

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

ME/6712/17

EMR RESPONSE TO THIRD PARTY COMMENTS

7 AUGUST 2018

1. **Introduction**
 - 1.1 This briefing paper sets out EMR's submissions in response to the third party representations published in redacted form by the CMA on Friday 3 August and Monday 6 August 2018¹. This paper also contains additional analysis that EMR has undertaken in response to new information coming to light that is relevant to the CMA's assessment of purchasing from tendered contracts in the West Midlands and North East regions, as well as the purchase of scrap metal for shredding in the South East.
 - 1.2 The submissions in this paper supplement EMR's response to the CMA's Provisional Findings Report and, EMR respectfully submits, provides further evidence in support of EMR's position that no substantial lessening of competition ("**SLC**") can be expected to arise as a result of the transaction on the frames of reference listed above, or at all.
2. **Purchase of ferrous and non-ferrous scrap metal (other than shredder feed) in the London region**
 - 2.1 In its response to the Supplementary Provisional Findings (the "**SPFs**"), EMR made clear that it agrees with the CMA's revised provisional conclusion that no SLC can be expected to arise in the London region and, indeed, that additional evidence is available that supports the CMA's revised provisional findings.
 - 2.2 EMR was therefore pleased to note that this revised provisional conclusion is supported by both metal recyclers and suppliers, including two metal recyclers and three suppliers from whom the CMA has not previously heard². This is in addition to the 28 suppliers whose responses to the CMA and the CMA's survey stated that they are unconcerned about the Merger³.
 - 2.3 Whilst a very small number of third parties continue to voice concerns, EMR respectfully submits that their views should be treated with caution given that many metal recyclers are both competitors and suppliers to the Parties and their views may be insufficiently objective; in any event, EMR's view is that the concerns expressed are not borne out by the evidence:
 - 2.3.1 The assertion that competitors operate smaller, lower capacity shears than the Parties results in their capacity being overstated is unsubstantiated and incorrect⁴. As the CMA is aware from Annex 10 to the Parties' Response to the Annotated Issues Statement and Working Papers, a large number of competitors in the London area operate shears with substantial shearing capacity including ASM, Benfleet, BFA, LKM, London City Metals, S Norton and Scrap Co which all operate shears which process in excess of 20T per hour. Indeed, Benfleet, Scrap

¹ As only a redacted version of third party representations has been provided, EMR's ability to comment meaningfully on a number of the submissions and the reliability of those submissions is necessarily limited.

² Summary of Responses to the CMA's Supplementary Provisional findings (the "**Summary**"), paragraphs 4-6.

³ PFs, paragraphs 9.34 and 9.42.

⁴ Summary, paragraph 8(b).

Co and ASM operate multiple shears across a number of sites⁵ (in comparison with MWR's single shear at one site)⁶;

2.3.2 The assertion that EMR 'sets prices for the whole of the UK metal recycling sector'⁷ is without basis. As EMR has explained, prices for scrap metal are generally determined by international benchmarks based on global commodities markets. EMR has provided evidence showing the correlation between these two and this is corroborated by suppliers⁸;

2.3.3 Market participants' concerns in relation to the Parties' 2017 data⁹ and the Parties as a route to market¹⁰ disregard the analysis that the CMA has set out in the SPFs¹¹ and are simply incorrect¹²;

2.3.4 Market participants' submissions that Sims, London City Metals and Southwark Metals (as well as unnamed 'other merchants') should not be relied upon by the CMA as constraints are not supported by objective evidence. The evidence presented to the CMA is that both London City Metals and Southwark Metals are opening or have opened new sites in the London area. Similarly, the articles submitted by EMR in relation to Sims clearly show Sims' own (public) views on its Sheerness site allowing Sims to compete strongly in London.

2.4 In summary, EMR respectfully submits that the weight of evidence in favour of the CMA's SPFs significantly outweighs any concerns from a small number of competitors, whose views must in any event be treated with caution in light of their insufficiently objective evidence and incentives with regard to the outcome of the CMA's investigation. EMR therefore reiterates its view that the CMA should confirm its revised provisional findings with respect to the London area.

