

**COMPLETED ACQUISITION BY AUSURUS GROUP LTD THROUGH ITS SUBSIDIARY  
EUROPEAN METAL RECYCLING LIMITED OF CUFE INVESTMENTS LIMITED**

**ME/6712/17**

**EMR RESPONSE TO NOTICE OF POSSIBLE REMEDIES**

**1. Introduction**

- 1.1 This document sets out EMR's initial responses to the Notice of Possible Remedies received from the CMA on 1 June 2018 (the "**NPR**").
- 1.2 EMR was disappointed that the CMA has provisionally concluded that a substantial lessening of competition ("**SLC**") has or would be likely to arise in a number of areas as a result of the transaction. EMR believes that this conclusion is fundamentally flawed, mischaracterises and fails to take account of evidence provided to the CMA. EMR will make representations in response to the CMA's Provisional Findings ("**PF**") in due course and the position set out in this document remains without prejudice to those submissions.
- 1.3 EMR will engage constructively with the CMA during the response hearing as well as in response to the remedies working paper. EMR looks forward to receiving this as soon as possible so that it is able to respond in a timely manner.

**2. Type of remedy**

- 2.1 The CMA has provisionally concluded that a structural remedy involving divestiture of everything acquired in the Merger (CuFe Investments Limited and MWR) would represent a comprehensive solution to all aspects of the SLC it has provisionally found. The CMA invites views on whether a smaller package or packages of divestitures in each area would be an effective and practicable remedy but provisionally concludes that a behavioural remedy is very unlikely to be an effective remedy to the SLCs or any resulting adverse effect provisionally identified. The CMA has not set out its reasoning for this conclusion.
- 2.2 In EMR's view, the CMA should not dismiss out of hand the possibility of a behavioural remedy, in whole or in part. The CMA's theory of harm rests on unilateral effects arising due to price decreases (in purchasing markets) or price increases (in sales markets) and / or service reductions in specific, but distinct, areas of the Parties' overlapping operations. The CMA's theory of harm, in all areas, is effectively based on the proposition that, as a result of EMR's size and efficiency, the loss of even a small constraint by MWR results in an SLC. In those circumstances, a behavioural remedy could, in principle, be more effective than the sale of the MWR business as a whole or in part.
- 2.3 EMR notes particularly that the CMA's theory of harm in relation to the markets for tendered contracts (and the linked sales of NPS to UK customers) is based around the Parties being the most frequent bidders who are successful in bidding for tendered contracts. Again, the CMA's assessment is determined by the fact that EMR bids the most, wins the most and subsequently sells the most NPS. MWR's bidding activity is not indicative of the competitive constraint it exerts on EMR unless that bidding activity leads to it winning business from EMR, which it does not. The CMA's theory of harm is that the loss of this limited constraint would result in an SLC in tendering markets. Whilst the sale of MWR to a third party could address the increment, the actual harm identified (i.e. the ability to worsen prices as a result of additional market power) could, in principle, be more comprehensively remedied by a behavioural remedy such as an access or tolling remedy which provides competitors with equivalent capability to MWR. It is important to recall that Supply under these contracts is variable and, as the CMA is aware, is re-tendered regularly (between 6 months – 3 years).

**3. Extent of any divestiture**

- 3.1 Given that the SLCs identified by the CMA are limited to specific geographies and, with the exception of London, relate to specific product areas where MWR's constraint is no stronger

than a number of other competitors, EMR respectfully submits that the divestiture of the whole MWR business would be disproportionate to the SLCs<sup>1</sup>.

#### Package of assets to be divested

##### *Wales*

- 3.2 As a preliminary point, EMR notes that the CMA's provisional conclusion on the package of assets to be divested significantly overreaches the SLC identified. Indeed, the CMA concluded at both phase 1 and, provisionally at phase 2, that no SLC arises in Wales in respect of any area of concern. Given that there is no SLC identified in Wales and the volume of NPS purchased in Wales under tendered contracts is very low, EMR submits that the acquisition of MWR Newport cannot reasonably be considered to contribute to any of the SLCs provisionally found by the CMA.
- 3.3 EMR therefore respectfully submits that the inclusion of MWR Newport in any divestment package would not be required to formulate a comprehensive solution to all aspects of the SLCs and, moreover, would be disproportionate.

