

Competition Commission Acceptance of Interim Undertakings

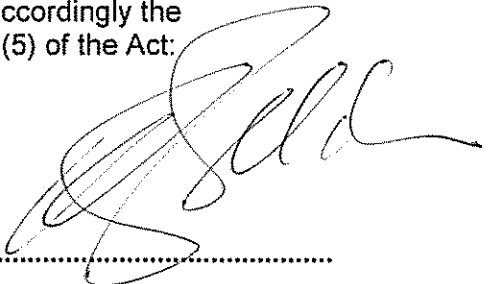
IN THE MATTER of a reference to the Competition Commission dated 6 February 2006 concerning the acquisition by Railway Investments Limited and English Welsh & Scottish Railway Holdings Limited of Marcroft Holdings Limited.

Whereas on 6 February 2006 the Office of Fair Trading, in exercise of its duty under section 22 of the Enterprise Act 2002 ('the Act') referred to the Competition Commission ('the CC') the completed acquisition by Railway Investments Limited and English Welsh & Scottish Railway Holdings Limited of Marcroft Holdings Limited:

And whereas Railway Investments Limited and English Welsh & Scottish Railway Holdings have agreed to give undertakings to the CC under section 80 of the Act for the purpose of preventing pre-emptive action, to ensure that no action is taken which might prejudice the reference or impede the taking of any action by the CC under Part 3 of the Act which may be justified by the CC's decisions on the reference:

Now the CC pursuant to section 80(2) of the Act hereby accepts the undertakings, a copy of which is set out in the attached Annex below, and accordingly the undertakings come into force in accordance with section 80(5) of the Act:

Signed by authority of the CC



.....
Jeremy Seddon
Group Chair
13 March 2006

ANNEX

COMPLETED ACQUISITION BY RAILWAY INVESTMENTS LIMITED AND ENGLISH WELSH & SCOTTISH RAILWAY HOLDINGS LIMITED OF MARCROFT HOLDINGS LIMITED

UNDERTAKINGS GIVEN BY RAILWAY INVESTMENTS LIMITED AND ENGLISH WELSH & SCOTTISH RAILWAY HOLDINGS LIMITED TO THE COMPETITION COMMISSION PURSUANT TO SECTION 80 OF THE ENTERPRISE ACT 2002

Whereas, on 6 February 2006, the OFT made the reference to the CC under section 22 of the Act concerning the completed acquisition by Railway Investments Limited and English Welsh & Scottish Railway Holdings Limited of Marcroft Holdings Limited:

And whereas the CC wishes to ensure that no action is taken pending final determination of the reference which might prejudice that reference or impede the taking of any action by the CC under Part 3 of the Act which might be justified by the CC's decisions on the reference:

And whereas the reference has not been finally determined in accordance with section 79(1) of the Act:

Now EWS hereby gives to the CC the following undertakings pursuant to section 80 of the Act for the purpose of preventing pre-emptive action.

Management of the MARCROFT business until determination of proceedings

1. Except with the prior written consent of the CC, EWS undertakes that it will not during the specified period take any action which might prejudice the reference concerned or impede the taking of any action under the Act by the CC or other party which may be justified by the CC's decisions on the reference, including any action which might:
 - (a) lead to the integration of the MARCROFT business with the EWS business;
 - (b) transfer the ownership or control of the MARCROFT business or any of its subsidiaries; or
 - (c) otherwise impair the ability of the MARCROFT business to compete independently in any of the markets affected by the acquisition.
2. Further and without prejudice to the generality of paragraph 1, EWS will at all times during the specified period, procure that except with the prior written consent of the CC:
 - (a) the MARCROFT business is maintained as a going concern and sufficient resources are made available to ensure that it is and remains upon determination of the reference a commercially independent operation;
 - (b) with the exception of the Common Services Provisions the MARCROFT business is carried on and managed separately from the

EWS business and the MARCROFT business' separate sales or brand identity is maintained;

