

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

ME/6712/17

EMR RESPONSE TO THE CMA'S SUPPLEMENTARY PROVISIONAL FINDINGS

26 JULY 2018

1. **Introduction**
 - 1.1 This response sets out EMR's submissions on the supplementary provisional findings report relating to the London region published by the CMA on 18 July (the "**SPFs**"), as well as EMR's representations on the impact of the CMA's revised provisional findings on the appropriateness of the remedies proposed in the Remedies Notice (dated 1 June 2018) and Remedies Working paper (dated 29 June 2018).
 - 1.2 EMR notes that the SPFs excises certain data. In light of these excisions, it may be necessary for EMR to make further representations if further information from the SPFs is disclosed or if new information comes to light.
2. **Substance of SPFs**
 - 2.1 EMR welcomes the publication of the SPFs and agrees with the CMA's revised provisional finding that the transaction has not resulted nor can it be expected to result in a substantial lessening of competition (an "**SLC**") in the purchase of ferrous and non-ferrous metals (other than shredder feed) in the London region¹. EMR submits that the CMA's revised provisional finding is supported by a strong and substantial body of objective evidence and therefore this revised provisional finding should become final.
 - 2.2 In this regard, EMR is naturally pleased that, having considered additional evidence from the Parties and third parties, the CMA has reconsidered its position with respect to its estimates of the Parties' market shares, its view of the strength of the competitive constraint provided by other metal recyclers and its view of the impact of the merger on the route to market for smaller recyclers:
 - 2.2.1 EMR's view throughout this inquiry is that the Parties do not have combined market shares which raise *prima facie* competition concerns. EMR therefore welcomes the CMA's revised estimate of the Parties combined market share and notes that this has fallen by [~~3~~] percentage points to a combined market share of [~~3~~]%, with an increment of [~~3~~]%. EMR is pleased in particular that the CMA accepted EMR's position that volumes of shredder feed purchases should be excluded from the CMA's market share estimates and that the CMA obtained additional volume data from three metal recyclers.
 - 2.2.2 EMR agrees with the CMA's revised provisional conclusion that MWR is not a unique competitive constraint on EMR in the London area and is not especially strong or substantially more effective than other metal recyclers². This has been EMR's consistent submission and EMR is pleased to note that, in reaching this revised provisional conclusion:
 - 2.2.2.1 the CMA took account of data submitted on daily purchase volumes at a number of its sites in the London region which

¹ SPFs 1.193.

² SPFs 1.62.

supports EMR's view that there is limited competition between the Parties in the purchase of material for shearing³; and

2.2.2.2 the CMA acknowledged that much of the survey evidence and supplier views pointed towards little impact from the merger⁴.

2.2.3 EMR is pleased that the CMA has taken account of its submissions and the objective evidence available regarding the competitive constraints exerted by a number of competitors in the London region, as well as new evidence that has been received since publication of the CMA's Provisional Findings report on 1 June 2018 ("**PFs**"). In this regard, EMR agrees with the CMA's revised provisional conclusion that Sims, Benfleet, Total Waste Management and BFA Recycling are likely to impose a material constraint on EMR post-merger with respect to the purchase of ferrous waste scrap metal in the London region⁵, whilst The Remet Company is likely to provide effective competition in purchases of non-ferrous waste scrap metal.

2.2.4 EMR is pleased, in addition, that the SPFs take into account evidence indicating that there is spare capacity available to many of the metal recyclers operating in the London region⁶. EMR maintains its view that there is significant and substantial capacity in the metal recycling sector, including on the part of effective competitors in the London region. For example, EMR refers the CMA to two articles in which Sims is described as having 300,000 tonnes of capacity at its Sheerness site⁷, which provides further evidence supporting this position⁸.

