

ME/6712/17
COMPLETED ACQUISITION OF METAL & WASTE RECYCLING BY EUROPEAN METAL RECYCLING
RESPONSE TO THE CMA'S PROVISIONAL FINDINGS REPORT

1. INTRODUCTION

- 1.1 EMR welcomes the opportunity to comment on the CMA's provisional findings report issued on 1 June 2018 (the "**Provisional Findings**").
- 1.2 EMR is naturally deeply disappointed by the provisional conclusions that the Merger gives rise to a realistic prospect of a substantial lessening of competition (an "**SLC**") in relation to:
- 1.2.1 Purchasing of shredder feed in the South East;
 - 1.2.2 Purchasing of ferrous and non-ferrous scrap metals in the London region;
 - 1.2.3 Purchasing of ferrous and non-ferrous scrap metals through tendered contracts in the West Midlands;
 - 1.2.4 Purchasing of ferrous and non-ferrous scrap metals through tendered contracts in the North East; and
 - 1.2.5 Sales of new production steel ("**NPS**") to UK customers.
- 1.3 EMR's strongly believes that the Merger will not result in an SLC (and nor is there a reasonable prospect of it doing so) on any possible frame of reference, including those listed in paragraph 1.2 above, or at all¹. Sufficient post-Merger constraints will remain after the Merger to ensure that rivalry continues to discipline the commercial behaviour of the Parties.
- 1.4 The CMA's statutory duty is to decide, on the balance of probabilities and on the basis of objective evidence, whether the Merger has resulted or may be expected to result in a SLC. EMR believes that the CMA's provisional conclusions do not meet that threshold. EMR considers that the CMA's provisional conclusions are wholly flawed and fail to give due and proper weight to all the available evidence; mischaracterise the substantial evidence that EMR has provided to the CMA during its Phase 1 and Phase 2 investigation; and gives undue weight to insufficiently objective evidence from third parties.
- 1.5 In particular, EMR considers that the CMA's assessment is significantly flawed in the following areas:
- 1.5.1 first, the CMA's characterisation of the metal recycling sector as being quasi-bereft of competition. The provisional conclusion that EMR will post-Merger face only a single effective competitor in the purchasing of non-shredder feed in London ("London non-shredder feed"), a single effective competitor in the purchase of tendered contracts in the North East ("NE tendered") and a single effective competitor in the purchase of tendered contracts in the West Midlands ("WM tendered"), is not supported by the evidence and simply does not correspond to the realities of the sector;

¹ With respect to other relevant frames of reference identified by the CMA, EMR notes and agrees with the CMA's provisional conclusion that the merger is not likely to result in an SLC with respect to purchases from tendered contracts in Wales; sales of other ferrous metals to UK customers and sales of non-ferrous metals to UK customers.

- 1.5.2 second, the CMA focuses almost entirely on the size and efficiency of EMR's operations as an indicator of the lack of competition (and thus the source of its and third parties' concern), whereas the key issue is whether a "substantial" loss of competition is likely to arise from the acquisition of MWR;
 - 1.5.3 third, the CMA relies on very limited evidence when forming the provisional conclusion that MWR exerts a meaningful competitive constraint on EMR and the CMA fails to apply the comparator of MWR (rather than EMR) as the appropriate threshold for determining whether competitors exert an effective constraint;
 - 1.5.4 fourth, the CMA dismisses or fails to take account of objective and verifiable evidence relating to the competitive constraints exerted by competitors, and fails to take account of evidence presented on spare capacity in the London region;
 - 1.5.5 fifth, the CMA gives undue weight to the insufficiently objective assertions of conflicted competitors, such as Sims and Liberty, when forming its provisional conclusions; and
 - 1.5.6 sixth, the provisional finding that neither suppliers nor customers exert countervailing constraints on EMR and MWR is entirely flawed. The evidence does not support this conclusion. Large, industrial companies such as Liberty, Tata or BMW, who have sophisticated supply chains and procurement functions, can and do defend their interests by a variety of means and there is no reasonable basis on which to conclude that they would suffer harm as a result of the Merger.
- 1.6 Moreover, from a procedural standpoint, EMR wishes to note that it is disappointed that the CMA did not share its thinking or analysis with respect to tendered contracts in the North East at the stage of providing its Annotated Issues Statement and Working Papers. The CMA's Annotated Issues Statement noted that the CMA intended to produce a working paper on the North East, but did not do so, notwithstanding that tendered contracts in the North East have now been identified as one of the areas of concern. As a consequence, and unlike all other areas in respect of which the CMA has provisionally concluded that a SLC arises, EMR was not given an opportunity to assess the evidence and make representations on the CMA's preliminary thinking and analysis at that stage of the investigation.
- 1.7 EMR's position remains that:
- 1.7.1 There is strong and effective competition at all levels of the supply chain, in all geographic areas and in relation to all consumers affected by the Merger;
 - 1.7.2 The Merger will not eliminate a significant competitive force in any region;
 - 1.7.3 There are numerous competitors who will remain post-Merger and who are at least as effective a competitor as MWR in terms of site locations, processing capabilities and access to export markets. These are set out below and include large companies with significant operations in the metal recycling sector, such as Sims, the second largest competitor in the UK metal recycling sector² and the world's leading electronics and metal recycling company³, and S Norton, the UK's third largest metal recycler⁴:
 - 1.7.3.1 London non-shredder feed: [X], [X], Benfleet, BFA, LKM, TWM and Remet (in NFE);
 - 1.7.3.2 NE tendered: [X], [X], Ward Bros, [X] and [X];

² PFs paragraph 2.13

³ <http://www.simsmm.co.uk/About-Us>

⁴ PFs paragraph 2.14

- 1.7.3.3 West Midlands tendered: [REDACTED],[REDACTED], Ward Recycling, [REDACTED] and One Stop Recycling; and
- 1.7.3.4 Sale of NPS: [REDACTED], [REDACTED], [REDACTED], Ward Bros and Enablelink.
- 1.7.4 There is significant spare capacity in all regions. If the Parties were to attempt to exercise unilateral market power, other competitors would therefore be in a position to fulfil suppliers' demand;
- 1.7.5 In relation to tendered contracts, suppliers of waste scrap metal and purchasers of scrap metal exercise a strong constraint on the Parties that would defeat any attempt by the Parties to exercise unilateral market power. Competition for these tendered contracts is intense and as discussed at the Response Hearing on 15 June 2018, [REDACTED]. Suppliers are in complete control of the value chain as, alongside the alternative metal recyclers to whom they can supply, they have a range of alternatives available to them, including self-supply, sponsored entry and direct supply to end customers. Furthermore, end customers can and do take action to protect their interests – for example, as discussed at the Hearing, Celsa has recently opened a processing yard (with a shear) in Swansea;
- 1.7.6 There are no particular barriers to entry or expansion. There is clear and compelling evidence of successful entry and expansion in all regions, including in London⁵ and in the West Midlands⁶;
- 1.7.7 UK customers for NPS will not be adversely affected by the transaction. The sales market for ferrous scrap metal is highly commoditised (driven by the price of new steel), efficient and competitive;
- 1.7.8 Supply of NPS significantly exceeds domestic demand resulting in significant choice for domestic customers who are able to exercise significant buyer power against metal recyclers. This is particularly the case as they can and do compete to purchase scrap metal directly from suppliers who are very often their own customers. For example, as discussed at the Response Hearing, [REDACTED] for supporting evidence; and
- 1.7.9 There is no barrier to metal recyclers accessing domestic customers for the sale of scrap metal or the global scrap metal markets. Metal recyclers are therefore incentivised to compete to purchase waste scrap metal that they require in order to be able to sell scrap metal.
- 1.8 The remainder of this response provides further evidence and analysis relating to the points set out above and is structured as follows:
- (A) Section 2 contains EMR's representations relating to London Non-Shredder Feed;
- 1.8.1 Section 3 contains EMR's representations relating to tendered contracts in the North East;
- 1.8.2 Section 4 contains EMR's representations relating to tendered contracts in the West Midlands; and
- 1.8.3 Section 5 contains EMR's representations relating to sales of NPS to UK customers.
- 1.8.4 Annex 1 contains supporting data.

⁵ For example, Sims in Shearness; Nortons in Barking and, very recently, Southwark Metals opening new sites in the London region: <http://www.southwarkmetals.co.uk/news> - see below for more information.

⁶ For example, Ward Recycling and Hawkeswood with new sites.

- 1.8.5 Annex 2 contains additional competitors for the purchasing of non-shred waste scrap metal in the London region.
 - 1.8.6 Annex 3 contains submissions relating to the CMA's survey evidence.
 - 1.8.7 Annex 4 contains submissions relating to efficiencies.
- 1.9 EMR will not be making further substantive representations⁷ in this Response to the CMA with respect to the purchase of shredder feed in the South East region. To be clear, however, EMR does not agree with the CMA's provisional conclusion that the Merger can be expected to result in a SLC for the reasons previously submitted and is exploring further evidence that supports EMR's position in this respect.

