OFFICE OF FAIR TRADING

Completed acquisition by Railway Investments Limited of (a wholly owned subsidiary of English Welsh & Scottish Railway Holdings Limited) of Marcroft Holdings Limited and Marcroft Engineering Limited

The OFT's decision on reference under section 22(1) given on 6 February 2006. Full text of decision published 20 February 2006.

Please note that square brackets indicate figures or text which have been deleted at the request of the parties for reasons of commercial confidentiality.

PARTIES

1. **Railway Investments Limited** is a wholly owned subsidiary of **English Welsh & Scottish Railway Holdings Limited (EWS)**. EWS is active in the provision of rail freight haulage services in Great Britain (GB) and through the Channel Tunnel. Through different subsidiaries EWS divides its activities into the following business units: rail freight haulage; rail industry services; rail passenger charter services; and non-freight operations.

2. **Marcroft Holdings Limited** and its subsidiary **Marcroft Engineering Limited** (together **Marcroft**) is a provider of maintenance services in Great Britain and mainly serves the rail freight industry. In particular, it is engaged in rail freight wagon maintenance; wagon conversion; and road, rail and defence refinishing and painting. Its UK turnover in 2004 was some £12.7 million.

TRANSACTION

3. This merger was notified to the OFT as an anticipated transaction but the OFT has been informed that EWS completed the acquisition of the entire shareholding of Marcroft on 1 February 2006.

4. A satisfactory submission was received by the OFT on 22 November 2005. The OFT's administrative deadline is 3 February 2006. The statutory deadline is 31 May 2006.

JURISDICTION

5. As a result of this transaction EWS and Marcroft have ceased to be distinct and one and the same person will be responsible for the supply of at least one quarter of a type of goods or services in respect of in-field rail freight wagon maintenance services in GB, so that the share of supply test in section 23(4) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

RELEVANT FRAME OF REFERENCE

Product market

6. EWS submits that the relevant market is the provision of in-field maintenance services to rail freight wagons owned by third parties (the 'open market').

In-field and heavy rail freight wagon maintenance services

7. Rail freight wagons require the provision of on-going maintenance as well as more periodic maintenance/repair events. A distinction can be made between the day-to-day maintenance carried out away from a depot (in-field maintenance services) and heavy maintenance. Heavy maintenance can be subdivided into three alternative types:

   - General Repair (GR) – the full strip down of a wagon (in the workshop) and the overhaul of safety critical systems such as brakes, bogies, buffers and drawgears;

   - Component based maintenance (CBM) – periodic replacement of components according to the pre-determined life span of the parts (removed components might then be refurbished elsewhere); and

   - Strip down and gauging/measure maintenance – a hybrid between GR and CBM involving the periodic gauging and testing of components and replacement but only if wear limits are exceeded.

   Wagon owners need to organise some combination of in-field and heavy maintenance (and whether to be done externally or internally) for their wagons although for new wagons the need for heavy maintenance events may be some years away (GR maintenance, for example, is generally undertaken every 7 years).

8. Customers take a number of factors into account when deciding what type of heavy maintenance service to use. Significant factors are the cost (including the costs of transporting the wagon to the workshop, if necessary), the type of wagon, the nature of its duty cycle and available maintenance windows. Customers can use different types of heavy maintenance for different types of wagons and switching among the different alternatives (at appropriate points in time) is not unusual. Some customers have said they would consider purchasing in-field maintenance from one provider and workshop based heavy maintenance from another while the perception of most third parties was that customers sought to obtain both types of maintenance from the same maintenance service provider.

9. For the purposes of this decision, we do not need to conclude as to whether in-field and heavy maintenance form a single product market, since the issues raised by this decision are similar however this frame of reference is defined.

