

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

**NOTICE OF ACCEPTANCE OF FINAL UNDERTAKINGS PURSUANT TO  
SECTION 82 OF AND SCHEDULE 10 TO THE ENTERPRISE ACT 2002**

On 12 September 2006, the Competition Commission (CC) published its report on the completed acquisition by Railway Investments Limited (a wholly-owned subsidiary of English Welsh & Scottish Railway Holdings Limited (EWS)) of Marcroft Holdings Limited, including its wholly-owned subsidiary, Marcroft Engineering Limited (together Marcroft) in which it concluded that:

- (a) the acquisition by EWS of Marcroft was the creation of a relevant merger situation;
- (b) the creation of that situation has resulted, and may be expected to result, in a substantial lessening of competition (SLC) in the market for rail freight haulage services in Great Britain. This may be expected to result in the adverse effects of lower service quality and higher prices for haulage operators and customers of haulage operators than would have been the case had the merger not taken place;
- (c) the CC should take action to remedy the SLC and the adverse effects flowing from it; and
- (d) having regard to the need to achieve as comprehensive a solution as is reasonable and practicable, the CC considers that a divestiture of all or, subject to the requirements set out in paragraphs 8.59 to 8.62 of the report, part of the Marcroft Outstation Business would be sufficient to remedy the SLC and the adverse effects arising from it.

The CC has reached agreement with EWS as to the terms of Final Undertakings for the purpose of remedying, mitigating or preventing the anti-competitive outcome identified.

On 15 November 2006 the CC gave notice of the proposed Final Undertakings in accordance with Schedule 10 of the Enterprise Act 2002 (the Act) and has considered the representations received.

EWS has now given the Final Undertakings to the CC for the purposes of remedying, mitigating or preventing the SLC and adverse effects identified. A copy of the Final Undertakings is set out in the attached Annex.

Now the CC accepts the Final Undertakings pursuant to, and they come into force in accordance with, section 82 of the Act.

Therefore the reference is finally determined in accordance with section 79 of the Act.



Jeremy Peat  
Group Chair

5 January 2007

## ANNEX

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

#### Final Undertakings given by English Welsh & Scottish Railway Holdings Limited to the Competition Commission pursuant to section 82 of the Enterprise Act 2002

On 6 February 2006 the Office of Fair Trading (OFT) referred the completed acquisition by Railway Investments Limited (a wholly-owned subsidiary of English Welsh & Scottish Railway Holdings Limited (EWS)) of Marcroft Holdings Limited, including its wholly-owned subsidiary, Marcroft Engineering Limited (together Marcroft unless otherwise specified) to the Competition Commission (CC) for investigation and report under section 22 of the Enterprise Act 2002 (the Act).

On 19 July 2006 the CC decided that, under section 39(3) of the Act, the reference period should be extended by eight weeks.

On 12 September 2006 the CC published a report entitled *Completed acquisition by Railway Investments Limited of Marcroft Holdings Limited* (the report).

And the report concluded that:

- (a) The acquisition by EWS of Marcroft was the creation of a relevant merger situation (the merger).
- (b) The creation of that situation has resulted, and may be expected to result, in a substantial lessening of competition (SLC) in the market for rail freight haulage services in Great Britain. This may be expected to result in the adverse effects of lower service quality and higher prices for haulage operators and customers of haulage operators than would have been the case had the merger not taken place;
- (c) The CC should take action to remedy the SLC and the adverse effects flowing from it.
- (d) Having regard to the need to achieve as comprehensive a solution as is reasonable and practicable, the CC considers that a divestiture of all or, subject to the requirements set out in paragraphs 8.59 to 8.62 of the report, part of the Marcroft Outstation Business would be sufficient to remedy the SLC and the adverse effects arising from it.

On 29 August 2006 EWS proposed a divestiture package comprising divestiture of certain contracts, employees, sites and facilities to a proposed purchaser and the CC concluded in paragraph 8.57 of the report that that proposal may be sufficient to remedy the SLC and adverse effects arising from the merger.

