

## MARKET INVESTIGATION INTO ROLLING STOCK LEASING IN GREAT BRITAIN

### Notice of proposal to accept undertakings pursuant to section 159 of and Schedule 10 to the Enterprise Act 2002 and public consultation on the proposed undertakings

#### Introduction

1. On 26 April 2007 the Office of Rail Regulation (ORR), in exercise of its power under section 131 of the Enterprise Act 2002 (the Act), referred the leasing of rolling stock for franchised passenger services ('the rolling stock leasing market') and the supply of related maintenance services in Great Britain to the Competition Commission (CC) for investigation and report.
2. The CC investigated the matters referred to it in accordance with section 131 of the Act and concluded, in accordance with section 134(1) of the Act, that there were features of the rolling stock leasing market, either alone or in combination, which prevent, restrict or distort competition within the relevant market and, in accordance with section 134(2) of the Act, that an adverse effect on competition existed.
3. The CC published its report entitled *Rolling Stock Leasing* on 7 April 2009 (the report).
4. The CC found that one of the features that adversely affected competition in the market was that train operating companies have limited incentives to negotiate with ROSCOs over lease rentals and a cause of this was the non-discrimination requirements contained in the Codes of Practice.
5. In the report the CC considered that a package of remedies would be effective and proportionate in remedying the various features of the market identified as having an adverse effect on competition. One element of this package set out in the report in paragraph 9.138 is to require that each of the ROSCOs amend its Code of Practice to remove the non-discrimination requirements.
6. The CC, in accordance with its duty under section 138 of the Act, proposes to implement this element of the remedies package by accepting Undertakings from each of [Porterbrook Leasing Company Limited; Angel Trains Limited; and HSBC Rail (UK) Limited] under section 159 of the Act.
7. The CC has now reached provisional agreement with each of [Porterbrook Leasing Company Limited; Angel Trains Limited; and HSBC Rail (UK) Limited] as to the terms of the draft Undertakings. A copy of those draft Undertakings is annexed to this Notice.

#### Notice of proposal to accept undertakings

8. The CC now gives notice of the draft Undertakings and invites written representations on them from any person or persons who wish to comment. Representations should reach the CC by 5 pm on **24 June 2009** and should be addressed to:

Emily Chissell  
Inquiry Manager  
Competition Commission  
Victoria House  
Southampton Row  
LONDON  
WC1B 4AD

or email: [emily.chissell@cc.gsi.gov.uk](mailto:emily.chissell@cc.gsi.gov.uk).

9. The CC will have regard to any representations made in response to this Notice and may make modifications to the proposed undertakings as a result. In the absence of any written representations, or in the event that the CC decides on consideration of representations made not to amend the undertakings, the CC proposes to accept the Undertakings in their present form. If the CC considers that any representations necessitate changes to the draft Undertakings, the CC may give notice of the proposed modifications.
10. The Undertakings may be varied, superseded or released by the CC under section 159 of the Act.
11. This Notice and the proposed undertakings will be published on the CC website.

*(signed)* DIANA GUY  
*Group Chairman*  
9 June 2009

## MARKET INVESTIGATION INTO ROLLING STOCK LEASING IN GREAT BRITAIN

### Draft Final Undertakings given by [ROSCO] to amend the Code of Practice

On 26 April 2007, the Office of Rail Regulation (ORR) referred the leasing of rolling stock for franchised passenger services ('the rolling stock leasing market') and the supply of related maintenance services in Great Britain to the Competition Commission (CC) for investigation. The reference was made under section 131 of the Enterprise Act 2002 (the Act).

The CC published a report entitled *Rolling Stock Leasing* on 7 April 2009 (the report).

[ROSCO], on behalf of itself and its subsidiaries, gives the following Undertakings to the CC pursuant to sections 138 and 159 of the Act to take action requisite as part of a package of remedies for the purpose of mitigating or preventing the adverse effects on competition identified in the report.

#### 1. Interpretation and definitions

- 1.1 The headings used in these Undertakings are for convenience and shall have no legal effect.
- 1.2 Unless the context requires otherwise, the singular shall include the plural and vice versa.
- 1.3 References to recitals, paragraphs, subparagraphs and appendices are references to the recitals to, paragraphs and subparagraphs of, and appendices to, these Undertakings.
- 1.4 The appendix to these Undertakings forms part of these Undertakings.
- 1.5 Except where terms are expressly defined otherwise, the Interpretation Act 1978 shall apply to these Undertakings as it does to Acts of Parliament.
- 1.6 Paragraph references to the Code of Practice refer to the main body of the Code of Practice and unless otherwise stated are not references to the Foreword of the Code of Practice.
- 1.7 For the purpose of these Undertakings (with the exception of the Appendix attached to these Undertakings):