Supply of in-field rail freight wagon maintenance services to the open market and in house

10. Both Marcroft and EWS provide in-field (and some types of heavy) maintenance services to rail freight wagons. However, while Marcroft provides in-field rail freight wagon maintenance services to the open market, EWS mostly carries out these services for its own wagon fleet (in-house). This raises the issue as to whether the provision of these maintenance services to the open market forms a separate frame of reference from the supply of the same services in-house.

11. For the purposes of this decision, we do not need to conclude on this issue since the competition concerns are valid however this question is resolved.

Other product markets

12. Some third parties contended that the (in-field) maintenance of certain rail freight haulage wagons required particular skills or equipment such that they should be regarded as separate markets within wider rail freight wagon maintenance. Without concluding on this question, the OFT considers these particular representations in paragraphs 46 and 47 below.

13. EWS is present in the downstream segment of rail freight haulage as well as in other closely related rail segments. As required in the context of this decision, some of these products and services are considered where concerns have been raised by third parties.

Geographic market

14. With regards to the provision of rail freight wagon maintenance services (whether in-field or heavy maintenance/repair), EWS argues that the geographic scope is GB. Third parties and the Office of Rail Regulation (ORR) have agreed with this statement. Due to the high costs of moving the wagons, some customers said that the location of workshops for heavy maintenance is important. However, no concerns at the local level have been raised, thus we have assessed this merger at the GB level.

HORIZONTAL ISSUES

In-field rail freight wagon maintenance services

15. The parties overlap in the provision of in-field rail freight wagon maintenance services.

16. If only in-field rail freight wagon maintenance services to the open market are considered (some 6,800 wagons estimated by EWS), the parties estimate Marcroft's share of supply to be 56 per cent. The second largest competitor, Wabtec, is said to have around 34 per cent of the segment while, other, smaller players hold shares of supply no larger than 3 per cent. EWS in fact, although only having two live contracts in place, according to the parties, is estimated to have 2.6 per cent of the open market.

17. If the supply of in-field rail freight wagon maintenance services in-house and to the open market are taken together (EWS estimates 21,040 wagons), the parties' combined share of supply is estimated to be around 77 per cent with Marcroft adding an increment of 18 per cent to EWS' 59 per cent (EWS is substantially the largest player in in-house in-field maintenance services). Other competitors are estimated to have significantly lower market shares: Wabtec (11 per cent); Freightliner (7 per cent) and others (5 per cent).

18. Thus, as regards the provision of in-field rail freight wagon maintenance services, the merger will combine the largest provider of such services to the open market and the largest in-house supplier. This raises the issue as to whether pre-merger EWS provided a competitive constraint on Marcroft and other companies supplying similar services to the open market.

19. EWS submits that this is not the case. Although EWS has three customers in the open market (it recently won a third contract), it argues that it is not well placed to expand further into the open market for two reasons. First, EWS has a [ ]. Secondly, it is not perceived as a real player in the open market for these services.

However, regardless of its cost base, EWS has recently developed a new brand to provide, among others, rail wagon maintenance services to third parties and won a new contract. Also, as set out below, it is perceived as a real player to the extent that it is recognised by customers as a provider of in-field maintenance services ahead of other existing players.

20. Finally, EWS claims that even if it were able to enter the sector on a credible level, it would have to expand its existing in-house in-field capability to meet new demand. This would have similar costs to other existing competitors or new entrants. Against this, it must be noted that EWS alone currently maintains almost six times as many wagons (12,474) as Wabtec (2,280), its largest competitor other than Marcroft. As a result, EWS is more likely than other competitors to be able to take on new contracts without having to expand its existing capabilities or incur significant additional costs.

21. EWS contends that, as a consequence of the above factors, it has only been invited to bid for five contracts in the last three years. According to the parties, there have been around 110 tenders (for in-field and heavy maintenance/repair events) in that time and EWS has won only one of those contracts. In the parties' view, this data shows that pre-merger EWS represents a negligible competitive constraint in the in-field maintenance segment. Therefore, EWS argues that the change in the market structure as a result of this transaction is negligible as EWS does not represent a viable actual or potential alternative to the several competitors active in in-field rail wagon maintenance service.