2.3 In terms of other points arising from the SPFs, and in order to assist the CMA, EMR wishes to note the following:

2.3.1 Whilst EMR welcomes the CMA's revised assessment of market shares, as the CMA notes, these exclude volumes purchased by the large number of metal recyclers who are exempt from any reporting requirements and whom the CMA has not contacted independently. Whilst the CMA notes that its belief is that the *'long tail of small metal recyclers and merchants...are unlikely to impose a material constraint on EMR post-merger'* (SPFs 1.29), EMR respectfully submits this should not, as a matter of principle, exclude them from the CMA's market share calculations; indeed, the CMA acknowledges that these are: *'in aggregate, non-trivial purchase volumes'*. As such, EMR remains of the view that even the revised market share estimates overstate the Parties' position.

2.3.2 The CMA's conclusion that MWR is likely to provide an important route to market for some metal recyclers but that this is not unique (as other large metal recyclers are available). In addition, EMR respectfully submits that many suppliers / metal recyclers can and do access the export and domestic customer

³ The CMA appears to conclude that there has been some impact at EMR Brentford (paragraph 1.42(d)), although the details have been redacted from the SPFs. EMR is not therefore able to comment meaningfully on this conclusion but wishes to note that EMR's economic advisers' analysis of the data does not show such an impact.

⁴ SPFs paragraph 1.49, footnote 58.

⁵ EMR notes that the SPFs restate the provisional conclusion that S Norton is likely to be a strong competitor to the Parties. EMR agrees with this conclusion.

⁶ SPFs paragraph 1.78. EMR notes, however that the CMA treats the Parties' estimates with some caution in paragraph 1.81 in light of the estimates changing over time. It is important to note that the Parties' estimates have changed as a result of a more detailed analysis being undertaken and provided to the CMA.

⁷ Submitted by email to Alison Trinkl on 16 July 2018.

⁸ EMR also notes that these articles may assist the CMA with its statement (at paragraph 1.96 of the SPFs) that the CMA does not have information on the spare capacity of Sims at its Sheerness dock.

markets directly and all metal recyclers have the option to do so themselves or via traders⁹.

2.3.3 Since publication of the SPFs, EMR has become aware of further new evidence indicating that LKM Metals and London City Metals should, properly, be characterised as exerting effective constraints on the Parties post-merger¹⁰:

2.3.3.1 EMR is aware that London City Metals has recently entered into a long term lease for a new scrap metal site on Nobel Road, London (N18). This is less than 1km from MWR Edmonton. This expansion and additional site capacity means that London City Metals will have more sites in the London region than MWR and demonstrates its continued aggressive growth as a competitor in the London region. EMR respectfully suggests that the CMA makes further enquiries of London City Metals in this regard and submits that London City Metals does, in fact, exert a strong constraint in the London region and, particularly, in the north London area; and

2.3.3.2 EMR believes that LKM Metals has recently upgraded its shear capacity¹¹ and is looking to acquire an additional site. This would increase LKM's size and processing capabilities.

2.3.4 Similarly, EMR submits that those competitors that the CMA identifies as providing 'some level of competitive constraint'¹² are in fact effective competitors:

2.3.4.1 Southwark Metals' recent expansion and strategic announcements suggest a significant London presence going forward which will be larger than MWR's;

2.3.4.2 Scrap Co is a multi-site operator across London and the South East with as large a London presence as MWR; and

2.3.4.3 global metal recycler ELG Haniel is a strong national buyer of scrap metal directly from source (i.e. a competitor and, potentially, a customer) from its six sites across the UK (including its site in Barking).

2.4 For completeness, and as submitted previously, EMR does not agree that new entry or expansion into the London area is unlikely¹³. EMR remains of the view that this conclusion is not supported by the evidence. In addition to the new evidence listed above (and the examples previously provided to the CMA¹⁴), EMR is aware of the following additional examples of entry or expansion in the London area which have emerged since publication of the SPFs:

⁹ EMR also notes that the SPFs continue to express some concern (in paragraph 1.90) about sales of competing metal recyclers to EMR. EMR notes that these are irrelevant in assessing the loss of competition from MWR as only sales to MWR would be relevant.

