

Completed joint venture between Tradebe Environmental Services Limited and Sita UK Limited

ME/6132/13

The OFT's decision on reference under section 22 (1) given on 29 October 2013. Full text of decision published 10 January 2014.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. Tradebe Environmental Services Limited (**Tradebe**), a subsidiary of Spanish-based company Grupo Tradebe Medio Ambiente S.L., is a UK group company whose principal activity is providing services for the integrated collection, treatment and disposal of healthcare risk waste (**HRW**). It commenced operations in 2010 with the acquisition of Britcare Limited and has subsequently expanded through the acquisition of Ecowaste Southwest Limited from SRCL as a result of the divestment required by the Competition Commission (**CC**) pursuant to its report on *SRCL/Ecowaste*.¹ Its turnover for the financial year ended 31 December 2012 was approximately £4.1 million.
2. Sita UK Limited (**Sita**), a subsidiary of French company Suez Environment S.A., is a UK group company providing services for the integrated collection, treatment and disposal of HRW. It has a number of plants across England and Wales, and expanded by acquiring its Wrexham, Redditch and Salford plants following a divestment order required by the CC pursuant to

¹ A report on the completed acquisition by Stericycle, Inc of Ecowaste Southwest Limited, 21 March 2012 ('SRCL/Ecowaste').

the *STG/Stericycle* Decision.² Its group turnover for the financial year ended 31 December 2012 was approximately £13.6 million.

TRANSACTION

3. On 19 September 2013, Tradebe and Sita entered into interlocking agreements including a Joint Venture (**JV**) Agreement, Share Exchange Agreements and an Option Agreement (collectively **the Transaction**). These provided for:
 - i. A new company to be called Tradebe Healthcare (Holdings) Limited to be incorporated to form the JV company.
 - ii. A transfer of the entire issued share capital of Tradebe Healthcare (Southwest) Limited and the entire issued share capital of Tradebe Healthcare Limited by Tradebe to the JV in consideration for the issue and allotment of additional shares in the JV to Tradebe.
 - iii. The entire issued share capital of Sita Healthcare Limited to be acquired by the JV from Sita in consideration for the issue and allotment of shares in the JV to Sita.
 - iv. Following the completion of the share transfers set out above and the issue and allotment of the respective consideration shares in the JV, all of the Sita HRW Group and the Tradebe HRW Group to be owned and under the control of the JV. The share capital of the JV to be held 75 per cent by Tradebe and 25 per cent by Sita.
4. Whilst the JV is jointly owned by Tradebe and Sita, it will trade under, and is known as, a Tradebe company and will be run on a day-to-day basis by a Management Committee appointed by Tradebe. Tradebe has three directors on the Board. Sita has two directors on the Board.
5. The parties provided a satisfactory submission to the Office of Fair Trading (**OFT**) on 22 August 2013. The administrative timetable was subsequently suspended. The OFT's extended administrative deadline expires on 29 October 2013.

² A report on the completed acquisition of Sterile Technologies Group Limited by Stericycle International LLC, 12 December 2006 ('STG/Stericycle').

6. The parties publicised and notified the OFT of completion of the Transaction on 20 September 2013. The OFT's statutory deadline expires on 19 January 2013.

JURISDICTION

7. As a result of the Transaction, the Tradebe HRW Group and the Sita HRW Group have ceased to be distinct enterprises in relation to their businesses and assets for the collection, treatment and disposal of HRW as these businesses will be integrated into the JV. Given its shareholding of 75 per cent and its majority board representation, the OFT considers that Tradebe will have legal control over the JV and therefore of Sita Healthcare Limited. However, in light of Sita's ability to influence the JV's commercial strategy through its two directors on the JV's board, the OFT considers that Sita will have at least material influence over the JV.³
8. The parties submitted that the share of supply test may be met in respect of the Birmingham area, as the parties' share of supply exceeds 25 per cent in this area.
9. Section 23(4) of the Enterprise Act 2002 (**the Act**) states that the share of supply test is measured on the basis of supply in a substantial part of the UK. A substantial part of the UK has been found to refer to an area of such size, character and importance as to make it worth consideration.⁴ In previous decisions considering whether an area could reasonably be described as a substantial part of the UK, the CC has considered such factors as population size, demographics and whether the area represents an administrative centre. Furthermore, the local nature of the markets in question has also been considered a relevant economic factor.⁵
10. Considering the sizeable population of the area, the fact that the affected areas include major cities, and the local nature of the collection, treatment

³ OFT guidance says that board representation is a key factor in its consideration of material influence (*'Mergers – jurisdictional and procedural guidance'*, OFT527, June 2009, paragraphs 3.23–3.26).

⁴ R. MMC Ex p. South Yorkshire Transport Limited [1993] 1 W.L.R. 23 at pp. 32.

⁵ See: CC, A report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough by Tesco plc dated 28 November 2007, CC, A report on the completed acquisition by Stagecoach Group plc of Preston Bus Limited dated 11 November 2009, CC, A report on the completed acquisition by Stagecoach Group plc of Eastbourne Buses Limited and Cavendish Motor Services Limited dated 22 October 2009 and CC, A report on the completed acquisition by Stagecoach Group plc of Preston Bus Limited dated 11 November 2009.

and disposal of HRW⁶, the OFT considers that the area in question may reasonably be described as a substantial part of the UK.

11. Consequently, the OFT considers that it is or may be the case that the share of supply test as per section 23(4) of the Act is met and therefore that it is or may be the case that a relevant merger situation has been created. In accordance with section 27(3) of the Act, the OFT will not take any account of any option or other conditional right until the option is excised (or the condition is satisfied). Therefore, the option agreed does not form a part of the relevant merger situation in this case.

FRAME OF REFERENCE

Background

12. Healthcare waste is a type of waste produced in healthcare and related settings. HRW is a category of healthcare waste that requires treatment prior to disposal. It includes waste such as needles and syringes (known as 'sharps'), dressings, medicines, plastic tubing, anatomical waste and some low-level radioactive waste. Most healthcare waste requires treatment prior to disposal because it is potentially infectious or could otherwise be harmful to health. Treatment of HRW is carried out by high-temperature (**HT**) plants, which incinerate the HRW, or alternative technology (**AT**) plants, which use a number of different methods to make the waste safe prior to disposal. The regulatory regime requires certain types of HRW to be subject to HT treatment, including anatomical waste, pharmaceutical and cytotoxic wastes, medicinally contaminated sharps, and waste suspected of being contaminated with certain pathogens⁷. Large customers typically purchase an integrated service of collection, treatment and disposal of HRW, which incorporates both waste which may be treated at an AT plant and waste which must be treated at a HT plant. The Environment Agency is responsible for administering the HRW regime, and ensuring that HRW producers properly segment waste, so that waste which requires HT processing is segregated and not sent to an AT facility.
13. The large majority of healthcare waste is produced by major NHS organizations (Acute Trusts, Community Trusts and Clinical Commissioning

⁶ See paragraphs 21-29 below.

⁷ *The Safe Management of Healthcare Waste*, publication of the Department of Health (March 2011), available at <https://www.gov.uk/government/publications/guidance-on-the-safe-management-of-healthcare-waste>.

Groups (CCGs)). Healthcare waste is also produced by the private healthcare sector, public and private nursing homes, dentists, veterinary clinics, pharmaceutical companies and tattoo parlours and may arise in other settings such as hotels, shops and offices. There are two types of producer of HRW. Acute Trusts (Hospitals) produce large amounts of HRW from individual locations and are known as large-quantity generators (**LQGs**). The LQG category also includes companies which collect HRW, but then subcontract treatment to an integrated collection and treatment only company or a treatment only company. Other producers of HRW, such as dentists and GP surgeries, typically only produce a small amount of waste at any individual site and therefore are referred to as small quantity generators (**SQGs**). GP surgeries and other community health sites often fall under the umbrella of a CCG, which will manage the clinical waste contract on their behalf. Although the waste produced by the individual locations will be relatively small, the cumulative volume of all their waste and thus the overall value of the CCG's HRW contract can be large.