- (c) except for in the ordinary course of business, the nature, description, range and quality of any services currently supplied in the United Kingdom by the MARCROFT business is maintained and preserved;
- (d) except in the ordinary course of business for the separate operation of the two businesses:
 - (i) the assets of the MARCROFT business are maintained and preserved, including facilities and goodwill;
 - (ii) none of the assets of the MARCROFT business are disposed of; and
 - (iii) no interest in the assets of the MARCROFT business is created or disposed of;
- (e) the sales operations of EWS and the MARCROFT business shall be operated separately and any negotiations with MARCROFT business customers in relation to the MARCROFT business will be carried out by the MARCROFT business alone and EWS will not negotiate on behalf of the MARCROFT business or enter into any joint agreements/tenders involving the MARCROFT business and such MARCROFT business customers. For the avoidance of doubt, subject to the requirements of paragraph 6, EWS and MARCROFT may negotiate, and bid for, contracts where either party acts as sub-contractor on reasonable, arms length, commercial terms.
- (f) where MARCROFT is the customer of goods or services under existing contracts, those contracts will continue to be held by and/or those goods and services will continue to be provided to the MARCROFT business to which they were contracted or provided;
- (g) subject to the Common Service Provisions in relation to IT services, there is no integration of the information technology of EWS and the MARCROFT business, the information technology systems of both the businesses will be configured such as to prevent any unauthorised access by either business to any information held by the other and any development or replacement of the hardware and/or software platform of the Marcroft business will allow them to be operated and supported on a stand-alone basis, separately from the EWS business;
- (h) except as provided for in the Common Services Provisions, no changes are made to the key staff or organisational structure of the MARCROFT business or to the management responsibilities within the MARCROFT business;
- (i) no key staff are transferred or seconded between the two businesses;
- (j) all reasonable steps are taken to encourage all key staff to remain with the MARCROFT business;

- (k) except as provided in paragraph 3 below, no Confidential Information, shall pass, directly or indirectly, from the MARCROFT business (or any of its employees, directors, agents, secondees or affiliates) to the EWS business (or any of its employees, directors, agents, secondees or affiliates), other than for the purpose of complying with these undertakings. If such Confidential Information has already passed directly or indirectly to the EWS business prior to the giving of these undertakings:
- (i) it should not be passed directly or indirectly to any employees, directors, or affiliates of the EWS business that do not have possession of such Confidential Information; and
 - (ii) it should not be used directly or indirectly by the EWS business to obtain customers.
 - (iii) EWS will use its best endeavours to ensure that any records or copies (electronic or otherwise) of such information wherever they may be held, except for documents and records that are required by any applicable law or by any judicial body to be retained, are either returned to MARCROFT, destroyed as soon as practicable and in any case within 48 hours of the acceptance of these undertakings or (in the case of information received by EWS in the course of the due diligence process leading up to the acquisition of MARCROFT) deposited with EWS's legal advisers and accessed only in the event of a breach of warranty claim by EWS.

3. Notwithstanding the undertakings set out above, the following Confidential Information flow is permitted:

- Confidential Information flows between the individuals listed in Appendix 4 necessary for the Common Services Provisions.

EWS will ensure that all employees, directors, agents, secondees or affiliates processing permitted flows of Confidential Information, or who otherwise have access to commercially sensitive information relating to the Marcroft business, are aware of the terms of these undertakings and the consequences of breach.

- (a) Permitted flows of Confidential Information relating to the Marcroft businesses shall only be used in accordance with the purpose of the permitted information flow and shall be held separate and in the event that the CC concludes that any assets of the Marcroft business should be divested all copies of such Confidential Information shall be returned to the Marcroft business and/or destroyed.
- (b) Any employees, directors, agents, secondees or affiliates processing permitted information flows will not disclose Confidential Information further. EWS will procure that all persons processing permitted information flows sign a confidentiality agreement, copy attached in Appendix 3 to these Undertakings. EWS shall further ensure that the confidentiality agreements entered into by any such employees, directors, agents, secondees or affiliates shall be enforced.