⁷ EMR notes, however, that the CMA's analysis on the impact of the Hitchin outage on EMR's purchase volumes is almost entirely driven by a transfer of inventory from MWR to EMR when the shredder first went down, and is not reflective of competition between the Parties. EMR also notes that the submissions made below in relation to the theory of harm and efficiencies for non-shredder feed in London apply equally to shredder feed.

2. **LONDON NON-SHREDDER FEED**

2.1 The CMA draws the provisional conclusion that, due to EMR's size, the increment resulting from the acquisition of MWR and the lack of effective constraint from other metal recyclers, the transaction may be expected to result in a SLC.

2.2 EMR submits that focussing on the strength of EMR, driven by its competitive and efficient recycling supply chain, is fundamentally flawed. The focus of the CMA's assessment should properly be the strength of the competitive constraint exerted by MWR relative to other competitors, and the consequential loss (if any) of competition that arises as a result of the Merger. In this regard, there is limited, objective evidence that points to MWR exerting an actual, meaningful competitive constraint. Indeed the CMA notes at paragraph 9.107 that *"not all of the evidence on the closeness of competition between the Parties pre-merger pointed towards a strong constraint from MWR on EMR"*.

2.3 However, in provisionally finding that EMR and MWR close competitors and that smaller recyclers are a weaker constraint⁸:

2.3.1 The CMA systematically dismisses competitors even where the evidence points to them being equally strong as, or stronger than, MWR. In particular, the CMA dismisses the evidence relating to the strong constraints exerted by [X] and Benfleet without providing a clear and compelling rationale for doing so;

2.3.2 The CMA accepts that competitors have spare capacity, yet it fails to take spare capacity into account when assessing the competitive strength of competitors. Instead, competitors are simply dismissed as ineffective based on their current volumes (rather than their spare capacity);

2.3.3 The CMA dismisses competitors even when numerous suppliers have said that they are "strong" or "viable" and does not give due and proper weight to the survey evidence which shows that suppliers believe other competitors are as close or closer alternatives to EMR than MWR. In this regard, there is no reasonable basis on which the concerns that the CMA raises with its survey should apply to this frame of reference;

2.3.4 The CMA provisionally concludes that competitors are reliant on MWR for onward sales or a route to market. EMR respectfully disagrees with this provisional finding as this is simply not borne out by the evidence. This shows that no competitor is reliant on MWR. While some metal recyclers sell waste scrap metal to EMR, this is irrelevant for the assessment of the Merger as the CMA's theory of harm is not one of vertical foreclosure. Moreover, each competitor considered in the Provisional Findings sells less to EMR than MWR does currently;

2.3.5 The CMA fails to take account of evidence indicating that the level of concern among suppliers about the impact of the Merger is low. This is supported by the CMA's survey evidence; and

2.3.6 The CMA fails to give due weight to the efficiencies that can be expected to arise if the CMA finds there is an SLC with respect to the purchase of waste scrap metal. Moreover, there would be a realistic expectation of those efficiencies being passed on to UK customers given the CMA's preliminary conclusion that downstream competition for sales to UK customers is strong.

2.4 Each of these points is considered further below.

The CMA's market shares for non-shredder feed in London include shredder feed volumes

2.5 The CMA estimates that the combined share of the Parties in London is [X]% with an increment of [X]%. The CMA notes as a sensitivity that excluding shredder feed, EMR's

⁸ PFs: 9.106 (a)

share falls to [X]% while MWR's increases to [X]%, giving combined shares of [X]%. Shredder feed volumes are already taken into account in the CMA's assessment of purchases of shredder feed in the South East and are entirely irrelevant to the assessment of competition for purchases in the London region of other (i.e. non-shredder) ferrous and non-ferrous metals. As such, EMR submits that the more appropriate figure cited in Provisional Findings is a combined share of supply of [X]%

2.6 However, as submitted previously, EMR considers that this overstates the Parties' position:

2.6.1 the CMA accepts that its calculations exclude purchases because the CMA has not received responses to its questionnaires from all competitors and is missing volume data from some sites – see footnote 238 on page 119; and

2.6.2 the CMA's data overstates MWR's 2017 volumes purchased at Edmonton and Neasden. Total purchases at Edmonton and Neasden in 2017 was [X] MT not [X] MT. This included purchases of around [X] MT at Edmonton and [X] MT at Neasden.

2.7 Taking account of both, this gives a combined share of [X]% with an increment of [X]%. EMR does not believe these figures give rise to *prima facie* competition concerns⁹, particularly when due and proper consideration is given to the totality of evidence from multiple sources which includes:

2.7.1 objective evidence of strong and effective competition remaining post-Merger (see below);

2.7.2 clear and compelling evidence of spare capacity within the London region; and

2.7.3 the CMA survey clearly pointing to EMR and MWR not being close competitors; and

2.7.4 evidence of low levels of concern amongst suppliers.

No evidence of switching from MWR Edmonton to EMR

2.8 EMR has consistently argued that the assessment of the Merger should be on the (limited) competition provided by MWR to EMR and the loss of this constraint relative to other competitors. The CMA has also indicated concern very specific to the MWR Edmonton site, and the extent to which EMR provides a competitive constraint to MWR at this site, the concern being that EMR would be able to lower the price paid for purchase volumes at Edmonton post-Merger.

2.9 The Edmonton site has a single shear, which suffered a technical disruption on 30 April. It has not been operational since then. This disruption to the processing capacity of MWR at Edmonton provides a (rough) natural experiment to analyse the impact on the purchase volumes of EMR's sites. If EMR provides a strong constraint to MWR Edmonton, one would expect to see an increase in the volumes purchased by EMR at its sites. The chart below sets out the average daily volumes for each week¹⁰ for the combined purchases of the three EMR sites located closest to MWR Edmonton (excluding the shredder site at Willesden): EMR Canning Town (11.4 km), EMR Wandsworth (16.9 km) and EMR Erith (22.7 km) More detail is included in the spreadsheet at [X].

⁹ The CMA itself notes that in markets where products are undifferentiated, combined market shares of less than 40% will not give the CMA cause for concern over unilateral effects *at Phase 1*. *Merger Assessment Guidelines*, paragraph 5.3.5 where references to the OFT indicate thresholds that apply at Phase 1.

¹⁰ These are weekly volumes divided by the number of working days in a given week, which accounts for bank holidays.

EMR purchase volumes at Canning Town, Wandsworth and Erith before and during Edmonton outage



2.10 The charts shows that there was *no noticeable impact in volumes at EMR's sites*.

MWR does not provide a meaningful competitive constraint to EMR in London

2.11 EMR respectfully submits that the evidence does not support the provisional conclusion that MWR acts as a strong competitive constraint to EMR in London.

2.12 The CMA considers that MWR's **site locations, processing capabilities, and ability to provide a route to market¹¹** are indicative of the constraint that it imposes on EMR in the London region. However, the available evidence does not point to MWR constituting a strong competitive force relative to other competitors:

2.12.1 **Site locations:** MWR has two metal recycling sites in the London region: MWR Edmonton is 11.4 km from the nearest (non-shredder) EMR site (Canning Town) and Neasden is 8.7 km from the nearest EMR site (Brentford). As noted below, there are 6 metal recyclers with an equivalent or greater number of sites in the London region and all of these are within 17 km of an EMR site, with three of them being located closer to EMR than MWR.

2.12.2 **Processing capabilities:** MWR has one shear and one baler. As noted below, the evidence demonstrates that there are seven competitors in the London region with equivalent or greater processing capabilities.

2.12.3 **Dock facilities:** MWR does not actively use its short sea dock facilities at Pinn's Wharf¹² and therefore the degree to which it can properly be regarded as "vertically integrated" is limited.

2.12.4 **Routes to market:** MWR does not have a unique route to market in the London region: MWR sells [%] of its output to EMR, a further [%] of its output to other metal recyclers, [%] is sold to UK traders that export, and [%] is sold directly to UK customers. Thus [%] of MWR's "routes to market" are available to competitors as readily as they are to MWR.

2.13 The CMA asserts that MWR represents an important alternative route to market for smaller recyclers because its "sales include those to metal recyclers that exported all or all of these

¹¹ PFs: 9.26

¹² MWR only used Pinn's Wharf on [%] occasions in 2017, totalling [%] MT (only [%] MT of which was for export). This is reflected in MWR's relatively small proportion of purchases that is directly exported in London (rather than sold to EMR, other recyclers, traders, etc.)

volumes (e.g. Norton)".¹³ The notion that this means MWR is an especially strong and close competitor to EMR is incorrect. Rather, it indicates that *Norton* is a strong competitor: other recyclers have as much ability to sell to Norton as MWR does. The CMA has presented no evidence to suggest that Norton (or other recyclers with export facilities) accepts sales from MWR and refuses sales from other recyclers. There is no reason to suppose this would be the case. The special MWR "route to market" identified by the CMA is at maximum [X] % of MWR sales (those which are exported directly). All other channels are available to other recyclers.