¹⁰ For the reasons set out in its response to the Provisional Findings report, EMR does not agree with the view that LKM Metals is likely to represent only a weak constraint on the Parties. EMR notes in addition that the SPFs conclude that "some level of constraint" is likely from London City Metals due to its site locations and current volumes, although it is unclear why this is considered to be the case due to redactions. This is despite the evidence from suppliers and other third parties who listed London City Metals as a strong competitor.

¹¹ [REDACTED].

¹² 1.171.

¹³ SPFs 1.191.

¹⁴ These are acknowledged in the SPFs.

- 2.4.1 LSMR, a totally new entrant, has entered the London area in north London (N18) on Advent Way; and
 - 2.4.2 Abbey Metal Reclamation, another totally new entrant, has opened a site in Cartersfield Road, Waltham Abbey (EN9).
- 2.5 EMR respectfully urges the CMA to take these further new examples into account in its assessment. In particular, in light of evidence of 3 totally new entrants (LSMR; Abbey Metal Reclamation and Smeeth Metal Export) and an established competitor (e.g. London City Metals) acquiring and opening scrap metal sites in the London area, it cannot conceivably be the case that third parties are “*severely constrained by the availability of land*”. Moreover, the example of Smeeth Metal Export demonstrates that sites can be acquired for processing activities.
- 2.6 Finally, EMR notes that the CMA appears to treat the responses of two third parties who had experienced price changes post-merger as evidence of a merger effect¹⁵. EMR reiterates that prices in scrap metal markets are constantly moving and are linked to international price movements in the global markets for the sale of scrap metal and related global commodities markets. A price change which was negative for a particular supplier is likely to simply reflect the nature of the commodities markets in which the Parties operate. It is difficult for EMR (and, indeed, for MWR, presumably) to comment further without knowing the specific circumstances of these third parties, although EMR does not accept, as a matter of principle, that this demonstrates any sort of ‘merger effect’.

3. Remedies

- 3.1 The CMA’s SPFs invite comments on whether the revised provisional finding in relation to the purchase of ferrous and non-ferrous waste scrap metal in the London region affect the CMA’s provisional findings in respect of remedies.
- 3.2 In EMR’s view, the CMA’s provisional conclusion that the only remedy that is likely to be both effective and practicable is the divestment of all (or substantially all) of MWR to one purchaser is not appropriate as a matter of substance and EMR respectfully submits that it is necessary for the CMA to reconsider its position¹⁶. This is for the following reasons:
- 3.2.1 The CMA revised provisional conclusion in relation to the purchase of ferrous and non-ferrous scrap metal in the London region means that there is no SLC to address in respect of this frame of reference. It is therefore not necessary for the CMA to consider remedial action in this regard with respect to any of MWR’s London sites and assets (including Pinn’s Wharf).
 - 3.2.2 As submitted previously¹⁷, EMR strongly agrees with the CMA’s provisional conclusion that the SLC provisionally identified with respect to the purchase of shredder feed in the South East would be addressed by the divestment of MWR Hitchin, its associated staff and equipment¹⁸. EMR submits that it is not necessary for any of MWR’s London sites to be included in any remedy package intended to address this SLC. While EMR does not accept that MWR’s shredding operation at Hitchin is reliant upon with MWR’s operations at MWR Neasdon and Edmonton¹⁹, EMR reiterates its previous submissions that it is confident that there is a sufficiently large pool of buyers fulfilling the CMA’s criteria with respect

¹⁵ See footnote 58.

¹⁶ EMR’s submissions on remedies that relate to provisional findings that are unaffected by the SPFs are without prejudice to EMR’s strong belief that the merger will not result in a SLC on any possible frame of reference.

¹⁷ Paragraph 2.2 of EMR response to the CMA’s Remedies Working Paper dated 10 July 2018.

¹⁸ Subject to the purchaser having a feeder site network or demonstrating that a feeder site is not necessary for it to be an effective competitor given its business model.

¹⁹ EMR wishes to reiterate its strong belief that there is very little volume that transfers from Edmonton and Neasden to Hitchin – see EMR’s comments in its response to the CMA’s request for information relating to remedies dated 26 June 2018.

to a purchaser having a feeder site network or appropriate business model such that a feeder site is not necessary.