22. The theory of harm that has been put to the OFT is that given the level of concentration in this segment and the parties' position, the merger will remove a competitive constraint (EWS). As a result of this, there is the risk of anticompetitive unilateral effects such as price rises which could be followed by second order effects; that is, that Wabtec, the other significant, though smaller in size, provider of in-field rail freight wagon maintenance services, may find it profitable to increase its prices or reduce its output.

23. Bidding data supplied by EWS and Marcroft in relation to the 110 tenders in the last three years does not identify who the other competitors bidding for those contracts were. Bidding data supplied by a third party showed that EWS was present in two out of the five formal tenders this third party entered into in the last three years. In addition, these figures and the estimated shares of supply suggested above may not accurately reflect the market position of the merging parties as EWS's substantial in-house in-field maintenance services may place it in a good position to expand its open-market activities

24. During the market assessment, the OFT has found that some end-customers identify EWS as a provider of in field maintenance services to rail freight wagons ahead of other existing players in the sector. In addition, the OFT has noted that EWS has developed a new brand 'Axiom Rail', which provides, among other things, rail wagon maintenance services. EWS has also recently been awarded a contract with Edinburgh District Council to supply the in-field maintenance services to the Council's rail freight wagons used for waste management.

25. The above factors suggest that EWS' attitude towards the in-field rail wagon maintenance sector even prior to the proposed acquisition of Marcroft was more pro-active than EWS suggests and there is a perception in the sector of EWS as a supplier of maintenance services in the open market.

26. Post-merger EWS/Marcroft's ability to raise price or restrict output depends on whether other rivals are capacity-constrained such that they are <u>not</u> a credible alternative to which the customer could award a substantial contract. In other words, EWS/Marcroft's judgment would be that competitors either simply lack the actual capacity to cater for those customers, or that by factoring in capacity expansion costs, this would render their bid uncompetitive, thus providing latitude for EWS/Marcroft to raise price – relative to that charged by Marcroft at present – and still win such contracts.

27. Marcroft's high share in the supply of in-field rail freight wagon maintenance services to the 'open market' and EWS' position as an actual (with a share of supply similar to other smaller third parties) or more credible potential competitor in a highly concentrated sector may raise competition concerns. On the basis of the evidence supplied to the OFT, the OFT cannot rule out the concern that the merger may lead to the loss of an important actual or potential competitive constraint on Marcroft.

Barriers to entry and expansion

28. The main barriers to entry and expansion cited by third parties during our assessment were: access to a rail connected workshop; capacity and financial incentives; nationwide coverage; and shortage of qualified staff.

29. EWS submits that the barriers to entry and expansion for in-field rail freight wagon maintenance services are low. The parties estimate that the cost of entering into this segment alone and achieving a five per cent share of supply to be £79,000. (However, this excludes, in particular, the cost of access to a rail connected workshop.) According to EWS, the recent entry of two companies Clarke Chapman and Arlington Rail Services demonstrates this ease of entry. In addition, EWS suggested that suppliers of heavy maintenance to passenger trains and rail-

related as well as general engineering companies can also easily enter the in-field maintenance sector. Furthermore, EWS believes that smaller players such as WH Davis and EG Steele can expand with ease.

Access to a rail connected workshop

30. As regards the requirement for a workshop, the OFT has found very mixed evidence. Whether having access to a workshop is necessary to enter this sector is not clear. While it is plausible to accept that a rail connected workshop is not required to provide in-field freight wagon maintenance services, according to most third parties, it is highly unlikely that customers would be prepared to place an order without the back-up of a rail connected workshop.

31. There is no evidence from the examples of entry supplied by the parties that this is not the case. Clarke Chapman, the first of the new entrants mentioned by EWS has a prominent workshop where it already performed some rail freight wagon-maintenance related work before entering the market on a greater scale. The OFT has not been able to obtain any independent information about Arlington or its activities. Most third parties that responded considered that the barriers to entry and expansion were high, but they accepted that barriers were lower for in-field maintenance on its own. However, third parties did not, generally, perceive entry to in-field maintenance in isolation to be feasible; most believed that access to some form of workshop facility would be necessary to provide credible entry.