- 2.14 EMR respectfully submits that, properly interpreted, the evidence instead shows that, in London in non-shredder feed, *MWR is simply an intermediary* (not a route to market): it purchases almost entirely from other UK metal recyclers ([X] % of its total purchases) and sells almost entirely to other UK metal recyclers or traders ([X] %), including EMR. To therefore present MWR as a strong competitive constraint to EMR has no evidential basis in the facts of the case.
- 2.15 In addition to the above, a significant body of objective evidence available to the CMA shows:
- 2.15.1 The level of concern among suppliers about the Merger was "quite low" (PFs: 9.107)
- 2.15.2 The survey "did not point towards a strong constraint from MWR". (PFs: 9.107)
- 2.15.3 Not [X] supplier named MWR as an alternative, including large suppliers and metal recyclers. (PFs: 9.44)
- 2.15.4 After prompting, an MWR site was considered a *viable* alternative by only [X] % of EMR suppliers. (PFs: 9.44)
- 2.16 Indeed, as noted earlier, the CMA recognises in paragraph 9.107 of its Provisional Findings that MWR exerts a limited constraint. For these reasons, EMR respectfully submits that any loss of competition with respect to London non-shredder feed that could conceivably arise as a result of the Merger cannot properly be considered, on the balance of probabilities and on the basis of available objective evidence, to be "substantial".

Competitors dismissed as "ineffective" are as strong or stronger competitors to EMR as MWR

- 2.17 The CMA provisionally concludes that, alongside MWR, there is only one effective competitor to EMR in London (S Norton).
- 2.18 The CMA argues that the constraint from MWR is based on it having the **site locations, processing capabilities, and ability to provide a route to market**, and conclude that it is "*one of the very few competitors in London [with the] characteristics required to compete with EMR in London*"¹⁴. If this premise is accepted (notwithstanding that the CMA also appears to conclude that MWR provides only a limited constraint in London), it is clear from the evidence that there are a number of other competitors who have at least the same characteristics as MWR and therefore must therefore be considered as equally effective or a more effective competitor than MWR. However, in reaching its provisional conclusions, these competitors are characterised as weak and ineffective.
- 2.19 Taking each attribute in turn:
- **Routes to market:**

¹³ PFs: 9.68.

¹⁴ PFs: 9.31.

2.20 Not a single competitor is reliant on MWR for onward sales. Norton, Benfleet, Sims, LKM, BFA, Scrap Co and Remet make [%] sales to MWR while TWM makes [%]% of its sales to MWR ([%] has also noted to the CMA that it [%]).¹⁵

2.21 While five competitors make sales to EMR:

2.21.1 This is irrelevant to the assessment of the Merger as the Merger does not change anything about these supply arrangements. These competitors made sales to EMR before the Merger and can continue to do so after the Merger. There is no vertical assessment in the Provisional Findings associated with a changed incentive to foreclose as a result of the Merger.

2.21.2 Every single competitor that makes sales to EMR is [%] than MWR is currently. MWR sells [%]% of its output to EMR in London, while Norton, [%], BFA, Scrap Co, Remet all [%], LKM ([%]%), TWM ([%]%), and Nationwide ([%]%) have very limited if not negligible sales to EMR. While Benfleet makes [%]% of its sales to EMR, this is still [%] than MWR currently (and Benfleet makes [%] to MWR)¹⁶.

2.21.3 The CMA’s analysis also takes no account of traders and the options they provide as a route to market for smaller recyclers.

2.22 It cannot conceivably be the case, therefore, that MWR is a more important route to market in London than other competitors, that MWR’s route to market makes is a stronger competitor to EMR than other competitors, or that competitors rely on MWR as a route to market. The evidence does not support this conclusion.

- **Processing capabilities:**

2.23 The CMA states that MWR’s processing capabilities mean it is one of the very few competitors in London with the characteristics required to compete. However, this is factually incorrect.

2.24 Seven competitors have processing capabilities in London broadly equivalent to or greater than MWR. [%], [%], [%], [%], [%] and [%] all have *more* shear equipment than MWR, whilst [%] has a single shear similar to MWR. All seven competitors also have at least one baler except [%] and [%]¹⁷. The provisional conclusion that MWR is “one of a few” competitors in London with the processing capabilities required to compete is simply not substantiated by this evidence.

- **Site locations:**

2.25 Compared to competitors, MWR is not located particularly close to any of EMR’s sites. Excluding the Willesden shredder site (which is in a separate frame of reference for the purchase of shredder feed in the South East), MWR Edmonton is 11.4 km from the closest EMR site at Canning Town while Neasden is 8.7 km from EMR Brentford. In comparison, Benfleet and LKM metals, both dismissed as competitors, are located closer to EMR sites than MWR, while there are seven competitors who are within 15 km of an EMR site and within the catchment areas of EMR and MWR competing sites¹⁸. See Table 1 in Annex 1.

¹⁵ PFs: 9.65.

¹⁶ Analysis of data in Table 9.5 of PFs

¹⁷ Details of this equipment and the estimated maximum tonnes per hour that can be processed has been provided to the CMA previously – Annex 10 to the Response to the Annotated Issues Statement.

¹⁸ Furthermore, the catchment area around any site is 50 km meaning that a significant proportion of suppliers are willing to (and do) travel from significant distances away from a given site (hence the size of the catchment area). The theory of harm cannot conceivably relate specifically to price reductions at Edmonton when the catchment (and market) is significantly wider (i.e. such a candidate market would fail the hypothetical monopolist because there would be sufficient switching away to other sites across the catchment; indeed the catchment area will be smaller than the relevant geographic market).

2.26 Turning to particular competitors who are characterised by the CMA as not exerting a strong constraint:

[REDACTED]

2.27 The CMA dismisses [REDACTED] as an effective competitor “at the moment” on the basis of its small volumes, site locations and [REDACTED] submissions that [REDACTED].

2.28 However, the CMA’s rationale for reaching this provisional conclusion is not clear as there is objective evidence that demonstrates, to the contrary, that [REDACTED] is actively competing in the London area now and is regarded by suppliers and metal recyclers as a strong competitor:

2.28.1 Seven suppliers considered it to be a “strong competitor” in London.

2.28.2 Between [REDACTED]% and [REDACTED]% of suppliers named specific [REDACTED] sites as “viable alternatives”.

2.28.3 Six recyclers also considered it a strong competitor.

2.28.4 The survey showed that [REDACTED], significantly greater than MWR. These are self-identified marginal suppliers to EMR that have told the CMA they could and would switch to [REDACTED] post-Merger.

2.28.5 The evidence the CMA presents (see PFs: 9.84) shows that [REDACTED] is purchasing significant volumes from metal recyclers in the London region. This is consistent with EMR’s experience that [REDACTED] is purchasing significant volumes of waste scrap metal in the London region¹⁹ and is contrary to statements by [REDACTED] that it is not active in the London area and that that a very low proportion of scrap travels outside of London²⁰. [REDACTED].

2.29 Moreover, when assessing the evidence about the constraints imposed by Sims, the fact that Sims is the second largest metal recycler in the UK (and the Sims group is the world’s leading metal and electronic waste recycler) with significant turnover (£[REDACTED] million per year) and handling significant volumes of waste scrap metal year, is highly relevant and probative.

2.30 EMR recognises that the CMA has a difficult task in assessing conflicting views. EMR would urge the CMA to assess such conflicting views, particularly at Phase 2, by relying on available objective evidence. In particular, in relation to the constraints exerted by Sims, EMR strongly believes that the objective evidence outlined above in paragraphs 2.26 and 2.27 supports its position (and the practical reality) that Sims is a strong competitor to EMR now (and a stronger competitor than MWR).

Benfleet

2.31 The CMA has dismissed Benfleet as an effective competitor on the basis of its small current size and its reliance on sales to the Parties. This provisional finding is, however, flawed in a number of important respects, with the evidence providing clear and compelling reasons why Benfleet exerts at least an equivalent constraint to MWR:

2.31.1 In 2017 Benfleet had purchase volumes of [REDACTED] in London ([REDACTED]% of the purchase volumes of MWR in 2017²¹). The evidence available to the CMA demonstrates that Benfleet is not reliant *to any extent* on MWR’s routes to market²². Benfleet

¹⁹ As stated by EMR at the Response Hearing on 15 June 2018 [REDACTED] (line 6, page 12 of EMR’s hearing transcript).

²⁰ PFs: 9.85. EMR notes in addition that all scrap metal travels outside London, as there are no end customers in London.

²¹ MWR’s 2017 purchase volumes in London were [REDACTED].

²² See Table 9.5 in the PFs.

exports [%] of its volumes directly itself, a larger proportion than MWR currently does in London ([%]). Indeed, Benfleet's total purchase volumes are close to [%] times larger than MWR's total 'unique' route to market (see above).

2.31.2 While Benfleet sells to EMR, it is [%] reliant on EMR ([%] of its total purchases) than MWR is currently ([%]). Moreover, the Merger has no effect on these sales. EMR's incentive to engage in a strategy of customer foreclosure does not change as a result of the Merger (and the CMA's Provisional Findings are not based on a theory of harm of vertical foreclosure). Benfleet also states that it has other routes to market currently using [%], [%] and [%].