3.2.3 With respect to the CMA's provisional findings relating to the purchase of waste scrap metal under tendered contracts in the West Midlands and North East regions, EMR notes that these relate to distinct, regional markets. The CMA has not identified an issue with respect to purchases of waste scrap metal under tendered contracts in the London region. Furthermore, the small volumes purchased by the Edmonton and Neasden sites under tendered contracts are only from suppliers based in the London area.

3.2.4 In practical terms, MWR's tendered contracts operations account for only a small part of MWR's business and these operations are operationally and structurally distinct from MWR Edmonton and MWR Neasden:

3.2.4.1 In the West Midlands, MWR's purchases of waste scrap metal under tendered contracts are predominantly focused at MWR Cradley²⁰. MWR's commercial team at Cradley manages its tendered contract purchases and NPS sales (albeit under the supervision of the commercial director based at MWR Edmonton). This is therefore an entirely distinct part of MWR's business with its own commercial staff and related assets which can easily be transferred to a purchaser;

3.2.4.2 MWR's Seaham site serves predominantly one supplier ([REDACTED]) and the assets and staff necessary to service this one supplier are all located at the Seaham site.

3.2.5 Moreover, MWR Edmonton and Neasden account for a negligible proportion of MWR's sales of new production steel ("NPS") to UK customers. As demonstrated in Table 2 of EMR's response to the Remedies Working Paper, the vast majority of MWR's sales of NPS to UK customers are made from its sites in the West Midlands and North East; MWR Edmonton and MWR Neasden account for only [REDACTED]% of MWR's total NPS sales to UK customers ([REDACTED]% of total sales of NPS by metal recyclers to UK customers)²¹.

3.3 For the reasons set out above, from the standpoint of "effectiveness", EMR strongly considers that it is unnecessary for MWR Edmonton and Neasden²², its associated assets, equipment and staff to be included in any remedy package. EMR notes that the market participant whose response the CMA has published appears to agree with this assessment²³.

3.4 EMR's view is that:

3.4.1 a divestment that together remedies the SLC provisionally identified in relation to the purchasing of shredder feed in the South East and the SLCs provisionally identified in relation to the purchasing of ferrous and non-ferrous scrap metals from tendered contracts in the West Midlands, and the North East, and in relation to the sale of NPS to UK customers; or

3.4.2 one divestment that remedies the SLC provisionally identified in relation to the purchasing of shredder feed in the South East and a second divestment that together remedies the SLCs provisionally identified in relation to the purchasing

²⁰ MWR Cradley accounted for [REDACTED]% of MWR's volumes purchased under tendered contracts in 2017.

²¹ See Table 2 of EMR's Response to the Remedies Working Paper. MWR Neasden [REDACTED].

²² EMR also notes that the CMA has allowed MWR to give notice at Pinn's Wharf. This would strongly suggest that the CMA considers that access to Pinn's Wharf is no longer required to form any part of a remedy package.

²³ See 2.9 of that document. In the market participant's view, the question is about the extent to which the tendered contracts business is a discrete unit and can be separated out. EMR's view is that this is the case and can be readily carved out, as explained below.

of ferrous and non-ferrous scrap metals from tendered contracts in the West Midlands, and the North East, and in relation to the sale of NPS to UK customers,

would, subject to EMR's views on proportionality, be effective in addressing the SLCs that remain from the CMA's Provisional Findings report.