##### *Mothballed and non-metal sites*

- 3.4 The CMA's analysis focuses on the active sites of MWR and their overlaps with EMR. The CMA has not considered the mothballed sites of MWR nor its non-metal sites (e.g. MWR Cox's Lane or MWR Walsall) to have any impact on the competition analysis. EMR submits that this is the correct approach. MWR's site at Telford which is permanently closed due to noise complaints, its sites which are sub-let to third parties, and its sites which handle non-metal waste cannot possibly be said to contribute to any SLC. As a result, their inclusion in any divestment package is unnecessary and disproportionate<sup>2</sup>. EMR submits that, in any event, whilst these sites do have value, they are unlikely to be particularly attractive to any prospective purchaser<sup>3</sup> who would be focused on the acquisition of operational elements rather than the additional sites which are a feature of a full share acquisition.

##### 3.5 *Assets included*

- 3.6 Paragraphs 3.8 to 3.22 below contain EMR's submissions in relation to the package(s) of assets which could form the basis of any divestiture. As a general principle, subject to indications to the contrary below, EMR believes that staff and equipment customarily utilised at particular sites should remain with that particular site, including any transportation fleet which is licensed (under the terms of MWR's operating licences) to that particular site. EMR notes that MWR's commercial staff are distributed between Edmonton, Cradley and Hitchin such that all packages discussed below would contain appropriate commercial staff where necessary, although EMR notes that existing metal recyclers will likely already have their own commercial staff as well as centralised functions such as HR and payroll. These functions can also be in-sourced easily and any purchaser may not require continuation of these services within MWR.
- 3.7 Transportation and environmental licences and permits are site-specific and, again, will remain with the particular site. The exact structure of any remedy will depend on the final make-up of any package(s). For a full divestment of the MWR business, this would likely entail a share sale. For smaller package(s) the principle set out in paragraph 3.6, above, would apply and there would likely be an element of hiving-out assets and sites retained by EMR or sold to third parties with a share sale remaining an option to transfer the small

---

<sup>1</sup> EMR notes the requirement for any remedy to be proportionate in the circumstances (CC8 para 1.7).

<sup>2</sup> And EMR notes that the CMA's provisional findings would need to have made out to the requisite legal standard that MWR's operations from / including these sites form part of the SLC in some way.

<sup>3</sup> Particularly, for example, in relation to mothballed and sub-let sites which are, in reality, an administrative burden and a financial liability (as rent payments are required under a headlease which, in some circumstances – such as MWR's [redacted] site – are not sub-let).

number of formal longer term contracts which exist with suppliers and any IP 9to the extent that there is any which would need to be transferred).

*Package(s) to address the SLCs*

- 3.8 EMR disagrees with the provisional conclusion that a full divestment of the acquired MWR business is required to address the SLCs identified. The CMA has provisionally concluded that competition (and the SLCs identified), occurs in distinct local markets on all purchasing markets. The one area in which the CMA has identified a wider geographic market (the sale of NPS to UK customers) is directly related, in the CMA's view, to the SLC identified for purchasing under tendered contracts in the West Midlands and the North East. The logic of this conclusion is, effectively, that the strength in upstream purchasing leads to strength in downstream sales. In EMR's view, the downstream SLC would effectively be addressed by any upstream remedy which addresses the upstream SLC provisionally identified.
- 3.9 EMR respectfully submits that following the SLCs provisionally identified by the CMA, there are three clear possible remedy packages. The content of each possible package and the extent to which each of these is actually required to cure the SLC identified is discussed below.
- 3.9.1 The Hitchin shredding operation (purchases of shredder feed in the South East);
- 3.9.2 London operations (purchases of ferrous and non-ferrous waste scrap metal in London);
- 3.9.3 The purchase of waste scrap metal under tendered contracts in the West Midlands and North East<sup>4</sup>.
- 3.10 In EMR's view, each SLC provisionally identified can be dealt with separately and a segmented approach is likely to have the effect of increasing the potential list of purchasers, logically resulting in a more competitive situation overall.
- 3.11 In general terms, given the nature of the CMA's concerns in each area (effectively, high market shares and limited constraints exerted by other competitors leading to the risk of unilateral effects), EMR respectfully submits that there is no reason why, in principle, EMR sites or assets could not be divested in place of MWR sites or assets. Indeed, many of EMR's sites in the West Midlands and the North East have [X]. Whether that is appropriate will depend on each case.

