explanation of why disclosing the Additional Material to a Veolia individual would seriously harm the legitimate interests of any person disclosing such information. This is also consistent with the judgment of the Competition Appeal Tribunal in *Meta Platforms, Inc. v CMA* [2022] CAT 26: "*In the first place, … a confidentiality ring including persons from Meta should have been considered*" (para. 12).

III. The Additional Material Supports Veolia's Submissions

15. The Additional Material supports the submissions that Veolia has made throughout the CMA's investigation, notwithstanding its limitations.

16. **The Additional Material reveals that local authority feedback does not represent current competitive conditions.** The Additional Material discloses the names of local authority customers who provided evidence. Although Veolia's external advisers are unable to comment in detail on these customers, it is possible to check when these local authorities last carried out a tendered exercise.[6] This evidence is revealing. Many of the local authorities who provided feedback awarded contracts many years ago and/or their contracts do not expire for a number of years: [Redacted for Confidentiality]

17. Veolia explained in its response to the Provisional Findings that at least four of the 11 "complex contracts" identified by the CMA started in [Redacted for Confidentiality].

18. Veolia also explained in its response to the Provisional Findings that it is necessary to consider whether there is a significant period left to run on contracts when assessing their relevance to the CMA's assessment. The CMA must consider whether, and if so how, there is an opportunity for the merging parties to increase their prices or degrade

[6] Based on Veolia's best information on contract dates. Much of this information is also publicly available.

their service to these customers in the foreseeable future (a period which the CMA must define). The Additional Material shows that [Redacted for Confidentiality].

19. Further, the Additional Material reveals that [Redacted for Confidentiality].

20. **The Additional Material contains evidence of credible competitor expansion plans.** Paras. 11.140 – 11.141 of the Provisional Findings indicate that [Redacted for Confidentiality]

21. The CMA provisionally concludes that "*the expansion plans of competitors are unlikely to materially change the competitive dynamics of the market over the next few years*" (para. 11.143). This finding is entirely incongruous. The CMA should explain why it dismisses the evidence on competitor expansion plans.

22. Similarly, [Redacted for Confidentiality] As with C&I services, the CMA should explain the basis for its view that "*entry and/or expansion would not be timely, likely and sufficient to prevent an SLC*" (para. 12.124).

23. [Redacted for Confidentiality] The Additional Material therefore reveals inconsistencies in the competitor evidence on which the CMA is relying.

24. **The Additional Material demonstrates that the CMA has sought evidence from the wrong customers**. [Redacted for Confidentiality].

25. [Redacted for Confidentiality]

26. Evidence from these customers cannot be used as the basis for finding an SLC in Industrial Water O&M. This also reinforces Veolia's view that the CMA has not sufficiently engaged with Veolia's evidence, particularly with respect to Veolia's voluntary additional submissions. It is an example of the flawed information gathering approach undertaken by the CMA, which could have been averted if Veolia had been granted its requests to contribute to the process.

27. **The Additional Material shows that [Redacted for Confidentiality]**

IV. The Provisional Findings' Share of Supply Estimates Are Flawed

28. The Additional Material reveals flaws in the Provisional Findings' share of supply calculations for [Redacted for Confidentiality]

29. The total number of contracts either [Redacted for Confidentiality] is therefore incorrect, even on the Provisional Findings' own terms.

30. **[Redacted for Confidentiality]**

V. Conclusion

31. The CMA appears not to have considered whether disclosing the Provisional Findings Report to external advisers is sufficient to discharge its consultation obligations. In any

event, the Additional Material is limited in scope, provided at the last minute, and cannot be shared with anyone at Veolia. As a result, the CMA's proposed decision and its reasoning has not been properly communicated, nor has the CMA carried out a proper consultation on its proposed decision, as it is required to do.

32. Even putting aside these procedural failings, the Additional Material strengthens Veolia's view that the evidence in the Provisional Findings does not support a finding that the transaction would result in an SLC in any of the markets under consideration.