2.5 With respect to remedies, EMR notes that the submission of a market participant argues that irrespective of the CMA's views on the market for the purchase of scrap metal (other than shredder feed) in the London region, the divestment of MWR's Hitchin site requires feeder sites. EMR does not agree with this submission, which is not supported by the evidence and respectfully refers the CMA to its representations in its response to the SPFs¹³.

3. **Purchasing under tendered contracts in (i) the West Midlands and (ii) the North East**

⁵ It is also important to note that Benfleet is currently installing a new 1400MT shear and LKM is upgrading its 1000MT shear to a 1250MT shear. EMR also understands that Scrap Co has recently invested in three new mobile shears of 900T, 600T and 500T, respectively.

⁶ EMR notes that there is also a suggestion that a shear being mobile means that it is less efficacious (Summary, paragraph 10). In reality, whether a shear is mobile or static is irrelevant; its capacity to process scrap metal is largely determined by the cutting force so a 750T mobile shear will have the same cutting force as a 750T static shear. In addition, mobile shears may confer a competitive advantage in that they can be moved to different sites and do not require planning permission. The Market Participant who states that the Parties' shears can process more than 6 times competitors' shears (paragraph 1.14, submission of 26 July 2018) has not provided (so far as EMR is aware) any evidence to support this statement and, in reality, the evidence submitted by EMR demonstrates that competitor shears have similar capacity to those operated by EMR.

⁷ 26 July 2018 submission, paragraph 1.16.

⁸ Paragraph 4.76.5 of the Parties' Response to the Issues Paper and Summary, paragraph 22(c). For clarity, EMR rejects the unsubstantiated assertion that it can set prices for the industry and maintain pricing which is not competitive.

⁹ 26 July 2018 submission, paragraph 1.21.

¹⁰ Summary, paragraph 8(c).

¹¹ SPFs, paragraphs 1.93-1.172.

¹² For completeness, EMR also notes that one third party is particularly concerned about the ease with which the mothballed MWR Rookes site could be re-opened (26 July submission, final un-numbered paragraph). Given that this site is currently sub-let to a tenant and [redacted] EMR submits that this concern is unfounded.

¹³ Paragraphs 3.2.1 – 3.2.2.

Third party representations

- 3.1 EMR notes that the CMA has received further representations from 12 suppliers which are overwhelmingly positive about the transaction. Suppliers, including those based in both the West Midlands and the North East, clearly support the Parties' submissions that:
- 3.1.1 there are a large number of effective competitors including Sims, Ward Recycling, Enablelink, Shakespeare, CF Booth, S Norton and a number of others including operators located abroad¹⁴;
 - 3.1.2 metal recyclers are very often competing directly with consumers of NPS¹⁵;
 - 3.1.3 scrap metal is a globalised commodity with transparent pricing linked to international benchmarks¹⁶;
 - 3.1.4 suppliers are able to and do exercise significant countervailing buyer power in order to defend their interests¹⁷; and
 - 3.1.5 barriers to entry for servicing tendered contracts, particularly for NPS, are low. The services being supplied are effectively logistics services and suppliers can (and do) self-supply¹⁸.
- 3.2 EMR notes that this feedback is in addition to 29 suppliers in the West Midlands and 4 suppliers in the North East who the CMA has already contacted and who are unconcerned by the Merger¹⁹. Whilst the CMA notes that the suppliers who have recently contacted the CMA did not supply substantial volumes to the Parties in 2017, it is unclear whether these suppliers (who identify as large producers of NPS) are supplying substantial volumes to competitors. EMR notes that the feedback of at least some of these suppliers is that there are various other options available to them and that the market is very competitive. This would suggest that at least some of these suppliers are likely to be supplying (potentially significant) volumes to other metal recyclers and direct to customers. The opinions of such suppliers are particularly pertinent in light of the CMA's provisional conclusion that constraints on the Parties are weak and it has not been able to identify evidence of countervailing buyer power²⁰.
- 3.3 In short, in light of the overwhelming third party evidence in support of the Parties' submissions, EMR respectfully submits that the CMA should reassess its provisional conclusion in relation to purchases under tendered contracts and should not adopt it as a final decision.