14. The distinction between LQG and SQG is relevant for the competition assessment as collections from LQGs are usually made with large vehicles (which carry between 15 and 42 large 770-litre bins) on a daily basis. Collections from SQGs are less frequent and are made with smaller vans which make several stops on a collection round.

Product market

15. In their submission, the parties referred to previous decisions of the OFT and CC⁸ to define the appropriate frame of reference. In particular, the parties noted the CC's recent decision in *SRCL/Ecowaste*.⁹ The CC concluded in the Ecowaste Decision that operators of AT plants competitively constrain operators of HT plants, and operators of HT plants constrain operators of AT plants, when competing for the customer's entire waste stream such that HRW which is mandatorily to be treated by HT is in the same market as HRW which can be treated by AT or HT¹⁰. The parties submitted (and most third parties in this case and previous decisions of the CC corroborated) that where waste could be treated by either process, most customers have a strong preference for AT such that they would not

⁸ *SRCL/Ecowaste*, STG/Stericycle, Anticipated acquisition by SRCL Limited of Cliniserve Holdings Limited, ME/3847/08, OFT decision of 21 November 2008 ('*SRCL/Cliniserve*')

⁹ *SRCL/Ecowaste*, paragraph 7.43

¹⁰ No third party LQG customer indicated that they would consider tendering separately for the AT and HT components of their HRW.

switch in response to a price rise of around five per cent. Third parties have indicated that this preference is driven by a combination of price and environmental factors, with Tradebe's cost figures indicating that AT processing costs approximately [] per cent of the cost of HT processing.

16. The CC has also previously concluded that the market should be segmented by LQG and SQG customers. In this case, the OFT has received evidence such as bid documents indicating that long term contracts and competitive tendering are common for LQG customers, but not for SQG customers who are more likely to purchase treatment and processing capacity on a spot basis. Third parties have also indicated and previous decisions of the CC corroborated that a wider range of companies are able to compete for business from SQG customers, although they may later have to contract with an AT or HT plant to treat the waste.

Conclusion on product market

17. The OFT has analysed the transaction against a market for collection, treatment and disposal of HRW. This market is segmented by LQG and SQG customers.

Geographic market

18. HRW is generated in a fixed site, such as a hospital, and must be collected and transported to a treatment plant. As such, transport costs act to limit the geographic area over which a firm is able to exert a competitive constraint. Due to the fragmented nature of the NHS, which is the main generator of HRW, there is little scope for national competition¹¹. However, the OFT does note that there are some larger procurement hubs, who tender framework contracts which members of the hub can then use. For these customers there may be a narrower set of potential suppliers as they are covering a broader geographic range, although they are still operating at a sub national level. Additionally, there are a number of large collection only companies who operate nationally. Whilst in some cases they may have national contracts, third party respondents have indicated that they also deal with local plants and that geographic location of plants is important to them as transport costs increase as distance from their waste transfer station increases.

¹¹ The parties submitted that NHS purchasing decisions are commonly made independently by Hospital or Foundation Trusts.

19. In the CC's Ecowaste Decision, the CC found that treatment prices were determined by competition at a local level. It found that the appropriate geographic scope in that case covered approximately a 50 mile radius around the Avonmouth plant which was the focus of the inquiry, this area encompassed waste generated in Bristol, Bath & North East Somerset, North Somerset and South Gloucestershire. However, in STG/Stericycle the CC found the geographic market to be wider and both the OFT and CC have previously used a 100 mile radius to indicate the extent of the geographic market.¹²
20. The parties submitted that the geographic market in Avonmouth is differentiated from other markets in the heart of England or in London and the South East. The parties submitted that this is because the Avonmouth plant is at the edge of the country with no competing plants for some considerable distance. They argued that in the centre of the UK, there are a large number of plants clustered in the Birmingham to North Yorkshire area, such that the radius of location of customers for each plant crosses over with the radius from another plant, resulting in a series of overlapping markets that constrain each other.
21. The CC considered the existence of chains of substitution in *STG/Stericycle*.¹³ In that decision it noted that firms that offer waste treatment services are able to vary their prices based on the location of customers. The OFT notes that this is supported by evidence received in the current case. In particular, bespoke prices are tendered for each LQG contract, allowing the price to be flexed depending on a customer's location. The CC concluded that indirect constraints do not exist since there is no constraining effect running from the prices charged in more competitive areas to those charged in less competitive areas, and found that the appropriate definition of the geographic markets for treatment services is a series of localized customer-centric markets covering Great Britain.
22. The local geographic market can be assessed by examining the area over which a business generates the vast majority (80 per cent) of its sales. These catchment areas are a pragmatic approximation for a candidate

¹² STG/Stericycle, paragraph 5.1, see also SRCL/Cliniserve, paragraph 21

¹³ STG/Stericycle, paragraph 4.62 et seq

market to which the hypothetical monopolist test can be applied; the use of catchment areas is not an alternative conceptual approach.¹⁴

23. The parties provided data on their sales by volume and value to LQG and SQG customers from their Redditch and Birmingham plants. The data shows that:
 - i. For Sita Redditch
 - a. LQG customers: 79 per cent of revenue and 81 per cent of volume are from within [46 – 56] miles.
 - b. SQG customers: 80 per cent of volume or value is from customers within [80 – 90] miles.
 - ii. For Tradebe Birmingham
 - a. LQG customers: 80 per cent of volume is from within [40 – 50] miles.
24. Third party competitors have indicated that the catchment area of a plant is between 50 and 75 miles, although it may be possible to economically transport waste over longer distances by bulking it up and ‘trucking’ it. One third party also indicated that because of the higher per tonne price of treating HT waste, and the lower number of HT plants in the country, HT waste can be transported over longer distances than AT waste. The majority of third party customers have indicated that geography is important, with some indicating that they will look to use the nearest plant.
25. The OFT considers that the data in this case partially supports the findings of the CC in SRCL/Ecowaste and suggests that the catchment area for LQG customers is around 50 miles. However, the data also indicates that the catchment area for SQG customers may be larger, possibly as more premises need to be visited to fill a vehicle, which necessitates it travelling further. The OFT notes that in SRCL/Ecowaste, catchment areas were found to be the same or narrower for SQG customers. Given that the OFT does not have the data available on customer distances from the Avonmouth, Doncaster and Salford plants, and given that the CC has previously used the same catchment areas for LQG and SQG customers,

¹⁴ *Merger Assessment Guidelines*, paragraph 5.2.25.

the OFT has, on a cautious basis, analysed the Transaction using a catchment area of 50 miles for both LQG and SQG customers.

COUNTERFACTUAL

26. In the case of completed mergers, the OFT generally adopts the pre-merger situation as the counterfactual against which to assess the impact of the merger. However, the OFT will assess the merger against an alternative counterfactual where, based on the evidence available to it, it considers that the prospect of prevailing conditions continuing is not realistic (for example, because the OFT believes that one of the merger firms would inevitably have exited the market), or where there is a realistic prospect of a counterfactual that is more competitive than prevailing conditions.¹⁵
27. The parties submitted that, if the Transaction had not taken place, Tradebe and Sita would not be able to effectively compete with SRCL. This is because Tradebe would continue to have to subcontract its HT treatment and Sita's [] plant would remain at capacity. Sita would then be unable to compete for certain tenders. Therefore, the parties submitted that, in the absence of the Transaction, Sita would possibly withdraw from the HRW market given that profit margins are too low and Tradebe would not have the volumes to justify additional investments in capacity.
28. The OFT notes that for the 'exiting firm scenario' to apply, the parties would have to adduce compelling evidence to the effect that Sita would have inevitably exited the market in the absence of the Transaction¹⁶. The OFT notes that the parties have not supplied any evidence supporting their assertion that Sita would possibly exit the market. Further, the OFT considers that the JV is not the only way in which the parties could contract to process volume with one another. The OFT also notes that data received during the course of the investigation indicates that Sita's plant in [] was not at full capacity last year, with [] tonnes of spare capacity in 2012 ([] per cent of total capacity), although the plant was at full capacity in 2009 and 2010. In any event, absent the Transaction, Sita could fully compete with others up to the point of its capacity constraint, and Tradebe could compete aggressively in order to increase the volumes of its operations. Accordingly, based on the evidence available, the OFT does not consider that an alternative counterfactual to the pre-merger conditions of competition is appropriate in this case.