Now therefore EWS gives to the CC the following Undertakings under section 82 of the Act for the purpose of remedying the SLC and the adverse effects, resulting from the merger, identified in the report.

#### Interpretation

1. Words and expressions defined in the recitals to these Undertakings shall have the same meaning in these Undertakings.



December 2006 and adopted in paragraph 43 of these Undertakings.

- 7.9 Proposed Purchaser [X]
- 7.10 Purchaser Complaint A complaint submitted to the CC, either by the Proposed Purchaser, or a potential purchaser who has submitted an expression of interest in writing as a result of the invitation to bid issued under paragraph 22, in relation to the divestiture of the Initial Divestiture Package or the Secondary Divestiture Package, as relevant.
- 7.11 Secondary Divestiture Package A package reflecting the decision in paragraph 8.61 of the report, and meeting the requirements of paragraph 24 of these Undertakings.
- 7.12 Secondary Divestiture Period [X] commencing from the date on which the CC issues a notice under paragraph 20.
- 7.13 Suitable Purchaser A purchaser identified in accordance with paragraph 23 and meeting the requirements of paragraph 25 of these Undertakings.
- 7.14 Trustee Obligation The Divestiture Trustee's obligation to dispose of a package suitable to remedy the SLC and adverse effects identified in the report [X], subject to prior approval of the CC of the package, purchaser and the divestiture arrangements.

## **Commencement**

8. These Undertakings shall come into effect on 4 January 2007.

## **Principal obligations**

### ***Initial Divestiture Package***

9. In order to remedy the SLC and adverse effects identified in the report, EWS undertakes that it shall use all reasonable endeavours to divest the Initial Divestiture Package to the Proposed Purchaser within the Initial Divestiture Period.
10. The Initial Divestiture Package shall comprise the customer contracts, maintenance bases, employees, assets and sites detailed in Annex 1 to these Undertakings, or a package similarly composed and approved in writing by the CC.
11. In addition to the elements outlined in paragraph 10 above and as required by the Proposed Purchaser the Initial Divestiture Package is to:
- 11.1. include any relevant support services for the outstation business presently conducted from the Stoke location, including administrative support and engineering supervision, to allow the Proposed Purchaser to run the Initial Divestiture Package as a viable and competitive concern;

- 11.2. include the offer of services and facilities on arm's length commercial terms provided by the Stoke workshop for a limited transitional period (up to one year) as necessary to enable the Proposed Purchaser to establish alternative arrangements for workshop services and the storage of materials; and
- 11.3. include an appropriately time-limited non-compete arrangement for transferred customers and an appropriately time-limited non-solicitation agreement in relation to transferred employees.
- 11.4. In the event of a non-compete/non-solicitation arrangement as described in paragraph 11.3 being agreed, EWS will not compete for customers or solicit employees included in the Initial Divestiture Package for the period provided for under the terms of the non-compete/non-solicitation arrangement agreed with the Proposed Purchaser.
12. EWS will guarantee the Proposed Purchaser access rights to any transferred sites owned or controlled by EWS on reasonable commercial terms and undertake to renew leases on transferred sites (where applicable) on reasonable commercial terms.
13. Where EWS has control over the access to any transferred sites, EWS should continue to provide access at the same or no worse than current terms.
14. EWS will use reasonable endeavours to provide to the CC confirmation that the customers of maintenance services identified in the Initial Divestiture Package agree to the transfer of the maintenance of the wagons currently carried out by Marcroft to the Proposed Purchaser.
15. The CC may require EWS, the Proposed Purchaser or both to provide it with such information and documentation as may be reasonably required to demonstrate that the Initial Divestiture Package is comprised so as to enable the Proposed Purchaser to operate the Initial Divestiture Package as an effective and financially viable competitor in the wagon maintenance market offering national coverage to its customers and the Initial Divestiture Package is being offered and sold in a manner consistent with these Undertakings. In order to determine whether these conditions are fulfilled, the CC shall have regard to paragraphs 11 to 14 above and the conclusions contained in paragraph 8.59 of the report.
16. Following due diligence, EWS shall use all reasonable endeavours to procure that the Proposed Purchaser provide the CC with business plans for the Initial Divestiture Package to demonstrate that the Initial Divestiture Package fulfils the requirements set out in paragraph 15.
17. EWS shall be deemed to have divested the Initial Divestiture Package to the Proposed Purchaser within the Initial Divestiture Period in accordance with its obligation under paragraph 9 above if, by the end of the Initial Divestiture Period, either:
  - 17.1. it has completed the sale of the Initial Divestiture Package to the Proposed Purchaser; or
  - 17.2. it has entered into a legally binding agreement with the Proposed Purchaser for the sale of the Initial Divestiture Package.