*Shredding*

- 3.12 The CMA has provisionally concluded that the purchase of shredder feed forms its own product market and the 115km Hitchin catchment area its own geographic market. The CMA accepted at both phase 1 and provisionally at phase 2 that shredding is a separate activity to the purchase of scrap metal more generally<sup>5</sup>.
- 3.13 EMR respectfully submits that the divestiture of the MWR Hitchin shredder site, together with associated staff and assets located at MWR Hitchin would be sufficient to deal with the SLC provisionally identified by the CMA. In EMR's view, given the distinct nature of the shredding operation, this could be divested on a standalone basis to any potential purchaser with the commitment to competing in the relevant market. This would not necessarily need to be a metal recycler currently operating a shredder. Other metal recyclers do not require any specialist knowledge nor ability to operate shredders (beyond the knowledge of MWR Hitchin's staff) and have readily accessible sales markets which can be served directly from

---

<sup>4</sup> In principle, EMR believes that this could be split into North East and West Midlands packages; for ease, these are addressed together as the same issues arise. EMR strongly believes that any solution to the upstream SLC provisionally identified would solve the downstream SLC provisionally identified. Indeed, it is worth noting that all of the three packages would involve an increase in downstream competition.

<sup>5</sup> See for example Table 8.3 as against Table 9.1 in the PF.

MWR Hitchin without the need for any additional infrastructure<sup>6</sup>. EMR does not believe that there is any necessity for any centralised functions of MWR to be divested together with its shredder site as, in reality, EMR believes that any purchaser is likely to be an existing UK metal recycler, steel producer or scrap trading company. Furthermore, no divestment of any other site would be required to resolve an SLC related solely to the purchase of shredder feed in the Hitchin catchment area.

- 3.14 However, it is important to note that MWR Hitchin is not solely a shredding site as it also purchases other metals; in the catchment area for Hitchin, no SLC has been identified in this area and so a divestment of the site would overreach the SLC provisionally identified. In EMR's view, a form of access or tolling remedy would be sufficient to provide competitors with the capacity and capability to compete and to address the SLC provisionally identified.

#### *London*

- 3.15 The CMA has provisionally concluded that an SLC arises in relation to the purchase of ferrous and non-ferrous waste scrap metal in London (although the CMA's analysis appears to focus on North London).
- 3.16 EMR maintains its view that a physical presence in London is not a pre-requisite to providing a constraint in London. As the CMA is aware, the entry into the London market of its strongest national competitor, [REDACTED], was by way of an out of London site<sup>7</sup>. EMR believes that the sale of MWR Neasden to a purchaser with sites outside of London (or the intention to open one) could result in the creation of a competitive force in the London area to replace MWR's current capability. In view of the proximity of Hitchin (which is not just a shredding site, as the CMA will recall from the site visit and from the data submitted) a combination of Neasden and Hitchin would be likely to create an effective competitor given the size of the Hitchin site and the ability to leverage from Hitchin into London with Neasden as a feeder site. It is also important to note that MWR Edmonton is in a re-development area and [REDACTED] going forward. Its importance for maintaining a competitive market in the London area is therefore limited in the longer term<sup>8</sup>.
- 3.17 In EMR's view, potential purchasers could include existing London-based competitors or national competitors (with or without a presence in London), all of whom would have existing centralised functions such as HR etc. In each case, this would have the benefit of not only solving the SLC provisionally identified but would also be comprehensive in that it would create a regional competitive force which would be stronger than MWR currently is.
- 3.18 However, this is not the only option as, in EMR's view, there are other potential purchasers who would meet the CMA's criteria, for example waste companies, overseas metal recyclers, steel producers and, indeed, financial investors provided that appropriate management structures are maintained.