Compliance

4. EWS shall procure that each of its subsidiaries complies with these undertakings as if it had given them.
5. EWS shall forthwith provide to the CC such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by EWS and its subsidiaries with these undertakings. In particular, on the 6th of each month, (or, where the 6th does not fall on a working day, the first working day thereafter) EWS shall provide a monthly statement to the CC confirming compliance with these undertakings in the form set out in Appendix 1 to these Undertakings signed by the following individuals:
 - Keith Heller, Chief Executive, EWS
 - Michelle Davies, Legal Director, EWS
6. At all times, EWS will procure that MARCROFT will actively keep the CC informed of any material developments relating to the MARCROFT business which includes but is not limited to:
 - (a) details of all key staff who leave or join the MARCROFT business;
 - (b) any MARCROFT business disruptions or breakdowns which have halted operations for more than 24 hours or changes in the MARCROFT business' operation arrangements which have affected the working pattern of more than five MARCROFT business employees;
 - (c) all customer contracts won or lost by the MARCROFT business including any changes in customers' demand. For avoidance of doubt this includes any arrangements where Marcroft acts as sub-contractor;
 - (d) any tender proposals or bids where MARCROFT proposes to supply goods or services as either contractor or sub-contractor; and
 - (e) changes in the MARCROFT business contractual arrangements with key suppliers.
7. EWS shall procure that the MARCROFT business shall provide a monthly report to the CC in the form set out in Appendix 2 to these Undertakings or such other information as may from time to time be directed by the CC as required for the purposes of monitoring compliance with these undertakings. These reports should be provided directly to the CC the first being provided on the on the 6th of each month, (or, where the 6th does not fall on a working day, the first working day thereafter) and signed by Rab McNeil, General Manager, Marcroft Engineering Ltd.
8. EWS shall comply insofar as it is able with such written directions as the CC may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings.

Interpretation

9. The Interpretation Act 1978 shall apply to these undertakings as it does to Acts of Parliament.

10. For the purposes of these undertakings:

"the acquisition" means the acquisition by EWS of MARCROFT, completed on 1 February 2006;

"the Act" means the Enterprise Act 2002;

"an affiliate" of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on from time to time and any enterprise that the second person carries on from time to time would be regarded as being under the common control for the purposes of section 26 of the Act;

"an agent" of a person (the principal) is another person who has the authority or capacity to create legal relations between the principal and a third party. For avoidance of doubt consultants and advisors will only be acting as agents where they are acting with such authority or capacity.

"business" has the meaning given by section 129(1) and (3) of the Act;

"the CC" means the Competition Commission;

"the Common Services Provisions" means the management services described in Appendix 4, which the CC has agreed will be provided by EWS to Marcroft pursuant to a management services contract to be executed within 8 working days of the conclusion of these undertakings, in a form notified to the CC.

"Confidential Information" means business secrets, know-how, commercially sensitive information (including customer information, correspondence and processes), intellectual property or any other information of a confidential or proprietary nature relating to the MARCROFT Business in the case of MARCROFT and the EWS business in relation to EWS;

"control" includes the ability directly or indirectly to control or materially to influence the policy of a body corporate or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, and in the case of a body corporate, a person shall for the purposes of these undertakings be deemed to control it if he holds, or has an interest in, shares of that body corporate which amount to 10 per cent or more of its issued share capital or which carry an entitlement to vote at meetings of that body corporate of 10 per cent or more of the total number of votes which may be cast at such meetings;

"the decisions" means the decisions of the CC on the questions which it is required to answer by virtue of section 35 of the Act;

"key staff" means staff in positions of executive or managerial responsibility or whose performance affects the viability of the business;

"the OFT" means the Office of Fair Trading;

"the ordinary course of business" means matters connected to the day to day supply of goods and/or services by the MARCROFT business and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of the MARCROFT business;

"the specified period" means the period beginning on the date of these undertakings and terminating when the reference is finally determined in accordance with sections 79(1) and (2) of the Act;

"subsidiary", unless otherwise stated, has the meaning given by section 736 of the Companies Act 1985 (as amended);

"the two businesses" means the EWS business and the MARCROFT business;

"EWS" means English Welsh & Scottish Railway Holdings Limited and its subsidiaries;

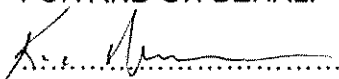
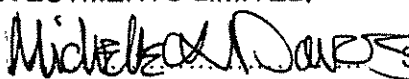
"the EWS business" means the business of EWS and its subsidiaries carried on as at 1 February 2006;

"MARCROFT" means Marcroft Holdings Limited and its subsidiaries;

"the MARCROFT business" means the business of MARCROFT carried on in the UK as at 1 February 2006 and

unless the context requires otherwise, the singular shall include the plural and vice versa.