¹⁵ *Merger Assessment Guidelines*, paragraph 4.3.5

¹⁶ *Merger Assessment Guidelines*, paragraph 4.3.10.

HORIZONTAL UNILATERAL EFFECTS

29. Unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices on its own and without needing to co-ordinate with its rivals.¹⁷ The OFT has investigated whether the Transaction gives rise to unilateral effects through an increase in prices, worsening of service quality, or decreased innovation and investment in capacity for the collection, treatment and disposal of HRW for LQG and SQG customers in the local areas where the parties' plants overlap.

LQG Customers in Birmingham

30. The parties overlap on the basis of a 50 mile radial centred on Birmingham. The parties submitted that the Transaction will lead to a six to five reduction in the number of suppliers (that is, the parties, SRCL, Veolia, New Cross Hospital and GW Butler). The CC has previously found that only integrated collection and treatment providers compete for LQG contracts.¹⁸ Veolia and New Cross Hospital are non-integrated suppliers.
31. Veolia has a HT facility at Tyseley, which is within the catchment area and four miles from central Birmingham. However, it is a non-integrated plant operator and does not currently provide HRW collection services to LQG customers, nor does it currently have a fleet of collection vehicles to supply such a service. During the course of its investigation the OFT did not find any instances of Veolia bidding for a hazardous waste disposal contract. Rather, its activities are generally limited to the incineration of waste for collection companies or (in some cases) integrated companies who lack in-house capacity or incineration facilities. On this basis the OFT has concluded that Veolia is not an effective constraint in respect of the collection and disposal of waste from LQG customers.
32. New Cross Hospital operates a HT incinerator on its site in Wolverhampton (17 miles from central Birmingham). The parties submitted that the incinerator is licensed to process around 5000 tonnes of waste per year. The OFT understands that the majority of this capacity is utilised internally for the processing of New Cross Hospital's own waste, with the remainder split between a small number of SQG customers, mostly in the NHS sector,

¹⁷ *Merger Assessment Guidelines*, paragraph 5.4.1

¹⁸ SRCL/Ecowaste, paragraph 5.13.

and ad hoc processing. New Cross Hospital does not currently have any LQG customers. The OFT notes that no third party in the area indicated that New Cross Hospital had tendered for any LQG contracts, and no third party indicated that they are a competitor for LQG contracts. New Cross Hospital indicated to the OFT that it would not consider bidding for LQG contracts. As such, the OFT does not consider that New Cross Hospital should be considered an effective constraint in respect of LQG customers.

33. GW Butler is located in Nottingham on the edge of the 50 mile catchment area, whereas the parties' plants are located in Central and Southern Birmingham. Third party comments have indicated that GW Butler are mainly active to the East and North of central Birmingham and therefore the OFT considers it will only represent a strong constraint on the parties' activities in those areas. While information received from third parties indicated that GW Butler has bid for contracts in the Birmingham area, the OFT did not receive any evidence that it had recently won contracts in this area¹⁹. Within the 50 mile radial, the OFT is only aware of one contract (in Nottingham) which is currently held by GW Butler.
34. The OFT considers that the evidence indicates that GW Butler does exert a constraint on the parties in some areas around Birmingham. However, given its location, the OFT notes that GW Butler's constraint will be weaker in Central, Western and Southern Birmingham. The OFT has therefore included GW Butler, but excluded Veolia and New Cross Hospital, in its table below presenting shares of capacity. On this basis, the Transaction results in a four to three reduction in the number of suppliers in this area. Share of capacity information is shown in the tables below. The OFT notes that these shares are based on total licensed capacity and therefore may overstate the constraint GW Butler presents in Birmingham for the reasons explained above.

¹⁹ The parties noted that GW Butler has recently won a LQG contract in Rotherham, but did not provide any parallel examples in the Birmingham area.

Table 1: Capacity shares in Birmingham (excluding Veolia and New Cross)

	Plant	Distance from Birmingham (miles)	Type	Capacity (tonnes pa)	Shares (per cent)
Tradebe	Birmingham	3	AT	10000	21.7
Sita	Redditch	15	HT	8500	18.5
Combined					40.2
SRCL	Cannock	21	AT	16000	34.8
SRCL	Nottingham	51 ²⁰	HT	6000	13.0
GW Butlers	Nottingham	50	AT	5500	12.0

Source: Parties

35. The parties submitted that total licensed capacity is not a good measure of market shares. They argued that there is significant over capacity in the market and unless there is demand for that free capacity, which is broadly not the case in the HRW market, capacity does not equate to market share of volumes or value of HRW disposed. The parties submitted that a more accurate measure would be either the volume or value of HRW waste disposed of within the 50 mile radial. In the Birmingham area, the parties submit that volume market shares are as follows:

Operator	Volume	Market Share (per cent)
SRCL	[6000-7000]	[50-60]
Sita	[2400-3400]	[15-25] ²¹
Tradebe	[1000-200]	[10-20]
Combined	[4000-5000]	[30-40]
New Cross Hospital (self supply)	[500-1500]	[0-7]
GWB	[500-1500]	[0-7]
Don't know	[< 50 }	[< 1]

36. The parties' market share calculations are based on their knowledge of which operator holds each NHS LQG contract in the 50 mile radial, and a

²⁰ The OFT has included SRCL even though it falls just outside the 50 mile radial, as SRCL are likely to use this plant to process at least the HT element of any LQG contract from Birmingham, given that it is their closest HT plant to Birmingham.

²¹ [] per cent of Sita's share is attributable to waste delivered to Sita under [].

uniform assumption of 0.8 tonnes of HRW being generated per hospital bed over the course of a year. However, the OFT is concerned that the parties' calculations may not accurately represent the competitive conditions in the market.

37. The OFT considers that the availability and extent of spare capacity at a plant is an indication on the strength of competitive constraint it is able to exert given the nature of the market, where tenders are won via competitive bids. Generally, plants with significant spare capacity are likely to be incentivised to compete aggressively to win additional business and increase their level of utilisation. Conversely, plants with little or no spare capacity are unlikely to compete as effectively for new customers. The OFT was not provided with consistent data on spare capacity, however given the churn of contracts and the bidding data received it considers that total capacity more accurately reflects the competitive conditions in the market than current market shares by volume.
38. On this basis, the OFT considers that market shares based on total licensed capacity are an appropriate measure of the competitive dynamics. The OFT notes that, when using this measure, the parties' combined share of 40.2 per cent is at a level which could indicate concern over potential unilateral effects.

Closeness of competition

39. The parties supplied the OFT with bidding data in respect of tenders in the Birmingham area in the last five years. The OFT's ability to draw conclusions from this data is limited, as it does not identify other bidders (beyond SRCL) or the ranking of those bidders. However, the bidding data is probative in that it shows that the parties bid against each other in all of the tenders in the Birmingham area in the last five years. Further, the parties' submission acknowledges that Sita and Tradebe may be considered close competitors in the Birmingham area.
40. Third party bidding data, which contains only a small number of tenders which are also reported in the parties' bidding data, indicates that the majority of contracts in the Birmingham area received four or five bidders. SRCL was the other most frequent bidder, with other bidders including GW Butler, HES, Mitie and PHS. The OFT did not receive any evidence indicating that HES, Mitie and PHS had been successful in bidding for collection and disposal of HRW in the Birmingham area, and only has

evidence of GW Butler winning contracts in the Nottingham area, close to its plant. All tenders in this area for NHS LQG customers were won by SRCL, Sita or Tradebe.