### ***Monitoring Trustee duties—Initial Divestiture Package***

18. The Monitoring Trustee will monitor the negotiations for the divestment of the Initial Divestiture Package in accordance with its terms of appointment.
19. The Monitoring Trustee will report to the CC every two weeks during the Initial Divestiture Period advising on the progress of discussions with wagon maintenance customers identified in the Initial Divestiture Package, and negotiations with the Proposed Purchaser.
20. If the Monitoring Trustee advises that the Initial Divestiture Package is unlikely to be sold within the Initial Divestiture Period, or the Initial Divestiture Period expires without agreement by the Proposed Purchaser to acquire the Initial Divestiture Package, then the CC will consult the Monitoring Trustee about the progress of negotiations and, unless satisfied that negotiations will conclude successfully within a further reasonable period, will formally notify EWS to cease negotiations and implement the Secondary Divestiture Package.

### ***Secondary Divestiture Package***

21. In the event that the CC requires the implementation of the Secondary Divestiture Package in accordance with paragraph 20, EWS undertakes that, in order to remedy the SLC and adverse effects identified in the report, it shall use all reasonable endeavours to divest a package that satisfies the requirements of paragraph 24 below, within the Secondary Divestiture Period.
22. EWS shall invite bids for all or part of the Marcroft Outstation Business.
23. Upon receiving expressions of interest EWS shall identify a Suitable Purchaser and notify the CC in writing providing detail of the package, addressing the requirements of paragraph 24, and the purchaser, addressing the requirements of paragraph 25.
24. The CC shall approve the Secondary Divestiture Package notified to it in accordance with paragraph 23 if it is satisfied that it:
  - 24.1. remedies the SLC and adverse effects identified in the report;
  - 24.2. allows a Suitable Purchaser, which satisfies the requirements of paragraph 25, to operate the divested entity as an effective and viable competitor in the wagon maintenance market, offering national coverage to customers;
  - 24.3. includes any relevant support services for the outstation business presently conducted from the Stoke location, including administrative support and engineering supervision, necessary for the Suitable Purchaser to run the divested business as a viable and competitive concern;
  - 24.4. includes the offer of services and facilities on arm's length commercial terms provided by the Stoke workshop for a limited transitional period (up to one year) as necessary to enable the Suitable Purchaser to establish alternative arrangements for workshop services and the storage of materials;
  - 24.5. in the event of a sale of part but not all of the Marcroft Outstation business and if required by the Suitable Purchaser, [X]; and that

- 24.6. EWS will guarantee the Suitable Purchaser access rights to any transferred sites owned or controlled by EWS on reasonable commercial terms and undertake to renew leases on transferred sites on reasonable commercial terms; and
- 24.7. where EWS has control over the access to any transferred sites, EWS will continue to provide access at the same or no worse than current terms.
25. The CC shall approve the Suitable Purchaser, notified to it in accordance with paragraph 23, if it is satisfied that it:
  - 25.1. is independent of and unconnected with EWS;
  - 25.2. has the incentive, resources and expertise to run the Secondary Divestiture Package as a viable competitor in the wagon maintenance market, offering national coverage to its customers; and
  - 25.3. is not likely, by its acquisition of the Secondary Divestiture Package, to create an expectation of an SLC in the wagon maintenance, haulage or related markets. If it considers it necessary, the CC may require the Proposed Purchaser's acquisition of the Secondary Divestiture Package to be considered by the OFT before approving the purchaser.
26. EWS shall only divest the Secondary Divestiture Package to a Suitable Purchaser when the CC has confirmed in writing that the package satisfies the requirements of paragraph 24 and the purchaser satisfies the requirements of paragraph 25.
27. The CC may require EWS, the Suitable Purchaser, or both to provide it with such information and documentation as may be reasonably required to demonstrate that the Secondary Divestiture Package is comprised as to enable the Suitable Purchaser to operate the divested entity as an effective and financially viable competitor in the wagon maintenance market offering national coverage and the Secondary Divestiture Package is being sold in a manner consistent with these Undertakings. In order to determine whether these conditions are fulfilled, the CC shall have regard to paragraphs 24 and 25 above and to the conclusions contained in paragraph 8.61 of the report.