2.31.3 Benfleet has a greater number of sites (three metal recycling sites) and a greater processing capability than MWR ([%] shears). It is located within very close proximity to EMR (only 2 km from Tilbury Dock) and is "*relatively well located to replace the competition lost from MWR Edmonton*".²³ The CMA notes that Benfleet was considered a strong or viable competitor by one competitor and one supplier, while it was considered the closest competitor to EMR by [%] suppliers in the CMA's survey and a further [%] considered it a viable alternative ([%]). The evidence indicates that suppliers would therefore switch to Benfleet and Benfleet has significant spare capacity to absorb those switching suppliers.

LKM

2.32 The CMA notes that LKM is "*unlikely to constrain EMR post-Merger*" due to its small current size and its distance from MWR Edmonton,²⁴ and more generally its sites in Kent are "*too far from the Parties' sites to materially constrain them*".²⁵

2.33 EMR respectfully submits that this conclusion is flawed, as the available evidence is either mischaracterised or not taken into account:

2.33.1 LKM purchases [%] MT in London. Moreover, LKM has more processing capability than MWR with [%] and [%]. EMR respectfully submits that LKM should not, properly, be characterised as "small";

2.33.2 LKM is located 2.8 km from EMR Rochester. This is closer to EMR than MWR and to conclude that LKM it is too far from the Parties' sites cannot be correct.

2.34 In addition:

2.34.1 the evidence demonstrates that LKM is not reliant on MWR as a 'route to market': it has its own short sea dock (at Chatham) and it [%] to MWR. It sells only [%] of its total purchases to EMR and LKM provides a route to market for other suppliers, accounting to approximately [%] of its purchases (presumably for export from its dock facilities);

2.34.2 LKM has stated to the CMA that it [%] and that it has spare capacity of [%] MT;

2.34.3 LKM expressly told the CMA that [%]. It provides examples of it competing with EMR.²⁶ The CMA's survey found that [%] of suppliers at EMR sites found LKM a viable alternative, a similar proportion as MWR. All of the evidence points in the same direction – that LKM competes strongly with EMR – and has been ignored by the CMA in reaching its conclusion on LKM.

²³ PFs: 9.80.

²⁴ PFs: 9.94.

²⁵ PFs: 9.54(b).

²⁶ PFs: 9.93-9.94.

- 2.35 LKM actually believes the Merger will lead to an [REDACTED], corroborating the findings of the CMA’s survey. [REDACTED].²⁷ For the avoidance of doubt, the fact EMR can [REDACTED] to suppliers is not relevant for the assessment of the loss of constraint from MWR (this would risk the CMA pursuing an ‘efficiency offense’).

Total Waste Management (TWM)

- 2.36 The CMA provisionally concludes that TWM is only “*likely to be a moderate constraint*” due to its small current size and its existing sales to the Parties. TWM purchases between [REDACTED] (table 9.3) and [REDACTED] (table 9.4) MT in London so its current size does not suggest it is a small competitor.²⁸
- 2.37 The CMA’s conclusion that TWM is reliant on the Parties is factually incorrect: while it sells [REDACTED]% its purchases to MWR and only [REDACTED]% to EMR, it [REDACTED], far more than it sells to EMR and MWR combined.²⁹ Furthermore, TWM itself does not appear to have indicated to the CMA itself that it is reliant on MWR (or EMR). On the contrary, it lists [REDACTED], in addition to its own [REDACTED]. The CMA fails to take account of the evidence from TWM that it has viable alternatives to conclude the opposite.
- 2.38 TWM is located only 15 km from the nearest EMR site (East Tilbury), almost as close as MWR Edmonton is to Canning Town. A supplier noted it as an alternative and the CMA’s survey indicates that [REDACTED] suppliers consider TWM the closest competitor to EMR, a similar amount as do MWR. TWM is estimated to have considerable spare capacity. As with LKM, TWM believes the Merger will actually [REDACTED].³⁰

Remet

- 2.39 The CMA has dismissed Remet as a competitor, stating that it handles “*much smaller volumes than the Parties in the region.*”³¹ This is factually incorrect. For the avoidance of doubt, the CMA has found an SLC in the purchase of ferrous ***and non-ferrous scrap*** in London.
- 2.40 MWR purchased in total [REDACTED] MT of non-ferrous waste scrap in London in 2017 ([REDACTED] at Edmonton and [REDACTED] at Neasden). [REDACTED] in 2017. Remet is over [REDACTED] times larger than MWR in non-ferrous waste scrap metal and is located within one kilometre of EMR’s Canning Town site, both of which are over 11 kilometres from the MWR Edmonton site. Remet makes [REDACTED] sales to MWR and [REDACTED] sales to EMR so presumably has its own routes to market.
- 2.41 The evidence indicates that Remet is a significantly stronger competitor to EMR in non-ferrous waste scrap metal than MWR. The provisional conclusion that there is a SLC in relation to purchases of non-ferrous scrap metal in the London region is therefore flawed.

Other competitors

- 2.42 Alongside these competitors, there are a number of smaller competitors that actively compete with the Parties. These include Nationwide, Scrap Co, Amptill and Southwark Metals. Relevant evidence relating to each of these are provided in Annex 2.

Suppliers indicate they would switch to competitors

²⁷ PFs: 9.38(b)

²⁸ PFs: 9.90 and 9.96. In paragraph 9.96, it is unclear whether the CMA believes its purchase volumes of [REDACTED] point to it being a moderate constraint or point against it being a constraint.

²⁹ PFs: 9.65(a)

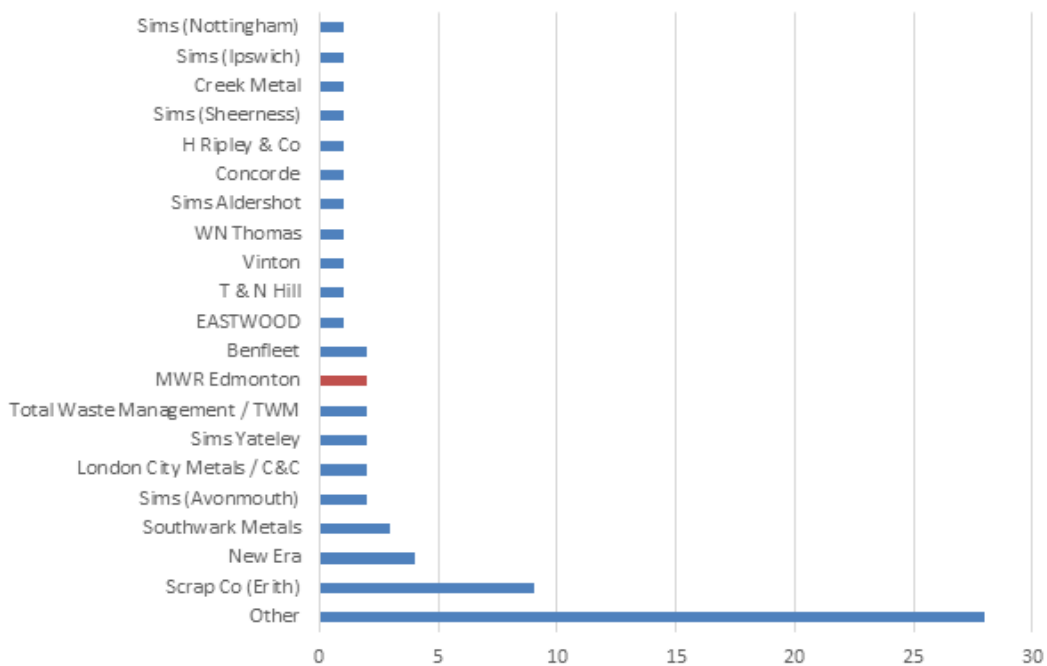
³⁰ PFs: 9.38(c).

³¹ PFs: 9.57.

- 2.43 Through the CMA’s third party enquiries and the CMA’s survey, suppliers indicate there would be significant switching to competitors. This has to be considered against the minimal expected switching that would occur to MWR.
- 2.44 For example, Norton, considered an effective competitor by the CMA, was noted as a strong competitor by [redacted] suppliers and [redacted] recyclers. Similarly, [redacted] was considered a strong competitor by seven suppliers and [redacted] recyclers, and was identified as the closest competitor to EMR in London by [redacted] suppliers across [redacted] sites. Benfleet Scrap was considered a strong competitor or viable alternative by two respondents, and was identified as the closest competitor to EMR in London by two suppliers ([redacted]). The CMA does not appear to have given this evidence due and proper consideration. Further detail is provided in Figure 1 below.

[redacted]

[redacted]



Source: CRA analysis using CMA survey data – file “SPSS_coded_v2_180418.csv”

- 2.45 Overall, suppliers have indicated to the CMA there would be significant switching in London, far exceeding the switching that would occur to MWR. These are marginal suppliers that would discipline EMR post-Merger. The CMA has almost entirely disregarded this evidence.