Capacity/Financial incentives

32. Some competitors in the rail freight wagon maintenance sector confirmed during the assessment that there was some spare capacity in the overall maintenance sector. Another third party active in the heavy maintenance side of passenger trains also estimated that it would be achievable for them to enter into in-field rail freight wagon maintenance services. Most customers did not consider the costs of switching between maintenance service providers to be substantial. However, some larger customers thought otherwise. In particular, one of EWS' competitors in rail freight haulage services considered that, in its case, switching costs and lead times would be substantial.

33. Several competitors have indicated that given the costs involved in expansion, they would only consider expanding if they secured a large contract which would justify such an investment. However, such large contracts are said to be scarce. While smaller contracts are tendered more regularly, the OFT has been told by third parties that only a small number of these contracts would justify the necessary investment. In order to offset any price increases by Marcroft, the expansion required by the smaller players to take on the business wishing to

switch away would be substantial, involving each one of those smaller competitors growing up to multiple times their current size.

Provision of nationwide in-field rail freight wagon maintenance services

34. Two of the largest rail freight operators (apart from EWS), told the OFT that they require a provider capable of supplying the maintenance services to their freight wagons on a nationwide basis (since the wagons could end up at any part of GB). Both third parties separately insisted that the only two companies able to supply these services purely nationwide are Marcroft and, to a lesser extent, Wabtec (excluding EWS' in-house operations which are also nationwide). The merging parties were named as the ones currently independently owning or having access to or control over the largest number of maintenance sites (although EWS made the point that Marcroft does not own any of the sites at which it provides in-field maintenance services but merely has access rights).

35. The key issue with respect to national coverage appears to be whether it is financially viable for an alternative (smaller) competitor to set up the same number of unmanned and manned stations around the country to be able to attend any event rapidly and have enough volume to maintain the personnel based at those distant locations. For the benefit of the end-customer the wagons must be operative as long as possible and the breakdowns should be either scheduled during 'resting' time or as short as possible. The merging parties enjoy a level of economies of scale which cannot be matched by any competitor unless they could secure contracts which made it financially viable to replicate EWS/Marcroft geographic coverage.

36. On the question of suitable sites, EWS pointed out that Marcroft did not own any of the sites from which it provided maintenance services but merely obtained access rights, mainly from Network Rail and EWS. However, third parties were concerned that, post merger, EWS/Marcroft might not have the same incentives to grant other competitors the same access rights as had been granted to Marcoft pre-merger.

37. Another option open to large customers post-merger is to expand their already existing in-house maintenance services. However, some third parties have explained that the required financial investment would be prohibitive. In addition, these third parties have indicated that it would be very difficult to find a suitable location for a workshop. The OFT notes that it is unclear as to the extent to which a workshop is necessary; as stated above, the evidence from third parties have been very contradictory.

Shortage of qualified staff

38. Some third parties argued that currently when a maintenance contract is won it is usual for the relevant employees to transfer (under TUPE regulations). If this did not happen then it would increase the barriers to entry/expansion since appropriate engineering staff would have to be recruited and trained and a suitable site identified. Third parties were concerned that, post merger, EWS/Marcroft might not have the same incentives to transfer staff with 'lost' contracts. EWS contended that recruitment is not a problem since the level of engineering skill required to carry out in-field maintenance was relatively low.