FOR AND ON BEHALF OF RAILWAY INVESTMENTS LIMITED,

 Signature  Signature

Keith Heller Name Michelle Davies Name

Chief Executive Title Legal Director Title

13 March 2006 Date 13 March 2006 Date

FOR AND ON BEHALF OF ENGLISH WELSH & SCOTTISH RAILWAY HOLDINGS LIMITED

 Signature  Signature

Keith Heller

Name

Michelle Davies

Name

Chief Executive

Title

Legal Director

Title

13 March 2006

Date

13 March 2006

Date

Appendix 1

Compliance Statement for Railway Investments Limited and English Welsh & Scottish Railway Holdings Limited

I [Name] confirm on behalf of Railway Investments Limited and English Welsh & Scottish Railway Holdings Limited (EWS) that to the best of my knowledge and belief:

- (a) EWS have complied with the undertakings given by us and accepted by the CC on [date] ("Undertakings") in the period from [*insert date*] to [*insert date*];
- (b) EWS's subsidiaries have also complied with the Undertakings in the period from [*insert date*] to [*insert date*];

I am aware that under section 117 of the Enterprise Act 2002 it is a criminal offence to knowingly provide the CC with false information.

FOR AND ON BEHALF OF RAILWAY INVESTMENTS LIMITED and ENGLISH WELSH & SCOTTISH RAILWAY HOLDINGS LIMITED

Signature

Name

Title

Date

Appendix 2

Report for Marcroft Holdings Limited

I [NAME] confirm on behalf of Marcroft Holdings Limited (Marcroft) that to the best of my knowledge and belief in the period from [*insert date*] to [*insert date*]:

Independent operation of Marcroft Holdings Limited

- a) The MARCROFT business has been maintained as a going concern with sufficient resources to ensure that it is and remains upon determination of the reference a commercially independent operation;
- b) The MARCROFT business' customer lists have been operated and updated purely for the purposes of MARCROFT business without any involvement of EWS.
- c) All customer negotiations have been carried out independently of EWS and on behalf of the MARCROFT business except the following:
 - (Negotiation topic, parties present eg MARCROFT, customer any other people present, summary of outcome, parties to the agreement).
- d) Except for in the ordinary course of business, there have been no significant changes to the nature, description, range and quality of any goods and/or services currently supplied in the United Kingdom by the MARCROFT business except the following:
 - (detail change, reason for change and confirm that this is not a measure that will further integrate MARCROFT and EWS businesses or impede MARCROFT's ability to operate independently and competitively).

Assets – including facilities and goodwill

- e) Except for in the ordinary course of business, none of the assets of the MARCROFT business have been disposed of except the following:

- (detail change, reason for change and confirm that this is not a measure that will further integrate MARCROFT and EWS businesses or impede MARCROFT's ability to operate independently and competitively).
- f) No interest in the assets of the MARCROFT business has been created or disposed of except the following:
- (detail change, reason for change and confirm that this is not a measure that will further integrate MARCROFT and EWS businesses or impede MARCROFT's ability to operate independently and competitively).
- g) Other than as specified in e) and f) above, all of the assets have been maintained as they were before the merger.

Contracts

- h) All existing contracts of importance to the MARCROFT business continue to be held by (and goods and services provided thereunder continue to be provided to) the MARCROFT business originally holding the contract except the following:
- (Name original contract party, name new contract party, detail change, reason for change and confirm that this is not a measure that will further integrate MARCROFT and EWS businesses or impede MARCROFT's ability to operate independently and competitively).

Information Technology Systems

- i) There have been no changes to the software and hardware platforms of the MARCROFT business, beyond routine changes and maintenance except for:
- (detail change, reason for change and confirm that this is not a measure that will further integrate MARCROFT and EWS businesses or impede MARCROFT's ability to operate independently and competitively).