### ***Monitoring Trustee Duties—Secondary Divestiture Package***

28. The Monitoring Trustee will monitor the invitation for bids, in accordance with paragraph 22, and the negotiations for the divestment of the Secondary Divestiture Package, in accordance with its terms of appointment.
29. The Monitoring Trustee will report to the CC every two weeks during the Secondary Divestiture Period advising on the progress of the invitation for bids, the responses and the negotiations with a selected purchaser.
30. If the Monitoring Trustee advises that EWS cannot procure divestiture of the Secondary Divestiture Package within the Secondary Divestiture Period, either the period may be extended by the CC or the CC may issue a direction to mandate the appointment of an independent Divestiture Trustee, in accordance with the procedure set out in paragraphs 49 to 52 these Undertakings, who shall carry out the function detailed in paragraph 56 within a time frame to be specified by the CC.

31. EWS shall be deemed to have divested the Secondary Divestiture Package within the Secondary Divestiture Period in accordance with its obligation under paragraph 21 if, by the end of the Secondary Divestiture Period, either:
  - 31.1. it has completed the sale of the Secondary Divestiture Package to a Suitable Purchaser; or
  - 31.2. it has entered into a legally binding agreement with a Suitable Purchaser for the sale of the Secondary Divestiture Package.

### **Ancillary matters**

32. EWS undertakes that where it requires the consent or approval of the CC (however that requirement is expressed in these Undertakings) it will seek the consent or approval in writing.
33. EWS undertakes that any application for the CC's consent or approval shall make full disclosure of every fact and matter that is relevant to the CC's decision.
34. EWS recognizes that where the CC grants consent or approval on the basis of misleading or incomplete information, the consent or approval is voidable at the election of the CC.
35. In the event that EWS discovers that an application for consent or approval has been made without full disclosure and is therefore incomplete EWS undertakes to:
  - 35.1. inform the CC in writing, identifying the particulars in which the application for consent is incomplete, within seven working days of becoming aware that the application is incomplete; and
  - 35.2. at the same time or as soon as possible thereafter, provide to the CC an application for consent that is complete.
36. EWS shall use all reasonable endeavours to make each application or to procure that each application for consent or approval is made so that it is received by the CC at least five working days, or such lesser period as the CC may allow, before the day on which the CC's consent or approval is necessary to avoid a breach of these Undertakings.
37. The CC shall use its reasonable endeavours to grant or refuse any consent or approval within the five-day period referred to in paragraph 36.
38. EWS recognizes that the CC shall not be required to approve the Secondary Divestiture Package, under paragraph 24, or the Suitable Purchaser, under paragraph 25, within a five-day period. The CC shall approve the Secondary Divestiture Package and the Suitable Purchaser within a reasonable time of receiving notice under paragraph 23.