Conclusion on barriers to entry and expansion

39. In order for entry or expansion to act as an effective constraint on the behaviour of the merged parties, sufficient entry or expansion must be feasible and timely. While recent entry has shown barriers to entry are not insurmountable, given the entrant has access to appropriate facilities, this entry has been on a very small scale and has been through related activities in the industry. As detailed above and contrary to the views of EWS, third parties were of the opinion that barriers to effective entry into in-field freight wagon maintenance are high, due among other things to the need to have access to a rail connected workshop. Entry into the provision of small scale in-field maintenance could, in theory be relatively easy. However, we have been told by some third parties that in reality, activities in the field require the back up of a workshop facility, which would be more difficult to secure.

Conclusion on horizontal issues

40. Marcroft accounts for a high share in the supply of in-field rail freight wagon maintenance services to the open market whereas EWS is currently a small actual competitor (with a share of supply similar to other smaller third parties) but it might be argued a much more credible potential competitor in what is a highly concentrated sector. To some extent, this appears to have some of the features of a bidding market and the loss of EWS as an independent bidder might be more significant than its current share of supply might suggest.

41. On the basis of the evidence supplied to the OFT, the OFT considers that the merger may lead to the suppression of an important actual or potential competitive constraint on Marcroft. This could lead to anticompetitive unilateral effects such as price rises.[1] Based on the evidence supplied to the OFT, the OFT

[1] Second order effects might also be possible in that Wabtec, the other significant, though smaller in size, provider of in-field rail freight wagon maintenance services might find it profitable to increase its prices or reduce its output.

does not believe that the possibility of new entry and/or expansion will be sufficiently credible or timely. Therefore, the reference test is met in respect of the horizontal overlap in in-field rail freight wagon maintenance services.

VERTICAL ISSUES

Rail Haulage services

42. While maintenance costs represent a small proportion of the overall cost of providing rail freight haulage services, maintenance services are an essential input.

43. Some customers of Marcroft - that are also in competition with EWS in the haulage sector - expressed concern that they would be reliant upon a competitor to provide essential maintenance services. The theory of harm put to us most by third parties is that post-merger EWS might have the incentive and the ability to raise prices or restrict output in the rail freight maintenance segment in order to foreclose a significant proportion of rail freight haulage. Namely, it has been argued that EWS would have the incentive to grow its market share in the rail freight haulage sector by restricting an essential input of its competitors in this sector and limiting their ability to compete.

44. On the one hand, we note from the company accounts and information supplied by third parties that both volume and profit margin are lower in freight wagon maintenance than they are in the rail freight haulage sector. We also note that EWS remains the largest rail freight operator since privatisation. Yet EWS' own assessment of competition within the haulage sector shows that its closest rivals are growing. Some internal documents show EWS' concern on the competitive growth shown by its rivals.

45. On the other hand, in response, EWS argued that there are other viable competitors and potential competitors in the rail freight wagon maintenance service sector which would frustrate any attempt to foreclose these maintenance services to the downstream rail freight haulage sector. EWS insisted that it is not in its commercial interest to foreclose any part of the market as it would harm its overall reputation. EWS also said that it is its intention to continue providing those services to Marcroft's existing and possible new customers on the same terms. However, a number of customers have indicated that they remain concerned.

AAE Megafret wagons

46. Third parties have also put other concerns to the OFT. A third party has raised concerns in respect of a particular type of wagon, denominated the AAE Megafret wagon, used for point-to-point intermodal haulage (as opposed the intermodal services from ports which required a different type of intermodal wagon). According to this third party, Marcroft is the sole agent able to provide maintenance services in connection with this type of wagon. The manufacturer, AAE, confirmed this point, whilst, Marcroft told us that it was unaware of this. The theory of harm suggested to the OFT by this third party was that EWS would have the incentive and the ability to foreclose the point-to-point intermodal segment by raising prices or reducing output or quality of service in the provision of maintenance services to the AAE Megafret wagons. On the other hand, the OFT notes that it is possible that AAE could change its policy if it believed that Marcroft's practice was harming its commercial interests in this country.