Material Developments

- j) No key staff have left or joined EWS from the MARCROFT business except the following:
- [insert name, position, reason for departure or recruitment, previous position]

- k) There have been no breakdowns or disruptions to the MARCROFT business which have halted operations for more than 24 hours or changes in the MARCROFT business' operations which have affected the working pattern of more than five MARCROFT business employees except the following:
- [Insert details]
- l) There have been no customer contracts won or lost for the MARCROFT business and no changes to the MARCROFT business' customer contracts except the following:
- [insert details of significant contracts won or lost, or any other significant changes in contractual arrangements with customers. Detail customer and if known successful party]
- m) There have been no changes in the MARCROFT business contractual arrangements with key suppliers except the following:
- [insert details];
- n) For the avoidance of doubt, where this Appendix refers to an item as "key", "important" or "significant", those expressions shall mean "as determined by MARCROFT, acting reasonably".

I am aware that under section 117 of the Enterprise Act 2002 it is a criminal offence to knowingly provide the CC with false information.

FOR AND ON BEHALF OF MARCROFT HOLDINGS LIMITED

Signature

Name

Title

Date

Appendix 3
Confidentiality Agreement Template

Dear Sirs

This letter is written in connection with the acquisition by English Welsh & Scottish Railway Holdings Limited (*EWS*) of Marcroft Holdings Limited (*Marcroft*) and the request that I provide services to Marcroft as described in the annex to this letter (the *Services*) [ATTACH APPENDIX 4 TO THE UNDERTAKINGS].

I understand that:

- the Competition Commission (the *CC*) is currently carrying on an inquiry into EWS's acquisition of Marcroft;
- the *CC* has required that EWS take no step that will lead to the integration of the Marcroft business with the EWS business or otherwise impair the ability of Marcroft to compete independently in each case for the duration of the inquiry;
- the *CC* has nonetheless consented to my providing the *Services* to Marcroft during its inquiry provided that:
 - I keep confidential to Marcroft (and in particular do not supply to EWS) any information or document that may come to my knowledge or into my possession as a result of my providing the *Services*; and
 - I give an undertaking that I will keep such information and documents confidential.

I am therefore writing this letter to each of EWS and Marcroft to confirm that I shall keep secret and confidential and shall not, without having been provided by EWS or Marcroft with written evidence that the *CC* has consented, disclose to anyone within EWS or any third party (i.e. to anyone other than a Marcroft employee or an EWS employee listed in the annex to this letter) any information or document (*Relevant Confidential Information*) that may come into my possession as a result of providing the *Services*. I will, at the end of the *CC*'s inquiry, destroy or return all *Relevant Confidential Information* in my possession in the event of EWS selling Marcroft upon the direction of the *CC*, and shall not use such confidential information for any purposes after such date.

This letter shall not apply if I am required by a court or by law to disclose *Relevant Confidential Information*.

I understand that my complying with this letter is highly important to EWS and necessary to enable it to comply with undertakings it has given to the *CC* and that breach of this agreement will constitute a breach of my terms of employment.

Yours faithfully

[NAME]

Appendix 4 Common Services Provisions

This Appendix contains a list of EWS employees who may carry out the functions described below for Marcroft.

For the purpose of the undertakings "the **Common Services Provisions**" means, to the extent and by the named individuals detailed below:

- (i) the provision of board services;
- (ii) the provision of payroll support services;
- (iii) the provision of legal services;
- (iv) the provision of technical management services in the fields of safety, quality and environmental assurance as well as specialist advice in relation to buildings and infrastructure matters and civil engineering requirements;
- (v) the provision of human resource management services;
- (vi) the provision of IT services (save that there must be no integration of the hardware and software platforms of the two businesses in accordance with the prohibition set out in paragraph 2(f) above); and

Employees and Details of Functions

In relation to the provision of Board services:

[REDACTED]

In relation to the provision of payroll services:

[REDACTED]

In relation to the provision of legal services:

[REDACTED]

In relation to the provision of technical management services:

[REDACTED]

In relation to the provision of human resources services:

[REDACTED]

In relation to the provision of IT support services:

[REDACTED]

The EWS personnel listed above are to have access to Marcroft's main site at Stoke-on-Trent. The EWS personnel are to have access to the site provided that: (a) with the exception of [REDACTED], such individuals do not have passwords to access computers or business critical databases; and (b) such individuals each sign a confidentiality agreement in the terms set out in Appendix 3.