### **EWS's secondary obligations**

39. EWS undertakes that until it has received the CC's approval for the sale of either the Initial Divestiture Package or the Secondary Divestiture Package, it will maintain the Marcroft Business as a going concern and will not, subject to the Consents, take any action that will:

- 39.1. lead to the integration of the Marcroft Business with the EWS business;
  - 39.2. transfer the ownership or control of the Marcroft Business; or
  - 39.3. otherwise impair the ability of the Marcroft Business to act as a viable and competitive concern.
40. EWS undertakes that until it has sold either the Initial Divestiture Package or the Secondary Divestiture Package it will:
- 40.1. preserve the assets of the Marcroft Outstation Business and use all reasonable endeavours to preserve all supplies of goods or services ancillary or connected thereto;
  - 40.2. take no steps that would impair the marketability, or that would jeopardize, delay or impede the sale of the Marcroft Outstation Business; and
  - 40.3. use all reasonable endeavours to preserve relationships with suppliers, customers, employees (subject to Marcroft's ordinary course employment disciplinary or dismissal practices and procedures) and any other person or persons having business relations with the Marcroft Outstation Business.
41. The management, sales and operations of EWS and the Marcroft Business (including, subject to the Consents, the Stoke workshop business) shall be operated separately and any negotiations with, or services provided to, the Marcroft Business customers in relation to the Marcroft Business will be carried out by the Marcroft Business alone. EWS will not, subject to the Consents, 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 paragraphs 39 and 40, EWS and the Marcroft Business may negotiate, and bid for, contracts where either party acts as subcontractor on reasonable, arm's length, commercial terms.
42. EWS is permitted to establish a data room for the conduct of the due diligence process required for the sale of either the Initial Divestiture Package or the Secondary Divestiture Package subject to the following conditions:
- 42.1. EWS shall ensure that all EWS employees, servants, agents or advisers present in the data room sign confidentiality agreements.
  - 42.2. EWS employees, servants or agents present in the data room shall not copy or retain any documentation.
  - 42.3. Any documentation that EWS is required to retain for liability or other purposes connected with the sale of the divestiture package shall be held by EWS' legal advisers and shall only be released to EWS with the written permission of the CC.
  - 42.4. The Monitoring Trustee shall be entitled to have access to the data room and shall ensure that the due diligence process is conducted in a manner consistent with these Undertakings.
  - 42.5. EWS shall notify the CC of the establishment of the data room two working days prior to the conduct of the due diligence process. This notice shall contain the names of the individuals attending the data room, details of the company they represent, and confirmation that EWS employees, servants or

agents have signed the confidentiality agreements provided for in paragraph 42.1.

### **Monitoring Trustee—adoption**

43. The Monitoring Trustee appointed in accordance with paragraph 8 of the Interim Undertakings is adopted to perform the role detailed in the terms of appointment signed on 4 December 2006 (in Annex 2).
44. At all times, EWS will actively keep the Monitoring Trustee informed of any developments relating to the negotiations for the divestiture of the Initial Divestiture Package or the invitation for bids and negotiations for and sale of the Secondary Divestiture Package.
45. At all times, EWS will use all reasonable endeavours to procure that Marcroft will actively keep the Monitoring Trustee informed of any material developments relating to the Marcroft Business which include but are not limited to:
  - 45.1. details of all key staff who leave or join the Marcroft Business;
  - 45.2. 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;
  - 45.3. 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 subcontractor;
  - 45.4. any tender proposals or bids where Marcroft proposes to supply goods or services as either contractor or subcontractor; and
  - 45.5. changes in the Marcroft Business contractual arrangements with key suppliers.
46. The Monitoring Trustee may require EWS or Marcroft to provide it with such information and documentation as may be reasonably required for monitoring compliance with these Undertakings.

### **Purchaser complaints**

47. EWS undertakes that the provisions of paragraph 48 shall apply where, in the case of the Initial Divestiture Package, the Proposed Purchaser or, in the case of Secondary Divestiture Package, a potential purchaser who has submitted an expression of interest in writing as a result of the invitation to bid issued under paragraph 22, makes a Purchaser Complaint to the CC.
48. The provisions of this paragraph are that:
  - 48.1. The CC shall consult EWS and the Monitoring Trustee as to whether the person making the Purchaser Complaint satisfies the criteria in paragraph 47 and, if so, whether the Purchaser Complaint is justified. The CC shall provide to EWS such information as is reasonably required by EWS to enable it to make written representations to the CC and the Monitoring Trustee as to whether the Purchaser Complaint is justified and EWS shall provide to the CC

such assistance as the CC shall reasonably require (including by the disclosure to the CC of commercially sensitive material) to consider whether the Purchaser Complaint is justified. In reaching its decision, the CC shall have due regard to any written representations submitted to it by EWS and to the views of the Monitoring Trustee.