Additional Points

- 3.4 The CMA's provisional conclusions relating to competition for tendered contracts takes into account²¹ overall evidence relating to:
- 3.4.1 data relating to volumes of NPS, as it represents the bulk of materials purchased in such contracts;

¹⁴ Summary, paragraphs 22(a) and 24.

¹⁵ Summary, paragraph 24.

¹⁶ Summary, paragraph 22.

¹⁷ Summary, paragraph 24.

¹⁸ Summary, paragraph 23.

¹⁹ Provisional Findings ("PFs"), paragraphs 10.50-10.51 and 10.72.

²⁰ PFs, paragraphs 10.114 and 10.118.

²¹ PFs 10.7.

- 3.4.2 bidding data relating to large, primarily industrial, tendered contracts; and
- 3.4.3 what the Parties and third parties told the CMA about the industrial contracts that they currently hold.
- 3.5 Specifically, the CMA considers the Parties' position in the market by examining estimated market shares and the competitive constraint that EMR and MWR currently exercise on each other pre-merger, by analysing bidding data.
- 3.6 This section of the briefing paper focuses on the CMA's assessment of market share data, in respect of which the CMA provisionally concludes that the Parties are particularly strong in the purchases of NPS, and outlines some new information which has recently come to light and is relevant to the CMA's assessment.
- 3.7 The CMA has estimated the Parties' and competitors' shares of purchases using data on recyclers' known sales of NPS. This is on the basis of the 'mass balance principle' that metal recyclers can only sell what they buy. However, further analysis undertaken by EMR indicates that the CMA's assessment of estimated market shares of purchases of NPS²² contains a number of anomalies and limitations. As a result, while EMR recognises the difficulties of calculating shares of purchases based on volume when independent third party data is not available, EMR respectfully submits that the CMA's data set is unreliable and it would be inappropriate for this data to inform the CMA's assessment of the strength of the Parties and the constraints imposed by other metal recyclers to any meaningful extent. This is for two key reasons:
- 3.7.1 first, the CMA's analysis includes volumes purchased from other metal recyclers. The CMA acknowledges that this is likely to result in an overestimate of the Parties' true share of purchases from original sources²³ and addresses this by conducting a sensitivity check, according to which the Parties combined share would be [x] % (increment of [x] %). EMR respectfully submits, however, that the CMA does not give sufficient weight to this alternative market share calculation in its assessment and that this combined market share is the more appropriate figure²⁴. Given that the relevant frame of reference is purchases from tendered contracts *which are let by industrial suppliers*, inter-merchant trade of NPS is irrelevant to an assessment of whether suppliers that use tendered contracts are likely to suffer harm as a result of the transaction; and
- 3.7.2 second, Table 10.1 does not contain volume data for 5 metal recyclers identified by the CMA (KA Anderson; SSUK; Adams; Green Earth Recycling and One Stop Recycling) and 7 other competitors identified by the Parties²⁵. This means that the CMA's assessment overstates the Parties' position and, conversely, that the CMA's assessment underestimates the effectiveness of the constraints exerted by other metal recyclers. In addition, further enquiries by EMR has resulted in EMR identifying additional volumes that it submits should form part of the CMA's assessment (see below).
- 3.8 In addition to the estimates previously provided, EMR has made further enquiries and has identified new additional volumes that it submits provide a more comprehensive estimate

²² PFs paragraphs 10.8 – 10.13 and Table 10.1.

²³ PFs 10.10.