- 3.5 EMR considers that a remedy (or remedies) of this nature would be practicable and capable of ready implementation. As EMR noted in its Response to the Remedies Working Paper (footnote 11), it would be relatively straightforward to carve out the retained parts of MWR's business (i.e. MWR's London sites and associated assets) and, if necessary, MWR Hitchin and associated assets (for sale to a third party) and leave the commercial and legal arrangements for tendered contracts and sales of NPS, as well as associated employees and assets, within MWR and sell the shares in MWR's holding company.
- 3.6 EMR has addressed the CMA's concerns in relation to composition and asset risk in its Response to the Remedies Working Paper²⁴ and does not repeat these here.
- 3.7 With respect to proportionality, for the reasons stated earlier in this response, EMR strongly considers that any remedy package requiring the divestment of MWR's London sites and assets would be entirely disproportionate, in terms of a distortion to market outcomes, compliance costs, the costs to the CMA and costs to third parties.
- 3.8 Moreover, in light of the CMA's SPFs, EMR respectfully urges the CMA to reconsider its assessment of proportionality with respect to the provisional SLCs that remain in other areas. Specifically, with the CMA now provisionally concluding that no SLC can be expected to arise with respect to a substantial part of MWR's business, EMR submits that the CMA's provisional decision about proportionality, which was predicated on the basis that the only effective remedy would be the divestment of the whole (or substantially all) of the MWR business, must be reassessed. In particular EMR wishes to reiterate its view that the divestment of all MWR sites in the West Midlands and North East in a divestiture package to address the SLCs provisionally identified with respect to the purchase of ferrous and non-ferrous waste scrap metal under tendered contracts, and the sale of NPS to UK customers, would be disproportionate. MWR's purchases under tendered contracts account for only a small proportion ([X]%) of MWR's total purchases and only a relatively small proportion of the volumes handled at MWR's sites in the West Midlands and North East relates to tendered contracts. Moreover, the CMA has already acknowledged that its approach to remedies (i.e. requiring a divestment of the full MWR business to solve limited and separate issues in distinct product and geographic markets) contains an element of disproportionality²⁵. For the reasons stated earlier, EMR therefore reiterates its submissions regarding the effectiveness of a remedy that does not require the divestment of all MWR sites²⁶ as well as its submissions on proportionality in paragraph 2.3.2 – 2.3.3. of its response to the Remedies Working Paper.

4. **The unaffected substantive PFs**

- 4.1 From a procedural standpoint, and as a preliminary point, EMR understands that the CMA has continued to gather and receive evidence, some of which may be relevant to the provisional findings that are unaffected by the SPFs. This evidence has not been published and therefore EMR has not had an opportunity to assess it or make representations on whether such evidence should properly be taken into account by the CMA when adopting its final decision. Accordingly, the points which follow are necessarily without prejudice to any further submissions that EMR may wish to make if new evidence is published or if further new information comes to light. Similarly, EMR notes that the CMA has recently cleared Sims' acquisition of Morley Waste Traders. EMR awaits the CMA's full decision in

²⁴ Section 4 of that Response.

²⁵ Paragraph 199 of the Remedies Working Paper.

²⁶ Paragraphs 3.20-3.21 in EMR's Response to the Notice of Possible Remedies and 2.3.2 – 2.3.4 in EMR's Response to the Remedies Working Paper.

that case and reserves its rights to make further representations in relation to the impact of that decision on the CMA's assessment of the merger.