- 48.2. In the event that the CC considers that the Purchaser Complaint is justified, EWS shall use its best endeavours to take such steps as the CC shall consider necessary to remedy the Purchaser Complaint.

### **Divestiture Trustee—appointment procedure**

49. EWS undertakes that within the period of ten working days from the day on which a direction is made by the CC pursuant to paragraph 30, EWS shall submit a list of two or more persons whom EWS proposes to appoint as Divestiture Trustee to the CC for approval. The proposal shall contain sufficient information for the CC to verify that each proposed Divestiture Trustee fulfils the requirements set out in paragraph 50 and shall include:
- 49.1. the full terms of the proposed mandate, which shall include all provisions necessary to enable the Divestiture Trustee to fulfil its duties; and
- 49.2. a schedule of the steps to be taken to give effect to the mandate.
50. Each person on the list shall be independent of any member of EWS and Marcroft, possess the qualifications necessary for the performance of its mandate, and shall on appointment and thereafter be free of any conflict of interest including any conflict of interest that might arise by virtue of the terms on which it is remunerated.
51. The CC may approve or reject any or all of the proposed Divestiture Trustees and may approve the proposed mandate subject to any modifications necessary for the Divestiture Trustee to fulfil its duties. If only one name is approved, EWS shall use all reasonable endeavours to appoint, or cause to be appointed, the individual or institution concerned as Divestiture Trustee in accordance with the mandate approved by the CC. If more than one name is approved, EWS shall be free to choose the Divestiture Trustee to be appointed from among the names approved. EWS shall use all reasonable endeavours to appoint the Divestiture Trustee within five working days from the CC's approval and in the terms of the mandate approved by the CC.
52. If all the proposed Divestiture Trustees are rejected, EWS shall submit the names of at least two further persons within ten working days from being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 49 and 50.
53. The provisions of paragraph 54 shall apply if:
- 53.1. EWS fails to nominate further persons in accordance with paragraph 52;
- 53.2. those further persons are rejected by the CC; or
- 53.3. EWS is unable for any reason to conclude the appointment within a time limit specified by the CC.
54. The CC shall nominate one or more persons to act as Divestiture Trustee, and EWS shall appoint, or cause to be appointed, such Divestiture Trustee within five working

days from such nomination under the terms of a Divestiture Trustee mandate approved by the CC.

55. EWS recognizes that the function of the Divestiture Trustee is distinct from the function of the Monitoring Trustee, although the two functions may be performed by the same person subject to that person meeting the requirements in paragraph 50.

### **Divestiture Trustee—functions**

56. EWS recognizes that the duty of the Divestiture Trustee is to give effect to the Trustee Obligation, in accordance with paragraphs 60 to 64, and EWS undertakes to enable the Divestiture Trustee to give effect to the Trustee Obligation.
57. EWS recognizes that:
  - 57.1. the CC may, on its own initiative or at the request of the Divestiture Trustee or EWS, give written directions or instructions to the Divestiture Trustee in order to assist it in the discharge of its duty;
  - 57.2. the Divestiture Trustee may include in a request such agreements, deeds, instruments of transfer and other instruments and documents as are necessary for the performance of its duty on such terms and conditions as it considers appropriate; and
  - 57.3. the Divestiture Trustee shall protect the legitimate financial interests of EWS subject to the Divestiture Trustee's overriding obligation to give effect to the Trustee Obligation.
58. The Divestiture Trustee shall take such steps and measures as it reasonably considers necessary to discharge its duty and to that end the Divestiture Trustee may give written directions to EWS, and EWS undertakes to comply with such directions and to take such steps within its competence as the Divestiture Trustee may specify.
59. EWS recognizes that in the performance of its duties, the Divestiture Trustee shall act solely on the instructions of the CC and shall not be bound by any instruction of EWS and EWS undertakes that it shall not seek to create or vary the obligations and duties of the Divestiture Trustee, except with the CC's prior written consent.