41. This is corroborated by third party responses to the OFT's investigation. One large LQG customer indicated that its framework has four suppliers, but that the only suppliers to bid and to be awarded contracts in the last five years were Sita, Tradebe and SRCL. Another LQG customer indicated that it received around 12 responses to its most recent tender round, but only five of these were viable. It indicated that these bidders were Sita, Tradebe, SRCL, GW Butler and Mitie, and that, while the customer did not have concerns over the effect of the Transaction, Sita (the incumbent) had secured the new contract 'by a narrow margin over Tradebe'.
42. A further LQG customer said that six operators bid for its recently tendered contracts, and that Tradebe and Sita were two of the six bidders. The others were Healthcare Environmental Services Limited, MITIE, PHS Group and SRCL. Despite having six bidders the customer indicated that it considered the parties to be close competitors in respect of the services they offer. While the customer's response showed that collection only companies were bidding for its LQG contracts, the customer also noted that companies having their own or access to treatment and disposal facilities in close proximity to the locations where the waste is produced was an important factor in awarding contracts. Further, the OFT has not received any evidence suggesting that collection only companies have been successful in winning LQG contracts in the Birmingham area.
43. The CC concluded in *SRCL/Ecowaste* that: 'expected outcomes in idealized bidding markets - in which as few as two firms can provide enough competition to ensure competitive outcomes - cannot be expected in the provision of HRW services, as firms take account of the relative position of their rivals and some firms are capacity constrained'. Consequently, the CC considered that any reduction in the relatively small number of potential bidders would have an adverse impact on prices and service quality available to purchasers²².
44. Taking into account the third party responses set out above together with bidding information provided by the parties, the OFT considers that the

²² SRCL/Ecowaste, paragraph 7.105

evidence suggests the constraint removed by the merger is as least as great as is implied by the parties' combined share of capacity.

Entry

45. The OFT will consider whether firms have the ability and incentive to enter the market or expand existing operations in the event of an increase in prices. To be considered a competitive constraint, entry or expansion should be of sufficient scope to deter or defeat any attempt by the merged firm to exploit any lessening of competition resulting from the merger.²³ The OFT has considered whether, in the event of a SLC, another firm would be likely to begin competing for LQG customers in Birmingham. In assessing whether entry or expansion might prevent a SLC, the OFT will consider whether such entry or expansion would be timely, likely and sufficient.
46. Potential (or actual) competitors may encounter barriers which adversely affect the timeliness, likelihood and sufficiency of their ability to enter (or expand in) the market. Barriers to entry are thus specific features of the market that give incumbent firms advantages over potential competitors. Where entry barriers are low, the merged firm is more likely to be constrained by entry; conversely, this is less likely where barriers are high. The strength of any given set of barriers to entry or expansion will to some extent depend on conditions in the market, such as a growing level of demand.²⁴
47. In *SRCL/Ecowaste*, the CC identified the following barriers to entry, which the parties acknowledged in their submission:²⁵
1. Regulatory requirements before a company can operate in the HRW market. The key ones are obtaining planning permission and environmental permits. Planning permission is likely to be easier to obtain for an AT facility than an HT facility. It is likely to take six to 12 months to secure an environmental permit, with usually a longer period for an HT plant.
 2. The capital cost of building a new plant. For an AT plant, several operators have confirmed that the capital costs for a new plant are in the range of £1.1–£1.5 million. An HT plant is likely to incur

²³ See *Merger Assessment Guidelines*, paragraph 5.8.10

²⁴ See *Merger Assessment Guidelines*, paragraph 5.8.3

²⁵ Submission by the parties to the OFT, 5 July 2013, paragraph 5.2.

significantly higher capital costs with estimates ranging from £4.2 million to £7–£10 million.

3. The prospective entrant would need to take account of likely competitor reaction in response to it building a new plant.
48. Third party comments in this case supported the CC's findings, and also suggested that there may be additional barriers to entry for any company only intending to operate one type of plant. One third party stated that 'any company dependent upon third parties for transfer treatment options is vulnerable to being priced out of the market.' This is supported by the parties' submission in this case, which noted that 'without HT facilities it is hard to compete on price²⁶.' The parties also considered that planning permission was unlikely for new HT capacity²⁷.
49. Therefore, the OFT does not consider that de novo entry (through building an entirely new facility) is timely, likely or sufficient in the Birmingham area. In addition, third parties generally considered that expanding capacity was not possible without demolishing and rebuilding a plant.

Expansion into LQG

50. The barriers to entry for an existing plant operator, who is not currently active in servicing LQG customers are materially different from a de novo entrant. In particular, if sufficient spare capacity were available to facilitate expansion into the LQG market, third parties have indicated that it is relatively inexpensive to begin offering collection services in addition to treatment. Third parties indicated that entry would be 'straightforward' and that plant ancillaries, such as vehicles, would cost between £200,000 - £400,000 per annum.
51. Timely entry to the LQG market is most likely to occur if existing plants located in the area, which currently do not offer a collection service, were to begin to do so. Veolia operates a HT facility in the area and does not currently service LQG customers. Therefore, Veolia may be able to enter the LQG market in a timely way.
52. However, Veolia would only represent a likely entrant to the LQG market if it had sufficient capacity available at its existing facility to begin treating the large volumes of HRW that a LQG contract would generate, and it is

²⁶ Ibid.

²⁷ Ibid.

not clear that this would be the case post Transaction. The maximum usable capacity of Veolia's HT incinerator at Tyseley is around 5,000 tonnes a year, with Veolia indicating that its plant is currently operating at full capacity. The parties submitted that the Transaction would free up [] tonnes of capacity at Veolia's Tyseley plant, given that the volumes provided by Tradebe would be transferred to Sita's Redditch plant. The parties indicated that [] tonnes of this could be transferred immediately by sending AT waste currently being processed at Redditch to Yardley Green. The remainder ([] tonnes according to the parties) could be realised by the end of 2013, when [].²⁸

53. The parties state that they have an incentive to process waste internally where possible, as they are currently paying [] to dispose of HT waste through Veolia and the marginal cost of the Redditch plant is under []. The OFT notes that the marginal cost estimates for Redditch do not include any additional labour costs and as such are likely to be an underestimate. However, the OFT considers that it is likely to be cheaper to process the waste internally. Nonetheless, although the parties would appear to have an incentive to switch volume due to potential cost savings, they may also have the incentive to leave volume with Veolia, if it were to prevent Veolia competing aggressively for new business.
54. Veolia has not historically operated a collection service, preferring to service customers who transport the waste to their facility. It is possible that Veolia may have an incentive to begin to offer a collection service and compete for LQG contracts if it were to lose a significant volume of waste following the Transaction. Veolia indicated to the OFT that it does not currently consider that a significant amount of capacity will be available post Transaction and, if it were, they would likely use this capacity to serve existing customers in the first instance. This is because the cost of entering the LQG market would require the investment in a collection service. Therefore, the OFT does not consider that the entry of Veolia into the LQG market is sufficiently likely to prevent an SLC from arising.
55. In relation to Birmingham, the OFT has also considered whether New Cross Hospital is likely to expand to offer collection services in a timely, likely and sufficient way. Given that it is a hospital owned and operated site and it is being operated as an ancillary 'unit' to service the hospital, it is unlikely that it would have the incentive to offer a full collection, treatment and

²⁸ The parties have indicated that []

disposal service as this would be a non-core activity for the hospital. The OFT received no evidence to suggest that it would be profitable for New Cross Hospital to forgo its use and expand into collection and processing for third parties in response to a small price increase. Therefore, the OFT does not believe that New Cross Hospital represents a credible and timely entrant into the supply of collection, treatment and disposal of HRW ('HRW services') to LQG customers.

56. Accordingly, the OFT does not consider that entry or expansion would be timely, likely or sufficient to prevent a substantial lessening of competition ('SLC') arising for LQG customers in Birmingham.

Conclusion on LQG customers in Birmingham

57. Given the evidence above, the OFT considers there is a realistic prospect of a SLC as a result of the Transaction in the supply of HRW services to LQG customers in Birmingham.