Gas-free facilities

47. Another third party pointed out that Marcroft has gas-free facilities on its Stoke-on-Trent workshop and no other maintenance service provider has this type of facility on-site. It was put to the OFT that Marcroft could therefore have the potential to raise its prices to supply this service which is required on a regular basis for wagons carrying flammable products. The theory of harm put to the OFT by a third party is that for third parties which require this service, EWS could have the incentive and the ability to foreclose this segment of the haulage sector by raising prices or reducing output or quality of service.

48. On the other hand, it is noted that some refineries and other users of this type of wagon also have this facility on their sites. In addition, it has been put to us by other third parties and by the parties that there are other processes which can achieve the same result (i.e. emptying the tanker of all its flammable product before being serviced) though at a higher cost: so to what extent this other system is a viable substitute conferring any competitive constraint on the 'gas-free' option might be debatable.

49. EWS has argued in response that the fact that Marcroft was (and continued to be) loss making did not suggest that it had any degree of market power or ability to foreclose even in narrower possible frame of reference such as supply of maintenance services to AAE Megafret wagons or in providing 'gas-free' facilities. EWS also argued that it provides other services to the rail freight industry (including to its closest competitors) such as the maintenance/repair of locomotives (a time critical activity) and the supply of bogies. EWS insisted that it

is not in its commercial interest to foreclose any part of the market as it would harm its overall reputation.

Conclusion on vertical issues

50. Given that the reference test is met in respect of the horizontal issues raised above, the OFT does not need to reach a conclusion on the vertical issues discussed above.

CONGLOMERATE EFFECTS

51. EWS is also active in other related segments such as the provision of locomotives or traction, supply of personnel for the rail industry, manufacturing and supply of parts and others.

52. The theory of harm raised by third parties was that post-merger EWS will be able to bundle a range of these services while its rivals in the different segments will be unable to provide competing bundles and thus be unable to constraint EWS's behaviour. For example, third parties have argued that EWS will be able to bundle its ad-hoc wagon movement services with its maintenance services and given the high costs of this ad-hoc service, this would be a substantial lever to remove competition from the rail freight maintenance service sector. It was argued that this could force some firms out of those segments and remove any incentive for a new entrant. Given EWS's leading position in some of the segments of the rail industry it was argued that it had the ability to engage in predatory conduct by using profits earned in one market to subsidise short-run loss in another market. It has been put to the OFT by third parties that EWS could then in the long run engage in profitable price rises, output reductions or other strategies.

53. The OFT notes that, on the one hand, one recent Marcroft customer decided to change to EWS as a provider of in-field maintenance services due to the 'convenience' of having one single provider of all its rail freight requirements. On the other hand, the OFT notes that there would be the opportunity for different operators at different segments to enter into commercial agreements to match EWS's capabilities.

Conclusion on conglomerate issues

54. However, given that the reference test is met in respect of the horizontal issues raised above, the OFT does not need to reach a conclusion on these conglomerate issues.

THIRD PARTY VIEWS

55. Extensive third party comments were received. The majority of these raised concerns. The most substantive concerns have been discussed above. The quality of the evidence supplied to support those concerns was mixed. A minority had concerns relating to specific sectors, which are addressed above.

56. The ORR expressed some competition concerns about this merger.

ASSESSMENT

57. The parties overlap in the provision of in-field maintenance services to rail freight wagons. Both parties also provide some type of heavy maintenance to the rail freight wagons. EWS is also a significant player in several downstream and closely related markets such as rail haulage, provision of locomotives and traction, supply of rail personnel.

58. At the horizontal level, the merger brings together the largest provider of in-field maintenance services for rail freight wagons to third parties with the largest in-house provider of these services. If only the open market for in-field maintenance services is considered, then the increment to Marcroft's current share of supply (56.4 per cent) is not very significant (2.6 per cent). However, as a large in-house supplier of maintenance services, EWS would be particularly well placed to expand its existing third party provision. If all in-field maintenance services were taken together the parties combined share would be some 77 per cent (increment 18 per cent) with the next largest player, Wabtec, having only 11.2 per cent.