²⁴ Although EMR believes that this figure is still an over-estimate. The CMA is utilising the Parties' national NPS purchase volumes in Table 10.1 but it is currently unclear whether the deduction of volumes purchased from metal recyclers takes account of all of the Parties' NPS purchases from metal recyclers nationally or inconsistently only accounts for purchases made by the sites in the West Midlands and North East. Similarly, it is unclear whether the CMA is comparing the Parties' national purchases of NPS to the national NPS purchases of competitors (such as [x], for example) or whether it is only taking account of purchases by those competitors within the West Midlands and North East.

²⁵ It is also unclear whether "other recyclers' known volumes" in Table 10.1 includes significant regional metal recyclers such as Ward Recycling, A Goodman & Sons (in the West Midlands) and Jebb Metals, J Denham and Pout & Foster (in the North East).

of all known competitors' purchases of NPS and should therefore form part of the CMA's assessment²⁶.

3.9 The key points to emerge from this analysis are as follows:

3.9.1 EMR has identified further NPS supply to metal recyclers of around [X]MT in the West Midlands and ca. [X] in the North East²⁷; and

3.9.2 including these additional tonnages, the Parties' purchases of NPS in the West Midlands and North East presents a much lower combined market share of circa. [X]%²⁸. This is significantly below the level at which *prima facie* competition concerns may be expected to arise²⁹ and is commensurate with EMR's previous submissions that estimated its share of purchases in the West Midlands to be 30-40%.

3.10 Moreover, taking account of volumes which EMR and MWR purchase from metal recyclers and not from industrial suppliers at source would decrease the Parties' combined market shares even further.

3.11 Taking this into account along with:

3.11.1 EMR's previous submissions that the bidding data does not support the provisional finding that MWR is a close competitor to EMR;

3.11.2 EMR's previous submissions that competitors in the West Midlands and North East are just as strong if not stronger than MWR;

3.11.3 new evidence submitted to the CMA since the publication of the PFs demonstrating that suppliers of waste scrap metal and purchasers of scrap metal exercise a strong constraint on the parties³⁰ by taking action to defend their interests; and

3.11.4 positive comments and corroborative evidence received from third parties since the publication of PFs,

EMR respectfully submits that the provisional finding of an SLC for purchasing under tendered contracts in each of the West Midlands and North East should be reconsidered and should not be adopted as a final decision.

4. Purchases of shredder feed in the South East

The Hitchin outage

²⁶ Following the publication of the provisional findings report EMR specifically tasked its commercial teams in the Midlands and North East to identify all NPS sources in these regions and competitors who serviced those sources in 2017. The result of this is the table in Annex 1. This is based on EMR's commercial team's knowledge and experience in the sector, their awareness of tonnages flowing through competitors' sites on a monthly basis as a result of them constantly travelling the areas and understanding who is purchasing certain grades; their understanding of who currently holds contracts with various original sources of NPS; and also from ongoing discussions with the sources of NPS when EMR is competing.

²⁷ EMR believes that further tonnages would also be identifiable on a national basis following a similar approach.

²⁸ EMR and MWR's sales of NPS in the West Midlands and North East in 2017 were [X]MT.

²⁹ Merger Assessment guidelines 5.3.5.

³⁰ See for example: the article submitted to the CMA by email on 9 July relating to Liberty opening its own port operation as well as the examples provided of Celsa looking to open a site in the West Midlands and Liberty competing directly for supplier contracts.

- 4.1 EMR indicated in its response to the Provisional Findings report³¹ that it was undertaking further work in relation to the CMA's assessment of purchases of shredder feed in the South East, specifically the Hitchin outage.
- 4.2 The CMA analysed the extent to which EMR's Willesden and East Tilbury sites gained volumes during the period between June 2015 and February 2016 when MWR's shredder at Hitchin was inoperative and has relied upon this analysis as evidence of a closeness of competition between EMR and MWR³². EMR's economic advisers, Charles River Associates, has conducted further detailed analysis of this data (see Annex 2) and this analysis is now complete. Analysed against the full background of the Hitchin outage and the inventory position of MWR at the time of the 'outage', EMR respectfully submits that the evidence does not unequivocally support the conclusions that the CMA has provisionally drawn from it with respect to the closeness of competition between EMR and MWR.

