

Completed acquisition by Ausurus Group Limited through its subsidiary European Metal Recycling Limited of CuFe Investments Limited

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups¹

Introduction

1. On 7 February 2018, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the completed acquisition by Ausurus Group Limited, through its subsidiary European Metal Recycling Limited (EMR), of CuFe Investments Limited, holding company of Metal & Waste Recycling Limited (MWR) (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).
2. On 11 September 2017 the CMA imposed an initial enforcement order on EMR for the purposes of preventing pre-emptive action in accordance with section 72(2) of the Act.
3. In its provisional findings on the reference notified to Ausurus Group Limited on 1 June 2018, the CMA, among other things, provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted or may be expected to result in a substantial lessening of competition (SLC) in the following areas:
 - (a) Purchasing of shredder feed in the South East;
 - (b) Purchasing of ferrous and non-ferrous metals in the London region;
 - (c) Purchasing of ferrous and non-ferrous scrap metals from tendered contracts in the West Midlands;
 - (d) Purchasing of ferrous and non-ferrous scrap metals from tendered contracts in the North East; and

¹ CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).

- (e) Sales of new production steel (NPS) to UK customers.
4. The CMA's analysis provisionally indicates that this SLC has resulted or may be expected to result in adverse effects in the form of worse terms offered to suppliers of waste scrap metal, and to customers purchasing processed NPS, compared to what would otherwise have been the case absent the Merger.
 5. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying the SLC and/or any resulting adverse effects identified in the Provisional Findings Report.²
 6. The CMA invites comments on possible remedies by 11 June 2018.

Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.³
8. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
9. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁴

Possible remedies on which views are sought

10. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring the rivalry that would be lost as a result of the merger;
 - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and

² See the EMR/MWR [Case Page](#).

³ Sections 35(4) and 36(3) of the Act.

⁴ [Merger Remedies: CC8](#) (November 2008), paragraph 1.7. This has been adopted by the CMA board.

(c) structural remedies do not normally require ongoing monitoring and enforcement once implemented.⁵

11. Divestiture of everything acquired in the Merger (CuFe Investments Limited and MWR) would prevent an SLC from resulting in any relevant market. The CMA therefore takes the provisional view that this full divestiture would represent a comprehensive solution to all aspects of the SLC it has provisionally found (and consequently any resulting adverse effects) and has few risks in terms of practicability or effectiveness.
12. However, at this stage the CMA would welcome views on whether a smaller package or packages of divestitures in each of the areas in which it has found an SLC would also be an effective and practicable remedy.
13. The CMA's current view is that a behavioural remedy is very unlikely to be an effective remedy to the SLCs or any resulting adverse effect that it has provisionally identified. However, the CMA will consider any behavioural remedies put forward as part of this consultation.
14. The CMA will also consider any other practicable remedies that the main parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or any resulting adverse effects.
15. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.
16. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.

Divestitures

17. In evaluating possible divestitures as a remedy to the provisional SLC it has found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies:

⁵ [Merger Remedies: CC8](#) (November 2008), paragraph 2.14. This has been adopted by the CMA board.

- *The scope of the divestiture package*
18. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.
 19. The CMA takes the provisional view that a divestiture package consisting of all of the MWR business would comprise an effective package that would be likely to enable the purchaser to compete effectively.
 20. However the CMA would also welcome views on whether divestiture of some parts of the MWR business would also be effective. At this stage the CMA's provisional view is that this package (or packages) would need to include the following elements:
 - (a) Shredder feed in the South East: divestiture of MWR's Hitchin site with all associated plant and equipment, including the 6000hp shredder on that site.
 - (b) Ferrous and non-ferrous metals in London: divestiture of MWR's sites at Edmonton and Neasden along with all associated plant and equipment, and the licence for Pinns Wharf.
 - (c) Tendered contracts in the West Midlands and North East, and NPS sales: divestiture of all sites, assets, contracts, rights and staff necessary to carry out this business (both sales and purchasing) as currently undertaken by MWR in the West Midlands and the North East of England.
 21. At this stage the CMA's view is that it would not be possible to separately remedy the provisional SLC in purchasing from tendered contracts (in the West Midlands and North East) and in sales of NPS to UK customers. The CMA's view is therefore that all of MWR's industrial and tendered supplier business (including NPS) in the West Midlands and the North East would need to be included in a single package.
 22. It is also the CMA's view at this stage that multiple small divestitures to different purchasers may be unlikely to be effective in comprehensively remedying the provisional SLC that the Group has found.
 23. The CMA invites views on:
 - (a) the package of assets to be divested:

- (i) for each of these elements, what assets would need to be included, for example would all mothballed sites need to be included along with the active sites;
 - (ii) for each of these elements, what else would need to be included, for example staff, customer and supplier contracts, customer data;
 - (iii) whether this or a similar combination of assets would form a coherent divestiture package that would enable the purchaser(s) to compete effectively.
- (b) How any partial divestiture should be structured to ensure that important elements of the business (such as staff and customer/supplier contracts) are retained by the divested business. This will be particularly important in the West Midlands and North East;
- (c) Whether all elements should be sold together as one package or separately to different purchasers, and specifically:
- (i) Whether the Hitchin and the London divestiture packages should be sold as one divestment package or could each be sold separately to different purchasers;
 - (ii) Whether the divestiture to address the SLCs related to tendered contracts in the West Midlands and North East (and to NPS sales) should be sold separately or would these need to be part of a larger package including the Hitchin and/or London packages.
- (d) In the event that any part of the divestiture package cannot be sold, whether we should require an equivalent asset from EMR to be put forward instead;
- (e) whether there are any other risks that the scope of the divestiture package may not be appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.
- *Identification of a suitable purchaser*

24. The CMA will wish to be satisfied that a prospective purchaser of either the entire MWR business or a smaller package of divestitures:

- (a) is independent of the main parties;
- (b) has the necessary capability to compete;

- (c) is committed to competing in the relevant market; and
- (d) will not create further competition concerns.⁶
25. The CMA invites views on whether there are any specific additional factors to which the CMA should pay particular regard in assessing purchaser suitability, for example:
- (a) Whether the purchaser(s) would need to have an existing presence in the market or access to dock facilities.
- (b) Whether the purchaser(s) would need to demonstrate an existing level of expertise in the market.
26. In addition the CMA invites views on who are likely to be suitable purchaser(s) for both the whole of the MWR business and for the smaller packages described above.
- *Effective divestiture process*
27. The CMA invites views on the appropriate timescale for achieving a divestiture.
28. At this stage, the CMA expects that if it selects a partial divestiture remedy it will be necessary for these parts to be divested before integration of the retained elements is allowed to proceed so that the CMA retains the option of requiring divestiture of the entire MWR business if necessary.
29. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture. The CMA invites views on whether the functions of the Monitoring Trustee (as set out in the [Directions](#)) should be amended to oversee the divestiture(s) and to ensure that the business or assets to be divested are maintained during the course of the process.
30. The CMA will have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
- (a) the merger parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or

⁶ [Merger Remedies: CC8](#) (November 2008), paragraph 3.15 ff.

- (b) the CMA has reason to expect that the merger parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
31. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. The CMA invites views on whether the circumstances of this Merger necessitate such an approach.

Cost of remedies and proportionality

32. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. In relation to completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.⁷
33. The CMA invites views on what costs are likely to arise in implementing each remedy option.

Relevant customer benefits

34. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.⁸
35. Relevant customer benefits are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
 - (b) greater innovation in relation to such goods or services.'⁹
36. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and

⁷ [Merger Remedies: CC8](#) (November 2008), paragraph 1.10. This has been adopted by the CMA board.

⁸ Section 36(4) of the Act, see also [Merger Remedies: CC8](#) (November 2008), paragraph 1.14.

⁹ Section 30(1)(a) of the Act, see also [Merger Remedies: CC8](#) (November 2008), paragraph 1.14.

(b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.¹⁰

37. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

Next steps

38. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by [11 June 2018] (see Note (i)).
39. A copy of this notice will be posted on the [CMA website](#).

Lesley Ainsworth
Inquiry Group Chair
31 May 2018

Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the Provisional Findings announced on 1 June 2018. The main parties have until 21 June 2018 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.

¹⁰ Section 30(3) of the Act, see also [Merger Remedies: CC8](#) (November 2008), paragraph 1.16.