59. While EWS has argued that it is not a viable actual or potential competitor, the evidence available to the OFT indicates that it is already active in the open market, and it may be in a favourable position to win new contracts given its national scope and presence. While EWS has maintained that [ ], and so it is not price competitive with, other in-field maintenance providers, this has not prevented EWS itself from winning new contracts for the provision of in-field rail freight wagon maintenance services in the open market.

60. Barriers to entry and expansion are an important counter consideration. These appear to be high for rail freight wagon maintenance. In theory, these may be lower for in-field maintenance alone. However, third parties have indicated that in relatity, it is necessary to have available a rail connected workshop in a suitable location in order to be considered a viable competitor in in-field maintenance services. Moreover, the perception of most third parties was that customers sought to obtain both in-field and heavy maintenance/repair from the same provider.

61. Consequently, the OFT considers that the merger may lead to the suppression of an important actual or potential competitive constraint on Marcroft. This could lead to anticompetitive unilateral effects such as price rises which could be followed by second order effects; that is, that Wabtec, the other significant, though smaller in size, provider of in-field rail freight wagon maintenance services may find it profitable to increase its prices or reduce its output.

62. Therefore, the reference test is met in respect of the horizontal overlap in in-field rail freight wagon maintenance services.

63. Turning to non-horizontal issues, some third parties have raised vertical concerns. In particular, third parties have argued that post-merger EWS might have the incentive and the ability to raise prices or restrict output in the rail freight maintenance segment in order to foreclose a significant proportion of the rail freight haulage sector. In addition, it has been argued by a few third parties that Marcroft is particularly well-placed to provide third party maintenance services for certain types of freight wagons, including petrol wagons and AAE Megafrets. Marcroft's customers competing in the downstream rail freight haulage sector which require these wagons said that they had concerns that the availability and quality of service levels may reduce post merger. However, given that the reference test is met in respect of the horizontal issues raised above, the OFT does not need to reach a conclusion on these vertical issues.

64. Lastly, conglomerate concerns have been raised by some third parties. Concerns have been expressed by third parties about the potential for EWS to 'bundle' the price of rail freight maintenance services to include the cost of ad-hoc wagon movement. However, given that the reference test is met in respect of the horizontal issues raised above, the OFT does not need to reach a conclusion on these conglomerate issues.

65. Consequently, the OFT believes that it is or may the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom as a result of the horizontal overlap in in-field rail freight wagon maintenance services.

UNDERTAKINGS IN LIEU OF REFERENCE

66. Where the duty to make a reference under section 22(1) of the Act is met, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, accept from such of the parties concerned undertakings as it considers appropriate for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may result from it.

67. EWS proposed undertakings to the OFT, intended to address the potential competition concerns, in lieu of a possible reference to the Competition Commission (CC). EWS proposed that the ORR should be nominated as the body that will oversee compliance, which ORR agreed was acceptable. The proposed undertakings were that:

67.1. EWS would maintain Marcroft as a stand alone business servicing the wagon maintenance needs of third party customers;

67.2. EWS would grant to third parties access to the 'railway facilities' where there is no viable alternative location available under market conditions for the purpose of providing in-field wagon maintenance of freight wagons. This would also be subject to available capacity among other conditions;

67.3. EWS, subject to capacity, would undertake to carry out ad hoc movement of rail freight wagons for any party in connection with maintenance events on commercial and non-discriminatory terms.

68. These proposed undertakings do not fully address the horizontal issues which have triggered our duty to refer, and therefore, in these circumstances acceptance of undertakings in lieu would not be appropriate. In particular, the qualified nature of the undertakings offered (paragraphs 67.2 and 67.3 above) mean that the remedy offered is not clear cut.

69. Accordingly, the OFT has decided not to exercise its discretion under section 73(2) of the Act to consider whether to accept undertakings in lieu of a reference.

DECISION

70. This merger will therefore **be referred** to the Competition Commission under section 22(1) of the Act.