#### *Purchases under tendered contracts and the sale of NPS*

- 3.19 As noted above, EMR respectfully submits that any remedy which appropriately addresses the SLC identified with respect to upstream tendered contracts would solve the SLC

<sup>6</sup> It is also important to note that EMR's [REDACTED] site will, ultimately, [REDACTED], which will result in significantly less capability and capacity for EMR, as well as a [REDACTED] for EMR in the [REDACTED]. EMR would be open to considering how to achieve this in an expedited timeframe.

<sup>7</sup> From a position of having no presence in London, EMR believes that [REDACTED] is purchasing monthly tonnages of [REDACTED] to [REDACTED] sourced predominantly from the London area. Either [REDACTED] was inconceivably dismissed by the CMA as '*not appear[ing] to be a strong constraint*' despite a significant number of suppliers (and other competitors) telling the CMA directly that it was a strong competitor and it having a '*stronger response*' in the CMA's survey (see 9.86 and 9.87 PF; despite the excisions, it is clear to EMR that this competitor is [REDACTED]).

<sup>8</sup> It is also important to note that the MWR Edmonton site contains MWR's cable granulator. Whilst the CMA has not segmented the purchase of copper cable into a separate frame of reference, EMR notes that the CMA '*received very little evidence of concerns in relation to the purchase of non-ferrous grades*' (PF 6.30) and that '*purchase and installation of a granulator may not be a substantial barrier*' (PF footnote 50). In light of this, and the Parties' submissions as to the large number of competitors now operating granulators and cable stripping equipment, EMR's view is that, to the extent that MWR Edmonton would need to be included in any divestment, MWR's cable granulator should be excluded from such a remedy.

identified with respect to the downstream sale of NPS given that the primary concern downstream is, essentially, one of volume share of sales.

3.20 EMR notes that:

3.20.1 Bidding and purchasing under large tendered contracts is generally a centralised function, as is the sale of NPS onwards to end customers; whilst a purchaser established in the UK is likely to already have such staff, these are easily segregated within the MWR business and would need to be included in any remedy package for it to be suitably attractive to a number of purchasers;

3.20.2 Metal recyclers providing services under tendered contracts are often providing a logistics service or, where they are purchasing and selling the scrap metal onwards, have minimal need to process the scrap metal at a processing site; indeed to the extent that a proximate site is necessary, it is typically for aggregation and onward transport reasons, not for processing. As a result, the activities undertaken at sites in the region where the SLC has been identified are relevant when considering the formulation of a remedy to address the SLC identified with respect to tendered contracts.

3.20.2.1 MWR has only one site in the North East which services tendered contracts. This site does not generally engage in the purchase of ferrous and non-ferrous scrap metal other than under tendered contracts and principally serves one supplier of MWR (an NPS supplier) accounting for over 80% of its volumes in that region.

3.20.2.2 In the West Midlands, MWR has three scrap metal sites which receive volumes from tendered contracts namely Cradley, Telford and Hockley. However, these sites are also general scrap metal sites which service other suppliers (such as merchants) in respect of scrap metal which is not supplied under tendered contracts.

3.21 In light of the above factors, EMR submits that the divestment of all of MWR's sites is disproportionate to the SLC identified. In fact, the tendered contracts business of MWR in the West Midlands and North East should (and can readily) be segregated from the core scrap metal business of MWR in respect of which the CMA has provisionally concluded that no SLC arises. In EMR's view, the divestment of a package including (if necessary) relevant central staff, supplier contracts<sup>9</sup>, either an MWR or EMR site capable of servicing these contracts and any associated assets would constitute a comprehensive and proportionate remedy to address the SLC provisionally identified.