Competitors have significant and sufficient spare capacity to absorb this switching

- 2.46 The CMA accepts there is spare capacity among the main competitors:

“... there may be spare capacity in excess of 170,000 tonnes across S. Norton, [redacted], and LKM... while the Parties estimates for Benfleet, Total Waste Management, BFA and Scrap Co would mean an additional 107,000 tonnes of spare capacity”³²

32 PFs: 9.61

- 2.47 Indeed, [X] indicated no capacity constraints, whilst S Norton, [X] and LKM indicated significant spare capacity. Estimates of EMR provided to the CMA indicate significant spare capacity for other suppliers as well.
- 2.48 The CMA goes on to note that:
- "the object [is] to determine whether relevant competitors do in fact have a material level of spare capacity. Our assessment of each competitor in detail, below, seeks to assess this evidence on spare capacity in combination with other evidence"*³³
- 2.49 However, the CMA takes no account of the spare capacity of competitors as evidence of the constraint they exert in its detailed assessment. Between paragraphs 9.72 and 9.95, in its assessment of seven competitors, spare capacity is mentioned only once. The analysis at paragraph 9.59 is not taken into account in assessing the (absence of) constraint from each competitor and the CMA fails to explain why, if a competitor has significant spare capacity, it would not act as a competitive constraint on EMR. In almost every instance the CMA erroneously focuses on current production volumes instead of analysing the extent to which competitors could absorb switching volumes.
- 2.50 The CMA notes that significant spare capacity may be in the "wrong place"³⁴. The CMA explains this to mean "at relatively distant locations from the Parties' sites", although EMR considers that the only reasonable interpretation of "wrong place" means outside the London region catchment area³⁵. Adopting this approach, EMR notes that there is significant spare capacity (approximately 277,000 MT) within the catchment areas of the Parties as described by the CMA at Table 9.4. On the basis, it cannot conceivably be the case that spare capacity is in the "wrong place" and should therefore be discounted from the CMA's analysis.
- 2.51 Moreover, the CMA does not properly consider how much spare capacity may be enough to constrain EMR post-Merger:
- "While it is instructive to compare these to the [X] tonnes that MWR purchased at its Edmonton and Neasden sites, it is not possible to come to a definitive conclusion on how much spare capacity is enough to constrain EMR post-Merger."* ³⁶
- 2.52 The impact of the Merger is driven by the purchases that would have been diverted to MWR pre-Merger (at Edmonton and Neasden) but are internalised post-Merger. The maximum that can be internalised as a result of the Merger is therefore determined by the level of MWR's spare capacity (at Edmonton and Neasden) pre-Merger. This is the relevant capacity against which competitors' spare capacity should be measured. The spare capacity of competitors far exceeds the spare capacity of MWR in London and the *total production* of MWR in London (at Edmonton and Neasden). The theory of harm relates to the loss of MWR as a competitive constraint on EMR. Even if the CMA were concerned with the loss of constraint from EMR on MWR, the CMA's analysis should properly assess the extent to which a constraint from MWR is lost (the volumes that could switch from MWR to EMR) and whether that loss is "substantial". In short, under any scenario, EMR strongly submits that there is significant and sufficient spare capacity and that the CMA's provisional conclusions fail to give due and proper weight to this evidence.
- 2.53 In summary, whilst the CMA acknowledges its existence, the CMA fails to take account of the large amount of competitor spare capacity despite evidence showing suppliers would switch; and competitors would easily be able to accommodate diverted sales.

³³ PFs: 9.61

³⁴ PFs: 9.61.

³⁵ There can be no reasonable sense in which spare capacity is too far away or "in the wrong place" within the catchment: the 80% catchment area covers 80% of the suppliers to EMR and MWR at each site and the marginal suppliers do not have to be those located closest geographically to the Parties.

³⁶ PFs: 9.61. Note that MWR's purchases in London at its Edmonton and Neasden sites in 2017 was only [X] and not [X] as stated.

The survey evidence for London non-shred cannot be dismissed

- 2.54 The CMA undertook an extensive survey of suppliers of both EMR and MWR. The CMA completed 800 interviews, 345 in London (231 non-shred suppliers)³⁷. Of these, the vast majority of suppliers were unconcerned by impact of the Merger. In addition a further 1,716 refused to respond, of which 998 were sufficiently unconcerned to not have the time to respond. The suppliers point to a wide range of competitors, many of which are a stronger constraint to EMR than MWR.
- 2.55 The CMA notes that it takes account of the survey in assessing competition for small suppliers yet this evidence is not given due weight in the CMA's provisional conclusions. This is the case, notwithstanding that:
- 2.55.1 the vast majority of the Parties' suppliers in the London region are small suppliers;
- 2.55.2 the vast majority of respondents to the survey are either pro-Merger or neutral to the Merger; and
- 2.55.3 respondents point to a wide range of competing alternatives many of which are explicitly identified by suppliers as equally close or closer competitors to EMR than MWR.
- 2.56 The CMA does not explain or seek to substantiate how EMR could feasibly identify and discriminate against a "small" supplier, which the survey shows overwhelmingly will be unaffected by the Merger, and a "large" supplier which the CMA seems to believe has far less alternatives³⁸; nor does the CMA identify what constitutes a small supplier, or draw separate conclusions for small and large suppliers.
- 2.57 The CMA dismisses its survey results (presumably only in relation to large suppliers) on a number of grounds relating to the survey sample. However, these sampling issues are far less valid, if at all, in assessing the weight that can be attached to the survey results in London (i.e. not in tendered contracts). EMR examines each of the four criticisms the CMA uses to dismiss its own survey in Annex 3 below and, taking account of these, strongly believes that the CMA should attach significant weight to the survey results for London. The survey results are corroborated by other evidence, including suppliers' views of competitors and of the impact of the merger obtained from direct third party enquiries, the significant availability of spare capacity and the minimal impact of the Edmonton outage on EMR volumes. These are further reasons supporting the probative value of the survey results in London.

Efficiencies are inherent in any SLC finding and competition downstream means they are passed on to UK customers³⁹

- 2.58 If the CMA finds an SLC in the purchase of non-shredder scrap in London, it is also concluding (unquestionably from an economic perspective) that the Merger will result in lower input costs. This is a clear efficiency which has been stated several times to the CMA but which does not appear to have been taken into account in the assessment of competition. Scrap metal is an input into EMR's recycling process and so a reduction in the purchase price paid by EMR is a purchasing cost efficiency. Indeed, many third party competitors corroborate the likely pro-competitive aspects of the transaction. This is explained further in Annex 4.

³⁷ Around [] of suppliers to MWR's Hitchin sites are also suppliers to MWR Edmonton and MWR Neasden. On a volume basis, [] of volume-weighted suppliers at Hitchin also supplied to Edmonton and Neasden. As a result, the survey results for Hitchin suppliers are included in the survey analysis for non-shredder volumes.

³⁸ Note that this is not supported by the survey. The results for large suppliers (over 10MT and £100K) show that [] is the closest competitor to EMR ([] suppliers switching) with a range of other competitors also highlighted, including [], [] and [].

³⁹ Note that this applies equally to the purchasing of shredder feed for which there is also downstream competition.

New evidence that barriers to entry and expansion are not high

- 2.59 The CMA provisionally concludes that barriers to entry in London for a site or sites which would provide an equivalent constraint to the independent processing and exporting capabilities and capacity that would be lost by the acquisition of MWR's London sites and assets.
- 2.60 EMR respectfully disagrees with this statement in a number of key respects. EMR's submissions on the mischaracterisation of EMR's exporting capabilities and the CMA's assessment of capacity are set out above and not repeated here.
- 2.61 With respect to barriers to entry to establishing a site with processing capabilities, EMR reiterates its position that these are not high. In support of this, and in addition to evidence previously provided to the CMA, EMR notes that Southwark Metals has recently opened a new site in London and states on its website that its aim is to have "3 sites strategically placed around south London within the next 18 months".⁴⁰ Southwark Metals actively competes with the Parties and Annex 2 contains further evidence.
- 2.62 EMR would urge the CMA to take this new evidence into account in its assessment. Not only does this demonstrate that sites can be accessed in the London region, but EMR respectfully submits that Southwark Metals should also be considered as an effective competitor in the London area and therefore relevant and probative to the CMA's conclusions about the level of rivalry that would remain post-Merger.

3. **NE TENDERED**

- 3.1 In purchasing through tendered contracts in the North East, the CMA has found that there is only one other effective competitor to EMR ([X]). The CMA notes some constraint from [X] (who does not have a site in the region) and a weak constraint from [X], [X] and [X].
- 3.2 Below EMR sets out the extent of the constraint from MWR and then assesses competitors relative to that constraint.