LQG customers in Gloucester

58. The nearest Sita HRW plant to Tradebe's Avonmouth plant is 81 miles away by road in Redditch. As a result it lies outside the 50 mile radial around the Tradebe plant, with SRCL operating two AT plants within the 50 mile radial.
59. However, the CC has previously found that markets are customer-centric²⁹. Plant-centric and customer-centric approaches can coincide when plants are located near customers (as in Birmingham). The parties overlap when the 50 mile radial is centred on the population centre of Gloucester, with the Transaction resulting in a reduction in the number of treatment plant operators from three to two. SRCL is present in the catchment area with one AT plant, and Veolia's HT facility at Tyseley is also inside the catchment area. However for the reasons discussed in paragraph 46 the OFT does not consider Veolia as an effective competitor in the market for LQG customers in and around Gloucester. Accordingly, based on information submitted by the parties, the OFT calculated shares of capacity for LQG customers centred on Gloucester and excluding Veolia:

Table 2: Capacity shares (Gloucester)

²⁹ STG/Stericycle, paragraph 4.74.

	Plant	Distance from Gloucester (miles)	Type	Capacity (tonnes pa)	Shares (per cent)
Tradebe	Avonmouth	30	AT	3000	10.2
Tradebe	Birmingham	46	AT	10000	33.9
Sita	Redditch	32	HT	8500	28.8
Combined					72.9
SRCL	Frome	42	AT	8000	27.1

source: Parties

60. As discussed above, the parties submitted that total licensed capacity is not a good measure of market shares. In particular they submitted that a more accurate measure would be either the volume or value of HRW waste disposed of within the 50 mile radial. In the Gloucester area, the parties submit that volume market shares are as follows:

61. Table 3: Market Shares (Gloucester), parties' estimates

Operator	Volume	Market Share (per cent)
Sita	[1500-2500]	[15-25]
Tradebe	[500-1500]	[5-15]
Combined	[2000-3000]	[30-40]
SRCL	[5000-6000]	[55-65]
Grundon	[500-1000]	[5-10]
NHS	[500-1000]	[5-10]

source: Parties

62. For the reasons discussed above at paragraph 36, the OFT does not consider that shares based on estimates of the volumes and values covered by contracts are likely to accurately represent competitive conditions. The OFT further notes that the parties' estimated figures indicate that SRCL is processing around [5000-6000] tonnes of waste in this area. This is not consistent with third party responses detailing the level of capacity utilisation at each plant.

63. The OFT notes that the parties have provided information which indicates that Grundon is active in this area, despite being located 92 miles from Gloucester. However, further analysis of the data provided by the parties shows that Grundon only hold one contract and that this is for a customer

located in Reading, under 10 miles from the Grundon plant, and outside the 50 mile catchment area around Gloucester. The OFT has received no evidence from third parties that Grundon are active in the catchment area, and they are not listed as a bidder in any tender by a third party in this area.

64. Accordingly, the OFT has taken the same approach as it has used in Birmingham and has considered market shares based on total licensed capacity to be an appropriate reflection of the competitive dynamics. On this measure, the parties' share of capacity is 72.9 per cent. Accordingly, the parties' share of capacity is high enough to give the OFT cause for concern over unilateral effects.³⁰

Closeness of competition

65. The parties submit that although certain customers within the radius of 50 miles of the Gloucester area are in the area of overlap between the catchment of the Tradebe Avonmouth plant and the catchment of the Sita Healthcare Redditch plant, there are very few LQG customers in that area. This is because of the relatively small population and correspondingly low volumes of HRW. Accordingly, the parties do not consider there would be an SLC as a result of the merger. The parties submitted that it is a feature of the UK HRW market that areas of lower population cannot support three or more providers. The parties argued that in these areas there are insufficient volumes of waste produced, as to be profitable a facility requires a minimum critical mass of approximately £2 million. However, the OFT notes that the parties provided data that indicated that the value of LQG contracts within a 50 mile radius of Birmingham and Gloucester was similar, and that the Birmingham area has supported more than three providers.
66. The OFT notes that the Sita plant is located to the north east of the catchment area, and therefore it could be argued that Sita only provides a strong constraint for some customers to the north east of Gloucester. However, the CC found in its Ecowaste decision that Sita was able to submit competitive bids for LQG contracts in the Bristol area,³¹ despite not

³⁰ See *Merger Assessment Guidelines*, paragraph 5.3.5, for the threshold below which the OFT considers unilateral effects to be unlikely.

³¹ SRCL/Ecowaste, paragraph 7.125

having a facility located close to Bristol.³² The parties have indicated to the OFT that Sita used its Redditch facility to bid for this tender. Therefore, as noted above, the competitive conditions referred to above may extend further south than the Gloucester area. Across the Gloucester area there is evidence that the parties are competing, for example, in relation to the NHS Gloucestershire tender which was examined by the CC in *Ecowaste*, the CC Report indicates that although SRCL was the highest ranked bidder, Polkacrest (Sita) and Ecowaste Southwest (whose plant is now owned by Tradebe) were ranked two and three respectively³³.

67. The OFT considers that evidence received in the current investigation also indicates that the parties may be close competitors in and around the Gloucester area. One LQG customer in the Avonmouth area told the OFT that, in its most recent tender round, Tradebe and Sita were two out of the four bidders. The other bidders were SRCL and a company which does not currently have any plants in the area.
68. The parties also provided bidding data for tenders in the Avonmouth and Birmingham areas. The OFT analysed which of these tenders fell within the 50 mile radius centred on Gloucester and found that there were six in total. Tradebe and Sita bid against each other in all six tenders. The OFT received information from the parties that indicated SRCL also participated in some of these tenders. However, the OFT does not have evidence on the ranking of bidders or (in relation to the Bristol and Bath tenders) details of the incumbent, which would allow it to better assess the competitive constraint Tradebe and Sita are exerting on each other. In the absence of evidence to the contrary, the OFT would generally consider the fact that the parties are bidding for the same contracts an indicator that they are head-to-head competitors, and that they provide a strong constraint on each other. This is supported by their share of capacity of 72 per cent.
69. The OFT notes that the CC found in *SRCL/Ecowaste* that any reduction in the relatively small number of potential bidders for HRW contracts would have an adverse impact on prices and service quality available to purchasers.³⁴ The Transaction will result in a reduction of suppliers from three to two for LQG customers in Gloucester. The OFT notes that in

³² At the time Tradebe did not operate the Avonmouth facility as this was owned by Ecowaste and subject to the merger enquiry. Tradebe submitted bids for Bristol contracts using its Yardley Green (Birmingham) facility.

³³ SRCL/Ecowaste, paragraph 7.53, Table 8.

³⁴ SRCL/Ecowaste, paragraph 7.105.

STG/Stericycle, the CC found that two providers was not sufficient to ensure a competitive outcome.³⁵

Entry and expansion

70. For the same reasons as set out above for Birmingham, the OFT does not consider that de novo entry (through building an entirely new facility) is timely, likely or sufficient in the Gloucester area. Third parties generally considered that expanding capacity was not possible without demolishing and rebuilding a plant.
71. The OFT considered above at paragraph 47 whether Veolia would expand to offer a collection service to LQG customers in a timely, likely and sufficient way, so as to remove any SLC concerns. The analysis applies equally to Gloucester as it does to Birmingham.
72. Given that the parties would have a combined share of licensed capacity of 72 per cent, even if entry by Veolia were timely and likely, it is unlikely to be sufficient to prevent a SLC arising for LQG customers in Gloucester.

Conclusion on LQG customers in Gloucester

73. Given the above evidence, the OFT considers there is a realistic prospect of a SLC as a result of the Transaction in the supply of HRW services to LQG customers in and around Gloucester.