Underestimate of competitors

- 4.3 EMR has consistently argued that the purchase of shredder feed nationally (and specifically within a 115km radius of MWR Hitchin) is a very competitive market with a large number of active and effective competitors and transparent pricing. This is supported by the 8 suppliers (including 3 who are not metal recyclers) who have told the CMA that they do not believe that an SLC arises in relation to shredder feed in the South East³³.
- 4.4 EMR continues to believe that the CMA's focus on the 115km 80% catchment area of MWR Hitchin is overly conservative and the [redacted]% market share set out by the CMA³⁴ is the more appropriate measure in this case (although EMR believes that this continues to be an overstatement in light of the fact that shredder feed travels significantly in excess of even 140km) particularly when it is considered that:

4.4.1 The evidence clearly shows that shredder feed can and does travel significantly beyond the 115km catchment area and these instances are not anomalies. In addition to the anecdotal evidence presented by the Parties during both phase 1 and phase 2 of the CMA's investigation, and the feedback of third parties in the Summary which clearly shows Ward Recycling, Sims and S Norton competing for shredder feed, MWR has made enquiries of its suppliers and has asked who they switched to from MWR during the time when MWR's shredder at Hitchin was out of operation. For example:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

4.4.2 The CMA's survey supports the conclusion that competitors located outside the 115km catchment area are effective competitors and viable options for suppliers. While the CMA may dismiss the survey as unrepresentative, or focused more on smaller suppliers (which presumably would be willing to travel less), suppliers

³¹ Paragraph 1.9.

³² 8.23-8.25 PFs.

³³ Summary, paragraphs 12-13. EMR notes that some of these suppliers, presumably [redacted], [redacted] and [redacted] are no longer concerned having previously expressed some reservations. In each case, these third parties have provided reasoning for their views, largely setting out the fact that they supply multiple metal recyclers who compete for their shredder feed. This is consistent with the feedback of the other suppliers with whom the CMA has spoken and to the extent that the CMA may have concerns about the reliability of these comments, they are capable of being objectively verified with the competitors mentioned (i.e. Sims, Charles Muddle, Ward Recycling and S Norton). [redacted]. If, however, the CMA retain doubts about the reliability of a third party's comments, then the CMA should not rely on that third party's statements made either now or previously.

³⁴ 48(a) PFs.

pointed to Ward Recycling and Sims as options, as well as Sackers and Ampthill. The number of suppliers saying they could use Sims Nottingham, Sims Avonmouth, as well as Ampthill and Sackers, were greater than the number of Hitchin suppliers saying they could use Willesden, and the number of East Tilbury suppliers saying they could use Hitchin, which were the same number as could use Ward as an alternative. ³⁵

- 4.5 Finally, EMR reiterates its submissions in respect of the counterfactual for shredding. The CMA's conclusion on the counterfactual is inconsistent with its assessment of the entry of competitors based on the facts and evidence available to it. In light of the relevant legal framework and the Merger Assessment Guidelines, EMR respectfully submits that either this conclusion, or the conclusion relating to barriers to entry, must be revisited³⁶.

³⁵ PFs: 8.53 to 8.58.

³⁶ See the *Merger Assessment Guidelines*, para 4.3.2 and 4.3.6. The counterfactual should incorporate only elements of scenarios that are foreseeable. In light of the fact that the CMA's provisional conclusion is that it is not foreseeable (and is, indeed, difficult) to find and open sites for shredding in the Hitchin area, it is difficult to see how it can be foreseeable for EMR to do so. EMR respectfully notes that the exclusion of [§] from the counterfactual makes a material difference and it is unclear how the CMA's 'additional detailed investigation' (required by 4.3.6 of the *Merger Assessment Guidelines*) has led the counterintuitive and juxtaposed conclusions in respect of the inclusion of [§] volumes in the counterfactual on the one hand and barriers to entry on the other.