The competitive constraint from MWR on EMR is very limited

- 3.3 EMR respectfully disagrees with the provisional conclusion that the loss of MWR would amount to the loss of an important competitive constraint on EMR⁴¹.
- 3.4 MWR has a single site at Seaham with only a baler and a capacity of [X] MT pa. MWR has bid for only [X] tendered contracts since 2015. Almost [X]% of its volumes are servicing a single contract, [X], for which it did not compete against EMR.
- 3.5 In [X] of the [X] contracts MWR was the incumbent and went on to win the contract renewal:
- 3.5.1 In [X] of these – and the largest in value by a significant margin – [X]. It competed against [X], [X], [X] and [X].
- 3.5.2 In [X], MWR faced competition from a large number of other suppliers alongside EMR, including [X], [X], [X] and [X].
- 3.5.3 In [X], MWR and EMR faced competition from only [X] but the contract was of such a small value, [X] and for [X] MT, that a range of other competitors could have entered and won.

⁴⁰ <http://www.southwarkmetals.co.uk/news>

⁴¹ PFs paragraph 10.82

- 3.6 In two of the [X] contracts, [X] and EMR were incumbents and went on to win the contract renewal.
- 3.7 In two of the [X] contracts, [X] won a contract from EMR and EMR won a contract from [X] suggesting the strongest constraint to EMR is not from MWR but from [X]. Alongside MWR, EMR faced competition from a number of other recyclers.
- 3.8 Properly interpreted, the evidence indicates that MWR and EMR are not competing closely at all. Of the [X] contracts only four are specific to the North East and on two of these [X], suggesting that a wider range of supplies from outside the region could have bid for the other four.
- 3.9 The CMA appears to rely on the frequency with which EMR and MWR bid against each other, or the frequency with which they won. This is not reflective of the competitive constraint that MWR exerts on EMR. The fact that MWR has won [X] contracts, the third largest behind EMR and Sims, is irrelevant unless the evidence shows that EMR and MWR were closest competitors for those tenders. In fact, they did not even bid against each other on [X]. [X]. See Table 2 in Annex 1.
- 3.10 By contract value, the three largest contracts are [X], [X] and [X], together accounting for close to 80% of total tendered contracts in the region over the period:
- 3.10.1 for [X], the Parties did not compete;
- 3.10.2 for [X], there were a large number of other bidders, including the option for Nissan to 'self-supply' via [X] so MWR did not represent a material constraint to EMR for the contract; and
- 3.10.3 on the [X] contract, [X] won this contract from [X] so was EMR's strongest competitor.
- 3.11 The CMA has also focused its assessment in a market for tendered contracts on the share of current volumes of the Parties. However, almost [X]% of MWR's volumes result from a single tender for which it did not compete with EMR.
- 3.12 The CMA's conclusion that MWR represents a material competitive constraint to EMR is not supported by this evidence.

Competitors in North East are just as strong if not stronger than MWR

- 3.13 Similar to its approach to purchases of ferrous and non-ferrous scrap metal (excluding shredder feed) in the London region, the CMA dismisses all competitors except [X] as weak or a weaker constraint than EMR. However, this assessment must be relative to the constraint exerted by MWR on EMR.
- 3.14 The CMA dismisses Ward Bros as a weak constraint. This provisional conclusion, however, is simply not borne out by the evidence. Ward Bros:
- 3.14.1 has three sites in the North East compared to MWR's single site and [X];
- 3.14.2 has [X] and [X] compared to a single baler of MWR;
- 3.14.3 is located closer to EMR's site than MWR's site;
- 3.14.4 purchases over [X] times as much volume (total) as MWR with [X]% of its business coming from factories;
- 3.14.5 has won [X] bidding against EMR;
- 3.14.6 has access to a dock;

- 3.14.7 has been named by suppliers ([REDACTED] and [REDACTED], both supplied by MWR and specific to the North East) and customers ([REDACTED], [REDACTED]); and
- 3.14.8 believes it can win additional business from EMR post-Merger and told the CMA [REDACTED].
- 3.15 Put simply, there is a disconnect between the evidence and CMA's provisional conclusions that Ward Bros is a weak constraint. EMR respectfully submits that proper interpretation of the evidence clearly demonstrates that Ward Bros is a strong competitor in the North East and a stronger competitor to EMR than MWR.
- 3.16 In addition, the CMA has dismissed other suppliers active in the region:
- 3.16.1 The CMA dismiss [REDACTED] as at best a weak constraint. [REDACTED], which is present in the North East with [REDACTED] sites, stated to the CMA that it competes for these contracts and has shown it is able to compete against the Parties and win. [REDACTED] has bid for contracts in the North East and EMR would have a strong expectation that [REDACTED] would be bidding for contracts in future and, given it has won elsewhere, it is reasonable to assume that would have a strong prospect of winning in this region.
- 3.16.2 The CMA also dismiss [REDACTED] as at best a weak constraint. [REDACTED] is double the size of MWR in the North East with four sites. It is shown it is willing to bid for large contracts, including for [REDACTED], and has been identified as a competitor by large suppliers.
- 3.16.3 The larger contracts also face significantly greater competition from bidders outside the region, including a strong constraint from [REDACTED] (which competes against and wins against the Parties), [REDACTED], [REDACTED] and through potential sponsored entry such as from [REDACTED] and others replicating what MWR did.

4. **WM TENDERED**

- 4.1 The CMA argues that *"other constraints in the area appear to be weak – rivals have bid very infrequently, and have won only one or no contracts against the Parties"*.
- 4.2 This assumes that the constraint from MWR is strong. However, there is only very limited evidence to support this provisional conclusion. The CMA's tender analysis again focuses on the frequency with which EMR and MWR bid against each other and the overall number of contracts won by each, which is not probative on the competitive constraint that each exerts on the other. As with the North East, [REDACTED]. They bid against each other in only [REDACTED]% of contracts. While EMR may have won [REDACTED] and MWR [REDACTED], this does not mean either represents a strong and critical competitive constraint to the other. This is particularly the case where suppliers have awarded the contract to the incumbent.
- 4.3 The CMA provisionally concludes that the only effective competitor in the West Midlands is [REDACTED].⁴² In contrast to MWR, EMR has won business from [REDACTED], [REDACTED], and [REDACTED] amongst others. In all tenders, there was a range of other suppliers also bidding which EMR would expect to face post-Merger. MWR has lost a tendered contract [REDACTED].
- 4.4 The CMA acknowledges that [REDACTED], [REDACTED], and [REDACTED] have bid against the Parties and won. In addition to the tenders considered, EMR also lost an additional contract (where it was the incumbent) to [REDACTED], also bidding against [REDACTED], to purchase from Greif UK, a steel fabricator in March 2016.⁴³ [REDACTED] ([REDACTED], [REDACTED], [REDACTED]) and [REDACTED] ([REDACTED], [REDACTED]) have also been named by suppliers as competitors.
- 4.5 In addition to this:

⁴² Needless to say, [REDACTED] states that it [REDACTED].

⁴³ Greif UK is based in Burton-on-Trent, technically in the East Midlands but is within 50 km of Birmingham.

- 4.5.1 [X] has won in competition with [X] and [X] ([X] – April 2015), has bid for [X] contracts and been named by a (redacted) supplier.
- 4.5.2 [X] has won in competition with [X] and [X] ([X] – April 2016, [X] – April 2017), has bid for [X] contracts and been mentioned by [X] and [X].
- 4.5.3 [X] won in competition with [X] and [X] ([X] – April 2016, [X] - April 2017).
- 4.6 Both [X] large contracts are located in the West Midlands. The CMA’s survey identifies those suppliers supplying under contract. In the West Midlands, the CMA’s survey indicates that suppliers would switch to [X] and [X] as second preference to EMR ([X] to MWR).
- 4.7 For the CMA to reach a conclusion that there is only one effective competitor when suppliers have together mentioned [X] other competitors, together, over [X] as often as MWR is mentioned, does not suggest there are no effective competitors.
- 4.8 As with the North East, large suppliers appear willing to sponsor entry. For example, [X], [X], and [X].

5. **SALES OF NPS TO UK CUSTOMERS**

- 5.1 EMR respectfully and fundamentally disagrees with the CMA’s definition of the market for NPS, its interpretation of the dynamics of that market, and the provisional conclusions it has reached in respect of the evidence provided to it during the Phase 1 and Phase 2 investigation. EMR respectfully submits that the CMA has misinterpreted the market dynamics and the provisional conclusions that the CMA draws from the evidence do not, in EMR’s view, match practical reality. In particular, the Provisional Findings do not give sufficient weight to the evidence and previous representations that the market for NPS is global in nature⁴⁴, and, accordingly, that EMR and MWR are constrained by prices in the global market, as are other UK sellers of NPS.

The supply of NPS is global

- 5.2 The CMA believes the geographic scope for the sale of NPS is national but with regional issues associated with the proximity of suppliers’ sites. These conclusion are drawn entirely from the views of customers who highlight their logistical requirements.⁴⁵ This is considerably narrower than previous decisions in the sector which has pointed to the market being at least EEA wide or international.⁴⁶
- 5.3 The CMA acknowledges that approximately 70%+ of NPS is exported. These export volumes cannot be excluded from the market for sales to UK customers. UK NPS customers compete to purchase NPS in a global input market. If a hypothetical monopolist in the supply of NPS to UK customers were to impose a SSNIP, it is without question that NPS currently diverted for export would switch to supplying UK customers. [X] confirms this in principle⁴⁷ and EMR notes that there are UK customers will always have an advantage compared to buyers in the export markets due to the simplicity of supplying a UK customer⁴⁸. This is true for metal recyclers of all sizes⁴⁹.