- 4.2 As noted above, EMR was pleased to note that the CMA had obtained additional volume information from three additional metal recyclers in the London area and that the CMA had taken this information into account in its assessment of the purchase of ferrous and non-ferrous waste scrap metal in the London region.
- 4.3 EMR continues to believe that having as full data set as possible from third parties will assist the CMA in making an assessment of the other areas in which the CMA provisionally identified SLCs. EMR notes that there remain areas of concern in the CMA's PFs where the CMA is relying on a significantly incomplete dataset²⁷. For example, in relation to purchases under tendered contracts in the West Midlands, the CMA acknowledges that its estimates of the Parties' market shares are likely to be an overestimate as a result of missing data. In EMR's view, this is a significant overestimate as the CMA appears to be missing data from at least 12 competitors. EMR understands that [REDACTED].
- 4.4 EMR has made submissions on the unaffected substantive PFs in its Response to the PFs. EMR does not seek to repeat its submissions here but wishes to draw the CMA's attention to the following new evidence in support of its submissions relating to the highly competitive tendered contracts space (in both the West Midlands and the North East) and the significant countervailing power of suppliers who operate tendering processes (which are, by definition, designed to obtain the most competitive offering):
- 4.4.1 EMR attaches as Annex 1 emails which evidence the competitive pressure of five other bidders in a recent [REDACTED] tender and three other bidders in another recent tender for the same supplier²⁸. In both cases, EMR was forced to offer a better price. EMR won one contract but lost the other. In EMR's experience, competitive pressure forces pricing movements in every tendering process in which it is involved.
- 4.4.2 Furthermore, attached as Annex 2 are a location plan and screening opinion²⁹ relating to an intention to use a site in Dudley in the West Midlands as a metal recovery and distribution centre. The screening opinion describes the applicant's aspirations for the site:
- 4.4.2.1 to process, store and distribute up to 20,000 tonnes per month of ferrous scrap metal sourced mainly from industrial and medium sized businesses in the West Midlands
- 4.4.2.2 2 no. weighbridges (approx. 100m south of the site entrance)
- 4.4.2.3 an office building consisting of 4x40ft containers
- 4.4.2.4 a raw material sheer (22m x 9m) which includes a conveyor belt (up to 18m long) and a magnetic separator measuring approx. 80m in length and up to 5m in height
- 4.4.2.5 a raw material shear and screen measuring approx. 80m in length and 15m in width
- 4.4.3 EMR believes that this application has been made on behalf of Celsa, as set out in the original application letter, but would encourage the CMA to verify these

²⁷ PFs 10.10.

²⁸ Both of which are contained in the tender data submitted to the CMA.

²⁹ Available at: [http://planningdocuments.dudley.gov.uk/AniteIM.WebSearch/\(S\(10ssfybnwzdv0v554izfyzr4\)\)/Results.aspx](http://planningdocuments.dudley.gov.uk/AniteIM.WebSearch/(S(10ssfybnwzdv0v554izfyzr4))/Results.aspx). To be clear, this is not a formal planning application. It is a 'Scoping Opinion' application to draw out any environmental issues relating to the intended use of the site. Having received the opinion, the applicant may now choose to make a formal planning application (addressing any issues identified) or to withdraw their interest in the site.

details with the applicant named in the decision notice. Assuming this is correct, this is an additional example of one of the UK's largest customers for NPS competing directly with EMR and other scrap merchants in the West Midlands. It also provides evidence of potential expansion and investment in the West Midlands region.

- 4.5 Finally, as noted above, Sims' acquisition of Morley Waste Traders has resulted in a strengthening of Sims' presence and scale as a competitor across the UK, and specifically in the North East and Yorkshire. This is a factor that is relevant to the CMA's provisional conclusions on the level of competitive constraint for tendered contracts in the North East. Even if the CMA continues to dismiss Ward Bros (despite several suppliers mentioning Ward Bros as a credible competitor and [redacted]³⁰, the CMA must accept, following its own logic in this case, that Sims now provides an even stronger competitive constraint on the Parties in light of an increased scale. Together with the constraint which the CMA accepts is exercised by S Norton from out of area and some constraint from other competitors, it cannot reasonably be the case, on the balance of probabilities, that an SLC arises in the purchase of scrap metal under tendered contracts in the North East. This is particularly the case when [redacted]% of MWR's activity in the North East relates to the servicing of one supplier, for whom there is [redacted] and the majority of suppliers were unconcerned by the Merger and felt that they had sufficient alternatives³¹.

³⁰ And, indeed, continues to regard [redacted], [redacted] and [redacted] as providing weak constraints, despite the fact that [redacted] to the CMA and both [redacted] and [redacted] are active in competing for tendered contracts in the North East.

³¹ PFs 10.72 and 10.74. This is entirely consistent with EMR's various submissions as to the various options available to and significant buyer power exercised by both suppliers and customers. By way of further example, [redacted], a customer and potentially a supplier (which also has the ability to self-supply) which has sites in the North East recently contacted EMR quoting prices obtained from a competitor for the purchases of low residual scrap metal (i.e., on the CMA's definition, NPS). See Annex 3.