LQG customers in Sheffield

74. The nearest Sita HRW plant to Tradebe's Doncaster plant is 82 miles away by road in Manchester. As a result it lies outside the 50 mile radial around the Tradebe plant, with SRCL, HES and GW Butler operating plants within the 50 mile radial.
75. However, the CC has previously found, and evidence in the current case supports that markets are customer-centric. The parties overlap when the 50 mile radial is centred on the major population centre of Sheffield, midway between Doncaster and Manchester, with the Transaction then resulting in reduction of competing suppliers from five to four. SRCL is present in the catchment area with four HT plants, GW Butler operates two AT plants, and HES operates one AT plant.

³⁵ STG/Stericycle, paragraph 15.

76. On the basis of including integrated collection and treatment companies only, the OFT has calculated the parties' combined share of total capacity at around 18 per cent, a level at which the OFT considers unilateral effects are generally unlikely³⁶.

Table 4: Capacity shares (Sheffield)

	Plant	Type	Capacity (tonnes pa)	Shares (per cent)
Tradebe	Doncaster	AT	5000	6.9
Sita	Manchester	HT	7700	10.7
Combined				17.6
HES	Wakefield	AT	12000	16.6
SRCL	Bolton	HT	6000	8.3
SRCL	Oldham	HT	6000	8.3
SRCL	Leeds	HT	17000	23.5
SRCL	Nottingham	HT	6000	8.3
Total SRCL				48.5
GW Butler	Bradford	AT	7000	9.7
GW Butler	Nottingham	AT	5500	7.6
Total GW Butler				17.3

source: Parties

77. Further, the parties submitted that their plants are located on different sides of the Pennines, which limits their ability to bid for the same contracts due to concerns over security of transport routes. The evidence indicates that their plants do not service customers located on the other side of the Pennines. The parties also provided the OFT with internal strategy documents which suggest HES in particular exerts a strong constraint on the parties. The evidence received on closeness of competition does not indicate that the parties impose a stronger constraint on each other than would be indicated by their shares of capacity.
78. Accordingly, the OFT does not consider there to be a realistic prospect of a SLC as a result of the Transaction in the supply of HRW services to LQG customers in and around Sheffield.

SQG Customers in Birmingham

79. Both Tradebe's Birmingham facility and Sita's Redditch facility take waste from SQG customers. The OFT has considered whether all the plants

³⁶ *Merger Assessment Guidelines*, paragraph 5.3.5

within the 50 mile radial centred on Birmingham constrain each other in respect of contracts for SQG customers, noting that based on the data received from the parties in respect of Sita's Redditch plant, a 50 mile radial may be an underestimate of the true catchment area in respect of SQG customers.

80. The CC has previously found that collection-only companies compete for SQG customers.³⁷ Third parties in this case corroborated that finding, with collection only companies indicating they compete against the parties, and larger SQG customers indicating that collection only companies bid for the contracts they tendered. Accordingly, SQG customers in the Birmingham area will have the option of using one of the integrated collection, treatment and disposal firms, or procuring their HRW disposal from a collection only firm which subcontracts the treatment and disposal. The OFT notes that collection only firms will only be able to impose a competitive constraint to the extent that they are able to economically dispose of the waste they collect. Collection only companies responding to the OFT's questionnaire indicated that they tend to procure services from AT or HT facilities in the vicinity of the contract which they are servicing. While two collection only companies indicated to the OFT that they have a preference for national suppliers, they both provided evidence which showed they also use suppliers with a local or regional focus. Accordingly, in considering the potential constraint from collection only customers, the OFT has considered whether collection only companies will have access to third party treatment and disposal facilities in the vicinity of their customers.
81. The OFT considered to what extent collection-only companies will have access to third party treatment plants in the Birmingham area. The OFT considers Veolia are also active in supplying SQG customers and collection only companies. To the extent that more capacity is made available post merger, Veolia is likely to compete further to supply existing and potentially new SQG customers, as this would not require any additional investment. There are also three alternative suppliers in the area, SRCL with one plant in the catchment area and one just outside, GW Butler with an AT plant on the edge of the catchment and New Cross Hospital with a HT plant in Wolverhampton.

³⁷ SRCL/Ecowaste, paragraph 5.13.

82. Third parties have indicated that waste can be bulked up in order to transport it over greater distances. This is consistent with the SQG catchment area of Sita's Redditch plant being 88 miles. This indicates that a plant located 50 miles from Birmingham may also be able to offer a stronger constraint for SQG customers than for LQG customers. The OFT considers that, although Tradebe and Sita may be close competitors for SQG customers in Birmingham, other integrated providers and collection-only companies will be able to exert a strong constraint on the JV in the area post-Transaction. As such, the OFT does not consider that there is a realistic prospect of a SLC as a result of the Transaction in the supply of HRW services to SQG customers in and around Birmingham.

SQG customers in Gloucester

83. For those SQG customers with contracts (rather than those which are dealt with on a spot basis³⁸), Sita services a number of dentists' clinics in Gloucestershire. Tradebe's Avonmouth plant (the closest geographic customer to Sita Redditch) has three SQG customers in Bristol, North Somerset and Gloucestershire, all of which are larger SQG customers. Tradebe's Birmingham facility also falls within the 50 mile radial centred on Gloucester and takes waste from SQG customers.

84. The OFT considered whether all the plants within the 50 mile radial centred on Gloucester constrain each other in respect of contracts for SQG customers, noting that based on the data received in respect of Sita's Redditch plant, a 50 mile radial may be an underestimate of the true catchment area in respect of SQG customers. The CC has previously found, and evidence received in the current investigation supports, that collection-only companies compete for SQG customers³⁹. During the course of its investigation, the OFT received information supporting this. Accordingly, SQG customers in and around Gloucester will have the option of using one of the integrated collection, treatment and disposal firms, or procuring their HRW disposal from a collection only firm which subcontracts the treatment and disposal.

85. The OFT considered to what extent collection-only companies will have access to third party treatment plants in the Gloucester area. To the extent that more capacity is made available at Veolia's plant post merger, any

³⁸ The OFT notes that the parties may have no record of SQG customers which use them on a spot / ad hoc basis.

³⁹ SRCL/Ecowaste, paragraph 5.11.

spare capacity released as a result of diverted Tradebe volumes is more likely to be used to service SQGs than LQGs, given that they will generally have arrangements in place with collection only companies. Further, SQG customers and collection only companies will also be able to access facilities at SRCL.

86. The OFT also notes that market testing has suggested that national players such as Initial and PHS may be able to access third party treatment plants which are further away through using waste transfer stations.
87. The OFT considers that the information it has received during the course of its investigation indicates that, although Tradebe and Sita may be close competitors for SQG customers in and around the Gloucester area, other integrated providers and collection-only companies will be able to exert a strong constraint on the JV in the area post-Transaction. As such, the OFT does not consider that there is a realistic prospect of a SLC as a result of the Transaction in the supply of HRW services to SQG customers in and around Gloucester.

CO-ORDINATED EFFECTS

88. A merger may give rise to a SLC through co-ordinated effects. Co-ordinated effects may arise when firms operating in the same market recognise that they are mutually interdependent and that they can reach a more profitable outcome if they coordinate to limit their rivalry. The form of this co-ordination may vary; it could involve firms keeping prices higher than they would otherwise have been, limiting production or innovation, or dividing up the market between them (for example by allocating contracts among themselves in bidding competitions).
89. When assessing co-ordinated effects, the OFT analyses the characteristics of the market that could be conducive to co-ordination. It examines whether there is evidence that the firms in the market were co-ordinated pre merger. If so, it will examine whether the merger makes co-ordination more stable or effective, given the characteristics of the market. If there is no evidence of pre-merger co-ordination, it will examine whether the merger makes it more likely that firms in the market will start to co-ordinate, given the characteristics of the market.⁴⁰

⁴⁰ *Merger Assessment Guidelines*, paragraph 5.5.4.