⁴⁴ Response to Annotated Issues Statement, para 6.5, Response to Phase 1 Decision, para 5.4 & Response to Phase 1 Issues Paper, para 4.78.1.

⁴⁵ PFs: 113 at 6.117 and 6.123.

⁴⁶ See Sims/Dunn, paragraph 35: *“The overwhelming evidence from the parties and third parties is therefore that the market for trade in scrap metal is international in scope.”* See also Case Comp/M.4495, ALFA Acciai/Cronimet/Remondis/TSR Group, Article 6(1)(b), February 2007, paragraph 25: *“The large majority of respondents believe [the market] is EEA-wide if not worldwide.. in line with earlier Commission practice.”*

⁴⁷ PFs: paragraph 11.43

⁴⁸ The export market is subject to additional transport and infrastructure costs.

⁴⁹ Clear evidence of this is contained in the videos previously supplied to the CMA on 1 May 2018.

- 5.4 Regardless of which supplier is making the sale, they will seek the best price and this will commonly be found amongst foreign customers. [X], [X] and [X] sell the majority of NPS (and [X] all of their NPS) to foreign buyers is because they obtain a better price through that channel. Clearly if those relative prices were to change, then supply would be diverted at the margin.

MWR is no stronger than five other competitors

- 5.5 MWR has broadly equivalent sales to [X], [X] and [X]. It is not clear from the evidence available, other than the stated views of customers which may not be sufficiently objective, why MWR would be a closer substitute or stronger competitor to EMR than any of these competitors. Both [X] and [X] are also just as strong or stronger than MWR; for example, customers commented that “EMR, Sims and Norton are the larger suppliers.”. Some customers have pointed to an even wider range of possible suppliers that they consider viable alternatives or use in negotiations. Similarly, the Provisional Findings do not contain an explanation, based on objective evidence, why other customers who feel their options are limited could also not use these alternatives. Along with [X] (named by a complainant and two non-complainants) and [X] (named by two complainants), these include, [X], [X], [X], [X]. One customer noted 15 possible suppliers.

Market dynamics have been misinterpreted

- 5.6 First, the CMA places significant weight on EMR’s strength in the supply of NPS, noting in particular its access to export facilities including UK docks. To be clear, EMR’s position is that this is irrelevant for assessing EMR’s competitive strength in supply to UK customers. The CMA suggests that because EMR has good access to UK and foreign markets this makes it an attractive route to market for other recyclers. It is true that EMR’s export infrastructure make it an effective and attractive route to *foreign* markets for other recyclers; EMR enables smaller recyclers to access global markets, and thus the export price. However, these recyclers are able to and do supply to UK customers directly. EMR’s export infrastructure provides it with no particular strength in supplying to UK customers.
- 5.7 Second, as noted earlier, MWR should properly be characterised as being “vertically integrated” to a limited extent. MWR rarely uses its short sea dock at Pinn’s Wharf;
- 5.8 Third, it is incorrect to draw the conclusion that there is a cost to importing NPS. The costs of exporting are the same as the cost of importing. There is simply a price differential as was evidenced to the CMA during the Phase 1 process⁵⁰. In particular, in its Response to the Issues Paper, EMR provided an explanation of the close correlation between export prices and prices for UK sales. An increase or decrease in the export price will result in a broadly corresponding increase or decrease in the domestic price. As previously noted to the CMA, there is only a £5 per tonne difference in price for NPS (excluding transport costs) when comparing the cost in the UK as compared to various global export locations. The lower price which a UK buyer pays as opposed to a buyer in the export market is simply a reflection of the fact that there is oversupply of NPS in the UK but not overseas. Accordingly, to say that there is a £45 premium on imported material directly implies that they are buying at a discount to the global market.
- 5.9 Fourth, paragraphs 6.106 - 6.108 of the Provisional Findings notes that imports of scrap metal are “negligible”; although this is true, this is for the reason that there is oversupply in the UK (acknowledged by the UK) which means that importing scrap is unnecessary and inefficient.
- 5.10 Fifth, EMR therefore respectfully disagrees with the provisional conclusion that customers do not exert countervailing power. It is simply not the case that customers of NPS are unable to defend their interests. Large industrial customers are sophisticated with well-developed procurement, logistics and supply chain functions. Where a customer is also a supplier, it may choose to switch to self-supply and examples of this were provided in the

⁵⁰ Response to the Issues Paper, para 5.68 – 5.70, Response to Phase 1 S.109 Notice (p.6) & Response to Phase 1 RFI 1 Part 2 dated 10 October 2017, para 4.

Response to the Annotated Issues Statement⁵¹. Customers that are not suppliers can switch to purchasing directly from suppliers given that there is generally no requirement for NPS to be processed, meaning that it is simply a question of logistics between customer and supplier. The [REDACTED] example referred to at the Response Hearing is further evidence of this. The responses from customers on this point are simply not credible: "*Customers.. do not feel that they have negotiating strength with one saying that 'downward pressure... is not feasible as the quantity of product available is in demand with several end users.'*" This does not reflect reality where there is significant excess capacity, not excess demand.

- 5.11 Finally, the evidence does not support the provisional conclusion that barriers to entry are high and EMR fundamentally disagrees with this finding. EMR provided the CMA with a number of videos by way of email on 1 May 2018 which demonstrate the ease with which NPS can be handled, demonstrating that any metal recycler can (and many do) service NPS suppliers. In particular, these videos evidence the process for the handling of NPS and show the ease with which NPS suppliers can be serviced by any metal recycler minimal equipment (a vehicle and skips / bins) as often no processing capability is required. Furthermore, the ease with which MWR opened new depots to service contracts (e.g. [REDACTED]; [REDACTED]) demonstrates that barriers to entry are low and EMR's experience is that suitable sites are available in the West Midlands or the North East.

⁵¹ For example, [REDACTED], [REDACTED] and [REDACTED] have all dealt directly with [REDACTED] cutting metal recyclers; [REDACTED] also competed against EMR to purchase from [REDACTED] and EMR believe they have competed head-to-head with [REDACTED] (a supplier, customer and now strong competitor) [REDACTED]

Annex 1
SUPPORTING DATA

Table 1
Analysis of competitor site locations

| Competitor | Sites | Total Surface (acres) | Equipment | Estimated spare capacity (MT) | Access to dock | Closest EMR site |
|----------------|------------|-----------------------|------------|-------------------------------|-------------------------------|----------------------|
| MWR | 2 | [REDACTED] | [REDACTED] | - | Pinn's Wharf | 3.2 km (Willesden) |
| S Norton | 1 | [REDACTED] | [REDACTED] | [REDACTED] ⁵² | Barking, Southampton, Ipswich | 7.1 km (Canning T.) |
| Benfleet Scrap | 3 | [REDACTED] | [REDACTED] | [REDACTED] ⁵³ | None | 2 km (Tilbury Dock) |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] | |
| TWM | 2 | 3.1 | [REDACTED] | 44,795 | None | 15 km (East Tilbury) |
| LKM Metals | 2 | 4.5 | [REDACTED] | 33,143 | Chatham | 2.8 km (Rochester) |
| BFA | 1 | 3.8 | [REDACTED] | [REDACTED] ⁵⁴ | unknown | 13.8 km (Brentford) |
| Scrap Co | 2 | tbc | [REDACTED] | [REDACTED] ⁵⁵ | tbc | tbc |

Source: Table 9.3 of Provisional Findings and analysis conducted by CRA

⁵² Based on [REDACTED] with overall capacity taking account of assumed utilisation similar to EMR of [REDACTED]

⁵³ Benfleet has [REDACTED] with overall processing capacity taking account of assumed utilisation similar to EMR of [REDACTED] MT.

⁵⁴ Based on [REDACTED] with overall processing capacity taking account of assumed utilisation similar to EMR of 125,596 MT.

⁵⁵ Based on [REDACTED] shears: [REDACTED] with overall processing capacity taking account of assumed utilisation similar to EMR of 171,506 MT.

Table 2

MWR tenders in the North East

| Award date | Supplier | Incumbent | Bidders | Winner | Annual Value |
|-------------------|-----------------|------------------|----------------|---------------|---------------------|
| [X] | [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] | [X] |
| [X] | [X] | [X] | [X] | [X] | - |

Source: CRA analysis of Parties' bidding data

ANNEX 2

Additional competitors for the purchasing of non-shred waste scrap metal in the London region

Nationwide: Nationwide has eight sites in the East of England with catchments that will overlap with those of the Parties, including one site at Hitchin. It has dock facilities. The CMA's survey pointed to Nationwide [X] to MWR in London with [X] MWR suppliers indicating they would switch to Nationwide before any other alternative, significantly more suppliers than indicated they would switch to MWR.