### **Divestiture Trustee—duties and obligations of EWS**

60. EWS undertakes to provide the Divestiture Trustee with all such cooperation, assistance and information (including by the production of financial or other information whether or not such information is in existence at the time of the request relevant to the Marcroft Business, but excluding any matter properly the subject of legal professional privilege) as the Divestiture Trustee may reasonably require in the discharge of its duty. EWS recognizes that the Divestiture Trustee shall be entitled, subject to a duty of confidentiality, to full and complete access to the books, records, documents, management or other personnel, facilities, sites and technical information necessary for the fulfilment of its duties and EWS undertakes that it shall provide the Divestiture Trustee upon request with copies of any such document. EWS undertakes to make available, as necessary, to the Divestiture Trustee one or more offices on Marcroft's premises and shall be available, and shall procure that personnel of EWS and Marcroft shall be available, for meetings in order to provide the Divestiture Trustee with all information necessary for the performance of its duties.

61. EWS shall grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to enable it to discharge its duty including the appointment of advisers to assist with the divestiture process. EWS undertakes that upon the request of the Divestiture Trustee, EWS shall execute the documents required to give effect to the Trustee Obligation.
62. EWS undertakes to hold the Divestiture Trustee, its employees, agents or advisers, harmless against any liabilities arising out of the proper performance of the Divestiture Trustee's duty, and EWS recognizes that the Divestiture Trustee, its employees, agents or advisers, have no liability to EWS for any liabilities arising out of the proper performance of the Divestiture Trustee's duty under these Undertakings, except to the extent that such liabilities result from actions or omissions that are contrary to law or from the wilful default, recklessness, negligence or bad faith of the Divestiture Trustee, its employees, agents or advisers.
63. EWS undertakes that at its expense the Divestiture Trustee may appoint advisers (in particular for corporate finance or legal advice) subject to EWS's approval (this approval not to be unreasonably withheld or delayed) if the Divestiture Trustee considers the appointment of such advisers reasonably necessary or appropriate in the discharge of its duty, provided that any fees and other expenses incurred by the Divestiture Trustee are reasonably incurred. Any appointment of advisers and any individual item of costs or expenses in excess of £1,000 shall not be incurred without the prior written consent of the CC. Before granting such consent, EWS and the CC shall discuss and seek to agree whenever any such costs and expenses are, in EWS's opinion, not reasonable. Should EWS refuse to approve the advisers proposed by the Divestiture Trustee the CC may, after consulting EWS, approve the appointment of such advisers. EWS recognizes that it shall not be entitled to issue instructions to these advisers and paragraph 59 shall also apply to the Divestiture Trustee's advisers. EWS shall be entitled to a fortnightly account from the Divestiture Trustee of all fees and expenses incurred by the Divestiture Trustee and its advisers (if any).
64. EWS undertakes to make no objection to the disposal of the Marcroft Outstation Business in whole or part, save on the grounds of bad faith by the Divestiture Trustee or the failure of the Divestiture Trustee to protect the legitimate financial interests of EWS, subject to the Trustee Obligation, and where EWS wishes to make an objection on the grounds of bad faith it shall submit a Notice setting out its objection within seven working days from the day on which it first became aware of the fact or facts giving rise to its objection.

### **Divestiture Trustee—replacement, discharge and reappointment**

65. EWS undertakes that if the Divestiture Trustee ceases to perform its functions under these Undertakings or for any other good cause, including the exposure of the Divestiture Trustee to a conflict of interest:
  - 65.1. the CC may, after consulting the Divestiture Trustee, require EWS to replace the Divestiture Trustee; or
  - 65.2. EWS, with the prior written approval of the CC, may replace the Divestiture Trustee.
66. If the Divestiture Trustee is removed according to paragraph 65, the Divestiture Trustee may be required to continue in its function until a new Divestiture Trustee is in place to whom the Divestiture Trustee has effected a full hand-over of all relevant

information. The new Divestiture Trustee shall be appointed in accordance with the procedure referred to in paragraphs 49 to 52.