90. The potential for co-ordinated effects has already been considered in relation to the HRW market. In *STG/Stericycle*, the CC considered whether features known to be conducive to coordinated behaviour were present in the HRW market and whether, in light of this, there was a potential for co-ordinated effects to arise.
91. The CC noted that this market has some features that may be conducive to coordinated behaviour. In particular, the CC considered that firms may be able to monitor one another's prices. Though firms cannot directly observe prices bid for NHS contracts, they may be able to observe prices indirectly based on their knowledge of their own bid, their bid ranking and observation of the winning bidder. This degree of transparency may mean that firms are able to monitor with some accuracy the prices bid by their competitors.
92. The CC further noted that the firms in this market are interdependent. Firms that collect waste but own no treatment facilities are dependent on the provision of treatment services by firms operating treatment sites. The CC found that this interdependence could mean that firms—especially those operating treatment sites—are able to punish firms which undercut an implicitly agreed minimum market price. A threat to cut prices (or to increase the prices of treatment services provided to waste collectors which are competing for LQG contracts) for an extended period would therefore be credible; the presence of such a threat may facilitate coordination between firms. One third party noted in response to the OFT's investigation that 'Sita's biggest customers are Sita's biggest competitors.'
93. In *STG/Stericycle*, the CC found that in a market characterized by the degree of transparency and interdependence discussed above, a higher concentration of suppliers may result in a greater risk of coordinated behaviour. However, in that investigation the CC received no evidence to suggest a history of coordination in this market in recent years nor any suggestion that the merger would be likely to lead to coordination.
94. Given the CC's previous conclusion that the conditions for coordination may be met in this market, the OFT has assessed whether the Transaction will alter the market at a national level in such a way as to increase the risk of coordination. Post-Transaction, the market is as follows:

Table 7: National shares post Transaction

Firm	Number of Plants	Share of Capacity (per cent)
Sita	6	12.9
Tradebe (inc Fawley)	4	19.0
Combined	10	31.9
SRCL	16	41.8
GW Butler	3	6.1
Grundon	2	3.9
HES	2	6.2
WSS	1	1.1
Addenbrookes	1	1.0
Novus	1	2.3
Veolia	1	1.6
Viridor	1	1.1
Peakes	1	1.6
Medisort	1	1.1

source: Parties

95. As a result of the Transaction, the market has moved from a situation with one large player, two medium-sized players and a long tail of smaller players, to two large, relatively symmetric large players accounting for over 70 per cent of national capacity, with a tail of smaller players. Furthermore, SRCL and the JV will be competitors in most local areas in which they operate, and are likely to repeatedly face each other in tenders.
96. As noted above in paragraph 88, there are multiple parameters which can be affected by co-ordinated behaviour. In this case, the OFT has assessed the likelihood that the change in the market structure could increase the risk that the JV and SRCL will coordinate over multiple geographic areas, to share the market between themselves by not bidding, or by submitting uncompetitive bids on contracts which are close to plants owned by the other party. The OFT has also assessed the possibility that in some geographic areas (for example, in the Birmingham, Gloucestershire and Sheffield areas), the Transaction may aid geographic co-ordination.
97. For coordination to emerge, the firms involved need to be able to reach a common understanding about their objectives⁴¹. As noted in paragraph

⁴¹ *Merger Assessment Guidelines*, paragraph 5.5.10.

106, the CC has previously found that although prices may be directly unobservable, firms may be able to observe prices indirectly based on their knowledge of their own bid, their bid ranking and observation of the winning bidder. Increased symmetry in a market where firms are able to monitor the prices bid by their competitors may make it easier for firms to reach a co-ordinated outcome.

98. However there are still reasons why it may be difficult to reach a common understanding in this market. As the parties and third parties have indicated that some large contracts (such as the Wales and Merseyside contracts) are extremely valuable, competition may be considered 'lumpy' and firms may find it difficult to either reach or subsequently maintain a co-ordinated outcome where each contract is potentially extremely valuable and the consequences of failing to win a contract (in terms of filling spare capacity) are high. Further, asymmetries remain between the parties in the form of their geographic distribution, their levels of spare capacity, and their respective ratios of AT/HT capacity, which may significantly limit their ability to reach a common understanding. Accordingly, the OFT does not consider there to be a realistic prospect of a SLC as a result of the Transaction in the form of coordinated effects.

NON-HORIZONTAL ISSUES

99. In assessing the Transaction, the OFT also considered a non horizontal theory of harm in the form of partial or total input foreclosure resulting from the vertical relationship between AT only operators and HT plants.
100. As discussed above, some types of HRW must be disposed of by HT incineration. This requirement creates a vertical relationship between any company which solely operates AT plants and an operator of HT plants. In the absence of such a relationship, the AT operator will lack access to an input that is required to process a HRW stream. The OFT has considered whether the parties may attempt to foreclose other integrated collection, treatment and disposal operators that only operate AT plants, either by increasing HT input prices (partial foreclosure), or by refusal to supply (total foreclosure).
101. Due to the cost of transportation, the OFT has concluded that the catchment area for HRW processing for LQG customers is around 50 miles. However, the OFT notes that if a firm is solely procuring the HT element of

HRW processing, it may be economical to transport the waste over greater distances, since HT waste attracts a price premium over AT waste, which results in the transport cost being less significant as a percentage of total costs. One third party indicated that it may be economical to transport HT waste over a distance of up to 100 miles.

102. Irrespective of whether a 50 or a 100 mile catchment area is used, the OFT identified two areas where rival firms may be affected by the Transaction. These areas are located around the Sita HT plants at (i) Redditch and (ii) Salford.
103. The OFT typically frames its analysis of non-horizontal mergers by reference to:
 - i. the ability of the merged firm to harm rivals, typically through an increase in price or a withholding of supply;
 - ii. the incentive of the merged firm to do so; and
 - iii. whether the effect of any action of the merged firm would be sufficient to reduce competition in the effected market to the extent that it gives rise to a SLC.⁴²
104. The OFT has considered whether the JV will have the ability to harm rival firms. This will be dependent up on a number of factors including: the JV's share of HT capacity in the local area; the JV's share of HT processing for AT operators; and the availability of outside options for AT operators.
105. Within the area around Redditch, there are two rival HT plants, operated by Veolia and SRCL. The share of HT capacity is shown in the table below.

⁴² See *Merger Assessment Guidelines*, paragraph 5.6.6.

Table 5: HT Capacity near Redditch

	Plant	Distance from Birmingham	Type	Capacity (tonnes pa)	Shares (per cent)
Sita	Redditch	15	HT	8500	43.6
Veolia	Birmingham	4	HT	5000	25.6
SRCL	Nottingham	51	HT	6000	30.8

106. Within the area around Salford, there are three rival HT plants, all operated by SRCL. The share of HT capacity is shown in the table below.

Table 6: HT Capacity near Salford

	Plant	Capacity (tonnes pa)	Shares (per cent)
Sita	Salford	7700	18.2
Sita	Wrexham	6500	15.3
Total Sita			33.5
SRCL	Leeds	16200	38.2
SRCL	Bolton	6000	14.2
SRCL	Oldham	6000	14.2

107. A firm's share of capacity in an area gives an indication of whether it is capable of engaging in any foreclosure strategy, as it indicates whether it may have market power in that area. If the share of capacity is low, all other things being equal, it is unlikely that a firm will be in a position to engage in a foreclosure strategy as customers could switch to a rival supplier. The shares of capacity in both areas are shown in the tables above and suggest that the JV may have the ability to foreclose, in particular in Redditch where it has a share of capacity of above 40 per cent. In addition, one third party collection only customer indicated that SRCL quoted them three times their current price for waste processing, which may indicate that SRCL does not have the incentive to provide an attractive option for HT disposal for AT only firms. However, the OFT has not received any information from other AT plant operators to suggest that

SRCL's prices to AT only operators are generally uncompetitive and indeed is aware of some AT only plants which have contracts with SRCL to process HT waste.