3.22 EMR notes that there may be a range of potential purchasers for this business. Other national metal recyclers would be able to increase their overall presence by acquiring this business. Equally, however, there are a number of options including waste companies, (potential overseas entrants including specialists in these contracts) or investors with an appropriate management team.

3.23 However, as noted above, given the specific nature of the servicing of tendered contracts which forms only a small part of the Parties' businesses ([~~8~~]%) by volume of MWR's business), site divestments would be disproportionate to the SLC identified. Moreover, in light of the CMA's provisional conclusion that EMR's geographical coverage gives it an advantage when bidding for large tendered contracts, other options may be more appropriate to deal with the SLC and the harm identified, particularly as the Parties' geographic coverage of these contracts was 'custom built' for these contracts. EMR believes that an appropriate remedy would be for it to make available its facilities (transport, sites and processing) on a tolling basis. This could be made available to either competing metal recyclers or to end customers (i.e. steel producers<sup>10</sup>). This would enable bidders for these contracts to utilise EMR's scale and efficiency to their own advantage and to compete on

<sup>9</sup> See paragraph 3.7, above.

<sup>10</sup> EMR notes that steel producers have used EMR in this capacity in the past.

the same basis as EMR. It could also enable steel producers to utilise EMR's facilities, transport and network to access new production steel.

3.24 These options would offer a more equitable and more effective solution to the SLC than a divestment.

#### 4. **Potential purchasers**

4.1 EMR is mindful of the criteria set out in CC8 and would, regardless of the extent and content of the remedy package(s), seek to present suitable purchaser(s) to the CMA in line with those criteria. However, EMR notes a number of points:

4.1.1 Prior to the transaction, MWR was owned by financial investors without particular experience or presence in the market. EMR therefore submits that existing presence or experience would not be a pre-requisite for any purchaser of the full MWR business (or a variant of it), nor for smaller divestment packages, provided that sufficient management resource is provided in the package. This is particularly the case for overseas metal recyclers, waste companies or specialist recyclers who have significant expertise, capability and resources outside of the UK. Indeed, any such restriction would, effectively, restrict investment and expansion into the UK market and would go further than proportionately necessary to restore the pre-merger levels of competition.

4.1.2 Pre-Merger, MWR had no dock facilities other than its access to Pinn's Wharf which it rarely used. To insist on any purchaser having access to dock facilities is, effectively, to insist on divestment to one of a handful of the largest recyclers without properly considering the pre-Merger constraint of MWR.

4.1.3 In reality, sale of the whole MWR business presents challenges; there were a limited number of potential purchasers interested in MWR when it was originally sold and, as the CMA is aware, there have been a number of subsequent transactions in the industry (some of which remain subject to investigation by the CMA). EMR respectfully suggests that the CMA should keep an open mind as to the type of (or identity of) potential purchaser(s) for the whole MWR business or, indeed parts of it. In principle, EMR believes that the following could, depending on individual circumstances, be suitable purchasers for the whole or partial package(s) outlined above:

4.1.3.1 Financial investors with current (or additional) management support;

4.1.3.2 Other UK metal recyclers, including large national operators as well as strong regional competitors;

4.1.3.3 Overseas metal recyclers; and

4.1.3.4 Waste companies and specialist recyclers.

#### 5. **Process**

5.1 In terms of timing, EMR believes that a realistic timeframe for achieving a divestiture of the magnitude envisaged by the CMA is between 9-12 months.

5.2 In terms of safeguards, EMR notes that the Initial Enforcement Order which is currently in force contains an obligation for the assets and business of MWR to be maintained as a going concern and the Monitoring Trustee is already appointed (and functioning) to monitor this. EMR is committed to constructively working with the CMA to achieve an appropriate remedy in this case (to the extent required by the final decision of the CMA) and respectfully submits that further duties for the monitoring trustee are not necessary and would simply add additional cost.

- 5.3 Again, EMR is committed to its obligations and to working with the CMA such that it submits that the unusual step of appointing a divestiture trustee at the outset of the process would be unnecessary.