67. EWS recognizes that the Divestiture Trustee shall cease to act as Divestiture Trustee only after the CC has discharged it from its duties after all the obligations with which the Divestiture Trustee has been entrusted have been implemented.

### **Effect of invalidity**

68. EWS undertakes that should any provision of these Undertakings be contrary to law or invalid for any reason, EWS and each member of the EWS Group shall continue to observe the remaining provisions.
69. EWS undertakes that it shall not rely on any default or want of authority on the part of EWS or any officer or employee thereof in the execution of these Undertakings unless directed so to do by the CC.

### **Provision of information to the CC and the OFT**

70. EWS undertakes that it shall and will use all reasonable endeavours to procure that Marcroft shall promptly provide to the CC such information as the CC may reasonably require for the purpose of performing any of its functions under these Undertakings or under sections 82, 83 and 94(7) of the Act.
71. EWS undertakes that it shall and will use all reasonable endeavours to procure that Marcroft shall promptly provide to the OFT such information as the OFT may reasonably require for the purpose of performing any of its functions under these Undertakings or under sections 92, 93(6) and 94(6) of the Act.
72. EWS undertakes that should it at any time become aware that it is in breach of any provision of these Undertakings, it will write to the CC within five working days to advise the CC:
  - 72.1. that it is in breach; and
  - 72.2. of all the circumstances.

### **Service**

73. EWS hereby authorizes Freshfields Bruckhaus Deringer to accept on behalf of EWS service of all documents (including any document of any kind which falls to be served on or sent to EWS in connection with any proceedings in Courts in the UK) orders, requests, notifications or other communications connected with these Undertakings.
74. Any document, order, request, notification or other communication shall be validly served on EWS if it is served on Freshfields Bruckhaus Deringer or such other person as EWS may nominate to the CC in writing; and service shall be deemed to have been acknowledged by EWS if it is acknowledged by Freshfields Bruckhaus Deringer or such other nominee.
75. Paragraph 74 has effect irrespective of whether, as between EWS and Freshfields Bruckhaus Deringer or other nominee, Freshfields Bruckhaus Deringer or that other nominee has or continues to have any authority to accept and acknowledge service on EWS's behalf; and no failure or mistake by Freshfields Bruckhaus Deringer or that other nominee (including a failure to notify EWS of the service of any document,

order, request, notification or other communication) shall invalidate any action taken in respect of these Undertakings including any proceeding or judgment.

- 76. Any communication between EWS or Marcroft and the CC under these Undertakings shall be addressed to The Secretary to the Remedies Standing Group, Competition Commission, Victoria House, Southampton Row, London WC1B 4AD, or such other address as the CC may direct in writing.
- 77. Any communication between EWS or Marcroft and the OFT under these Undertakings shall be addressed to Director of Mergers, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JY, or such other address as the OFT may direct in writing.

**Compliance**

- 78. EWS undertakes to comply with such written directions as the CC or the OFT may from time to time give and to take such steps within its competence for the purpose of carrying out or securing compliance with these Undertakings.

**Subsidiaries**

- 79. EWS undertakes to procure that its subsidiaries comply with these Undertakings as if they had been given by those subsidiaries.

**Governing law**

- 80. EWS recognizes that these Undertakings shall be governed and construed in all respects in accordance with English law.

**Termination**

- 81. EWS recognizes that these Undertakings shall be in force until such time as they are varied, released or superseded under the Act.
- 82. EWS recognizes that the variation, release or supersession of these Undertakings shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation, release or supersession.

FOR AND ON BEHALF OF RAILWAY INVESTMENTS LIMITED

	Signature		Signature
on behalf of and with the authority of	Name	Michelle Davies	Name
Keith Heller	Title	Legal Director	Title
Chief Executive	Date	4 January 2007	Date
4 January 2007			

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



on behalf of and with the authority of

Keith Heller Name

Chief Executive Title

4 January 2007 Date



Michelle Davies Name

Legal Director Title

4 January 2007 Date

## Details of the Initial Divestiture Package



## Trustee Mandate Agreement