108. Share of capacity information alone does not indicate that the parties have the ability to foreclose as they may not be active to a meaningful degree in supplying AT plants with HT services. The OFT does not have sufficient information to precisely determine shares of third party HT processing in each area independently, but can produce an upper bound estimate⁴³ for the two areas together.
109. The third party data indicates that Sita has a market share in third party processing of HT waste below 10 per cent in each area. Additionally, third party enquiries have shown that each AT-only operator in the areas of concern has a pre-existing contractual relationship with at least one additional operator. In addition, in paragraph 80, the OFT noted that any spare capacity released at the Veolia plant post-merger is more likely to be used to service SQGs, rather than LQGs, as they are existing customers of Veolia. Therefore, based on third party enquiries, the OFT believes that there would be sufficient spare capacity at HT plants with whom AT only operators have existing contractual relationships to process all the volume currently being processed by Sita, if Sita attempted to foreclose them.
110. The OFT also notes that third parties have not expressed any concern about any form of input foreclosure. Given the low market share, the lack of third party concerns and the pre-existing use of other HT suppliers, the OFT does not consider it likely that the JV has the ability to attempt to harm rivals through an increase in price, or a withdrawal of supply.
111. The OFT has gone on to consider whether the JV will have the incentive to foreclose rivals. The OFT found that since a higher HT only price is charged for 'upstream' business (that is volumes sent to a HT plant by an AT only operator), whereas a weighted average of the HT and the lower AT price are charged for the LQG contract as a whole. Given that Sita currently processes both AT and HT waste in the same HT plant, the profit margin is likely be higher for upstream business. Therefore, by attempting foreclosure, the JV would lose higher margin upstream business in order to

⁴³ The estimate is an upper bound as the OFT does not have information for waste flows to all HT processors.

win lower margin downstream business. There is only likely to be an incentive to do this if a higher volume is captured downstream than was lost upstream. The OFT considers that the JV would be unlikely to capture all volume previously processed by the operator it attempts to foreclose, as it would be in competition with other integrated operators for the contract. Therefore, it is unclear whether the JV would also have the incentive to foreclose.

112. Accordingly, the OFT does not consider there to be a realistic prospect of a SLC as a result of the Transaction in the form of input foreclosure.

THIRD PARTY VIEWS

113. The OFT received comments from 15 customers and six competitors of Tradebe and Sita. These third party views have been incorporated above where appropriate.

114. The majority of third party concerns related to Gloucester and Birmingham. Of the third parties which did not express concerns, two of these noted that the merger was potentially pro-competitive where a customer requires a national supplier.

EXCEPTIONS TO THE DUTY TO REFER

115. While mergers can harm competition, they can also give rise to efficiencies. The Act enables efficiencies to be taken into account in the form of relevant customers benefits. These benefits are defined in section 30(1) of the Act, and are not limited to efficiencies affecting rivalry. Relevant customer benefits are a potential exception to the duty to refer a merger to the Competition Commission where they outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition from the merger as a whole.

116. Relevant customer benefits are limited by section 30(1) of the Act to be benefits to relevant customers in the form of:

- i. Lower prices, higher quality or greater choice of goods or services; or
- ii. Greater innovation in relation to such goods or services.

117. The parties submitted that the Transaction would have a pro-competitive effect because it will result in another national player with both AT and HT plants, in competition with SRCL. They argue that economies of scale play a part when a hospital assesses a tender based on quality. For example, the NHS distinguishes suppliers by issues such as the ability to provide back-up logistics and training. However, the tender information supplied by the parties does not support their submission that it is necessary for an operator to operate AT and HT plants nationally in order to offer high quality services. Bidding data provided by the parties indicates that AT only operators, including Tradebe, HES and GW Butler, have been successful at winning significant contracts, and that Tradebe were ranked top for quality in a number of contracts.
118. The parties argued that the imminent tender process for the next clinical waste contract for the whole of Wales (expected December 2013 or early 2014) is evidence of the ability of the JV to compete more effectively with SRCL. This is because, absent the Transaction, neither Tradebe nor Sita would meet the quality criteria for the all-Wales contract and Tradebe would be subject to the competitive disadvantage of exposure to third party pricing as it has no HT treatment facility. They further argue that, in any event, neither party would be able to put in a bid competitive to SRCL.
119. However, the OFT does not consider that the parties have provided sufficient evidence of the likelihood or effect of the proposed increase in competition for the all-Wales contract arising from the JV. Evidence suggests that the contract will be structured to grant a bidder one year to build any additional capacity required to serve the contract, and therefore it is not clear that SRCL would be the only provider able to bid absent the JV. This also suggests the benefits identified by the parties are not merger specific.
120. In summary, the extent of customer benefits created by the Transaction is not clear from the limited evidence presented by the parties. It is far from clear that these would outweigh the SLC created by the Transaction.

ASSESSMENT

121. In accordance with previous decisions of the OFT and the CC, the OFT has analysed the transaction against a market for collection, treatment and disposal of HRW. This market is segmented by LQG and SQG customers.

The OFT has assessed the geographic market using a radius of 50 miles for both LQG and SQG customers. At the local level, there are potential overlaps between the parties in three areas: Birmingham, Gloucester and Sheffield.

122. In the Birmingham area, the OFT has found that the merger will lead to a four to three reduction in the number of integrated collection and treatment providers for LQG customers. Considering that their share of capacity, market testing and bidding information indicate that the parties appear to be close competitors in the area, and given that the OFT does not consider that entry or expansion would be timely, likely or sufficient to prevent a SLC arising, the OFT considers there is a realistic prospect of a SLC as a result of the Transaction in the supply of HRW services to LQG customers in and around Birmingham.
123. In the Gloucester area, the OFT has found that the merger will lead to a three to two reduction in the number of integrated collection and treatment providers for LQG customers. Considering that their share of capacity, market testing and bidding information indicate that the parties appear to be close competitors in the area, and given that the OFT does not consider that entry or expansion would be timely, likely or sufficient to prevent a SLC arising, the OFT considers there is a realistic prospect of a SLC as a result of the Transaction in the supply of HRW services to LQG customers in and around Gloucester.
124. In the Sheffield area, the OFT has found that the merger will lead to a five to four reduction in the number of integrated collection and treatment providers for LQG customers. Given the parties have a low combined share of capacity, given the fact that they do not appear to be close competitors in the area, and given the constraint imposed by other integrated providers, the OFT does not consider there is a realistic prospect of an SLC as a result of the Transaction in the supply of HRW services to LQG customers in Sheffield.
125. In relation to SQG customers, the OFT found that Tradebe and Sita may be close competitors for SQG customers in Birmingham and Gloucester. However, the OFT also found that other integrated providers and collection-only companies will be able to exert a strong constraint on the JV in the area post-Transaction. As such, the OFT does not consider that there is a realistic prospect of a SLC as a result of the Transaction in the supply of

HRW services to SQG customers in and around Birmingham and Gloucester.

126. The OFT considered the possibility of co-ordinated effects post Transaction. The OFT did not receive any evidence to suggest that co-ordination is either occurring or likely to increase as a result of the Transaction. Whilst the merger increases symmetry between firms, the OFT found that it would not make it materially easier for firms in the industry to reach a common understanding about their objectives. Therefore, the OFT does not consider there to be a realistic prospect of a SLC as a result of the Transaction in the form of coordinated effects.
127. The OFT also considered the possibility of partial input foreclosure through an increase in price for third party HT treatment, or a withdrawal of supply. Given the low market share of the merged entity, the lack of third party concerns, and rivals' pre-existing use of other HT suppliers, the OFT does not consider that the JV has the ability to attempt to harm rivals by increasing price or withdrawing supply. Given that it would potentially sacrifice higher margin upstream business in order to win lower margin downstream business, it is also not clear that it would have the incentive to do so. Accordingly, the OFT does not consider there to be a realistic prospect of a SLC as a result of the Transaction in the form of partial input foreclosure.
128. The parties submitted that the Transaction would have a pro-competitive effect because it will result in another national player with both AT and HT plants, in competition with SRCL. However, the OFT found that the extent of customer benefits created by the Transaction was not clear from the limited evidence presented by the parties, was not necessarily merger specific, and would be unlikely to outweigh the substantial lessening of competition which may result from the Transaction.
129. Consequently, the OFT believes that it is or may be the case that the Transaction has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

130. This merger will therefore **be referred** to the Competition Commission under section 22(1) of the Act.