Scrap Co.: Scrap Co. has two sites, [X]. One of these sites is only 23 km from MWR Edmonton. The CMA's survey pointed to Scrap Co being [X] to EMR in London with [X] suppliers indicating they would switch to Scrap Co before any other alternative.

Amphill: Despite being outside the London region, the CMA's survey pointed to Amphill being the [X] to MWR in London with [X] suppliers indicating they would switch to Amphill before any other alternative.

Southwark Metals: Estimated to have purchase volumes of at least 100,000 MT (as EMR alone purchases around [X] MT per week from them and they also sell to other merchants). Southwark [X]. EMR understand they are particularly strong in purchasing from demolition contracts, they have 5-6 vehicles and their website indicates they recently invested £750,000 upgrading their fleet. Southwark are only 14 km from Edmonton and were listed by a supplier, [X], as a competitor and the CMA's survey pointed to Southwark being [X] to EMR in London with [X] suppliers indicating they would switch to Southwark before any other alternative, more than those that said they would switch to MWR.

ANNEX 3

The survey evidence for London non-shred cannot be dismissed

1. The CMA dismisses its survey results (presumably only in relation to large suppliers) on four grounds. First, the sampling frame included only those suppliers for which the Parties were able to provide contact details. The CMA then asserts that, as a result, this is likely to have resulted in a sampling frame that is unrepresentative.⁵⁶ The CMA provides no evidence to support that the survey sampling frame is unrepresentative. In fact, the data suggests the sample is broadly representative⁵⁷. Importantly, the CMA dismisses key results in the survey without considering if the survey would systematically have biased these results⁵⁸⁵⁹.
2. Second, and related to this, the CMA notes that a high proportion of survey respondents supply only small amounts of metal.⁶⁰ The CMA implies that this suggests the survey is unrepresentative. However, this accurately reflects the population of suppliers of both EMR and MWR, and this is exactly what one would expect from a sample drawn from such a population. The majority of both EMR and MWR suppliers supply only small amounts of metal.
3. Third, the CMA notes that suppliers are heterogeneous, which makes it harder to draw statistical conclusions across the supplier population. EMR acknowledges there may be concerns over the extent to which inferences can be drawn from the entire survey sample in relation to *tendered contracts*.⁶¹ This does not apply to the purchase of non-shred in London. There is no evidence from the survey – and the CMA has presented no evidence from direct third party enquiries – that certain supplier groups would be systematically more or less affected than other groups. If the CMA has evidence that a certain type of supplier group is more or less affected in London non-shred such that the survey results are not valid for that particular supplier group, this evidence must be put to EMR so it has a fair chance to respond. In the absence of such evidence, there is no reason why the survey would not reflect the views of all suppliers and in particular capture the marginal suppliers that would discipline EMR post-Merger, regardless of how heterogeneous they might be.
4. Finally, the CMA notes that completed interviews at individual sites is small. The CMA has assessed the transaction in the purchase of ferrous and non-ferrous scrap across London. The catchment areas are 50 km around each site and the relevant geographic market will be wider than this. While the closeness of substitution for suppliers between sites located closer to each other may be greater, the CMA seems to ignore that an 80% catchment area covers 80% of the suppliers to EMR and MWR at each site. Those more affected by site proximity will be smaller suppliers, which the CMA's survey notes are unequivocally unconcerned and have highlighted a range of alternatives. Larger suppliers are able to travel (and get collected) further. In addition, the marginal suppliers that discipline EMR

⁵⁶ PFs: 7.35 (a).

⁵⁷ For example, most of MWR's suppliers in London ([REDACTED]) supply up to £10,000 worth of scrap. In the survey sample, [REDACTED]% of MWR's suppliers in London supply up to £10,000 worth of scrap. Similarly, [REDACTED]% of MWR's suppliers supply up to weekly, and [REDACTED]% supply several times a year. In the survey sample, the same percentage supply up to weekly as in the population ([REDACTED]%) and [REDACTED]% supply several times a year.

⁵⁸ For example, there is no evidence to suggest that the survey sample in non-shred in London systematically overestimates switching to competitors and systematically underestimates switching to MWR. The CMA simply assumes this is the case and dismisses the results.

⁵⁹ There is also not evidence, aside from tendered contracts, to suggest that the results for smaller suppliers are not illustrative of the alternatives available also for larger suppliers. Indeed, if anything larger suppliers are likely to be willing to travel further (and EMR collect from further) so have a wider set of viable competitors, particularly where there are no capacity constraints among the competitors that smaller suppliers have pointed to.

⁶⁰ PFs: 7.35(c).

⁶¹ Note that the survey identifies suppliers that supply under contracts and the results show that the vast majority of these suppliers ([REDACTED]%), when excluding don't knows, thought the merger would have a positive or neutral impact on them. Not a single contract supplier pointed to MWR as their second preference to EMR, yet a range of alternatives were highlighted, including [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

will commonly be at the edge of the catchment – EMR is not constrained only by those suppliers at the centre of the catchment area.

5. Importantly, the CMA knew the sample from which it drew from the population before the survey was undertaken. The CMA was aware of the predominance of smaller suppliers in the population prior to undertaking its survey.⁶² The CMA was also aware of the heterogeneity of suppliers prior to undertaking its survey. Despite this, the CMA went ahead with the survey, which would imply the CMA had an expectation that the results would be probative.

⁶² Indeed, the CMA's survey deliberately sought to make the sample less representative of the population by excluding from the sample suppliers that provided less than 10 metric tonnes and values below £100.

ANNEX 4

Efficiencies are inherent in any SLC finding and competition downstream means they are passed on to UK customers

1. These lower input costs will result in lower prices to end UK customers purchasing processed scrap. In particular, the extent to which these cost savings are passed on to UK customers will depend on two factors:
 - (i) whether the cost reductions are marginal costs reductions; and
 - (ii) the extent of competition downstream.
2. Where the efficiencies involve marginal cost reductions⁶³ and there is competition downstream, it would be expected that the efficiencies would be passed on to downstream customers.⁶⁴
3. In relation to the first criteria, this is without question, as the prices paid by EMR for input scrap are by definition its marginal costs (i.e. the cost of acquiring one more unit).
4. In relation to the second criteria, the CMA has explicitly stated in its Provisional Findings that the downstream supply of ferrous and non-ferrous scrap to UK customers is competitive. The CMA notes, in relation to non-NPS ferrous, that:

"There are many UK recyclers that currently sell to UK customers... with most [customers] telling us that they have multiple other recyclers from whom they can purchase non-NPS grades"
5. And, in relation to sale of ferrous, that:

"the market appears to be fragmented, with numerous other competitors... the suggestion that there is a lack of suppliers in the copper market appears to be unfounded."
6. The CMA must therefore have a strong presumption (i.e. significantly greater than a balance of probabilities) that in relation to non-shredder feed in London any SLC will result in efficiencies that will enhance rivalry downstream.
7. The CMA may believe that the efficiencies will not be passed through to customers in the circumstances in which the downstream price is affected by the export price. However, the assessment of efficiencies is in relation to UK customers.
8. The CMA's approach to efficiencies and to the theory of harm more generally contradicts the approach it took in assessing this sector in previous decisions relating to EMR's closest competitor, Sims. In the *Sims/Dunn* decision, the CMA outlined the criteria required for harm to arise and through which efficiencies occur:

*Generally, an increase in buyer power as a result of a Merger is not likely to give rise to unilateral effects. However, unilateral effects may arise from anticompetitive buyer power when (i) a merged firm has an incentive to reduce the amount it purchases so as to reduce the purchases price and (ii) also has sufficient market power over its customers so that, as it reduces the quantity sold to them in the market for the trade of scrap, it can increase the selling price there*⁶⁵

⁶³ *Merger Assessment Guidelines*, CMA, paragraph 5.7.9: "The Authorities are more likely to take cost savings into account where efficiencies reduce marginal (or short-run variable) costs as these tend to stimulate competition and are more likely to be passed on to customers in the form of lower prices."

⁶⁴ See, for example, *Tesco/Booker Phase 2 Report* CMA, Dec. 2017: "Where competition is effective, wholesalers or retailers are expected to pass on to customers a substantial portion of any better supply terms received."

⁶⁵ See *Sims/Dunn* (OFT, 20111), paragraph 51 ff. and *Merger Assessment Guidelines*, 5.4.20.

- 8.1 In this case, the second limb is not met: EMR does not have sufficient market power over its downstream customers. The CMA confirm this in the Provisional Findings. EMR cannot therefore reduce the quantity sold downstream and increase its output price. This logic applies to both shredder and non-shredder feed in London.⁶⁶ The CMA's theory of harm makes no sense from an economic perspective.

⁶⁶ Note also that EMR strongly believes that the first limb is not met either, for the reasons outlined above. In *Sims/Dunn*, the CMA notes that the first limb is also dependent on whether scrap merchants could sell to processors outside of their region (i.e. in areas where there is no SLC), which in this case is all of the areas contiguous to London (shredder and non-shredder). In this case, as in *Sims/Dunn*, a number of scrap merchants do sell to processors outside of their own regions. The CMA has this evidence in this case but has not taken it into account in its assessment.