<b>Act</b>	means the Enterprise Act 2002;
<b>Appendix</b>	means the appendix to these Undertakings;
<b>CC</b>	means Competition Commission;
<b>Code of Practice</b>	means the Code of Practice issued by [ROSCO] on [insert date 2002] (as amended) set out in the appendix;
<b>Commencement Date</b>	means the date on which these Undertakings are accepted by the CC;

<b>ORR</b>	means the Office of Rail Regulation or any successor body to the Office of Rail Regulation;
<b>Principal Period</b>	means the period ending 30 days from the Commencement Date or such longer period as the CC may allow;
<b>Principal Undertaking(s)</b>	means the undertaking(s) given by [ROSCO] in paragraph [3];
<b>Report</b>	means the CC's final report of 7 April 2009 on the Rolling Stock Leasing Market Investigation;
<b>Revised Code of Practice</b>	means the Code of Practice having been amended in accordance with paragraph 3 of these Undertakings;
<b>[ROSCO]</b>	means [Porterbrook Leasing Company Limited/Angel Trains Limited/HSBC Rail (UK) Limited – <i>delete as appropriate</i> ] or any successor entity or entities to it that adhere to the Code of Practice;
<b>Undertakings</b>	means these undertakings given by [ROSCO].

## **2. Commencement**

- 2.1 The obligations in these Undertakings will come into force on the Commencement Date.

## **3. Principal Undertakings**

- 3.1 [ROSCO] undertakes that it will amend the Code of Practice as specified in paragraph [4] within the Principal Period.
- 3.2 [ROSCO] undertakes that it will amend the Code of Practice as specified in paragraph [5] within the Principal Period to ensure that the terms and expressions used in the Code of Practice are up to date.

## **4. Amending Code of Practice**

- 4.1 The Code of Practice will be amended as follows:
- 4.1.2. In the third sentence of paragraph 1.1, for the word 'equitable' substitute 'reasonable'.
- 4.1.3. In the third sentence of paragraph 1.1, omit the words 'with any differences in the terms offered to individual customers being justifiable on fair and reasonable criteria as outlined in this Code'.
- 4.1.4. In the heading immediately before paragraph 1.3, for the words 'Fairness and non-discrimination' substitute 'Fair and reasonable terms'.
- 4.1.5. In paragraph 1.3, omit the first sentence 'We will not discriminate, except on the basis of the criteria outlined in this Code, between customers in relation to: the price at which stock is leased or offered for lease; other terms connected to the leasing of rolling stock, including maintenance and

modifications; or in relation to the sub-lease, sale or disposal by other means of stock.’

- 4.1.6. Immediately before paragraph 1.4, insert as a heading the words ‘Non-preferential treatment for vertically integrated companies’.
- 4.1.7. In paragraph 1.4, for the words ‘except on the basis of the criteria outlined in this Code, to that customer’ substitute ‘to that customer, except on the basis of the factors outlined in this Code at paragraph 2.21, although in exceptional circumstances additional factors may be taken into account’.
- 4.1.8. In the second sentence of paragraph 1.5, omit the words ‘and non-discriminatory’.
- 4.1.9. In the third sentence of paragraph 1.5, for the words ‘equitable basis as outlined in section 4 of this Code’ substitute ‘reasonable basis’.
- 4.1.10. Move the text of paragraph 1.5 (as amended) to after paragraph 1.3 and renumber as a new paragraph 1.4. Renumber paragraph 1.4 as a new paragraph 1.5.
- 4.1.11. In the first sentence of paragraph 2.2, after the words ‘paragraphs 2.3 to’ insert ‘2.20 and’.
- 4.1.12. In the first sentence of paragraph 2.21, omit the words ‘and in a non-discriminatory manner’.
- 4.1.13. In the second sentence of paragraph 2.21, omit the words ‘, in exceptional circumstances’.
- 4.1.14. In the second sentence of paragraph 2.21, for the word ‘criteria’ substitute ‘factors’.
- 4.1.15. In the heading immediately before paragraph 4.2, omit the words ‘Non-discrimination’.
- 4.1.16. Omit all of paragraph 4.2.
- 4.1.17. Omit all of paragraph 4.3.
- 4.1.18. In the second sentence of paragraph 5.2, omit the words ‘and non-discrimination’.

## **5. Updating Code of Practice**

- 5.1 The Code of Practice will be amended as follows:
  - 5.1.1. For each reference to ‘Franchising Director’, substitute ‘Secretary of State for Transport, Scottish Ministers or other relevant authority, as appropriate’.
  - 5.1.2. In paragraph 1.1 of the Foreword, before the words ‘Rail Regulator’s’ insert ‘then’. For each reference to ‘Rail Regulator’ (other than in paragraph 1.1 of the Foreword) substitute ‘Office of Rail Regulation’.
  - 5.1.3. For each reference to ‘Strategic Rail Authority’, substitute ‘Department for Transport or Transport Scotland’.

5.1.4. In paragraph 5.1, for the words 'Director General of Fair Trading' substitute 'Office of Fair Trading'.

## **6. Ancillary matters**

- 6.1 [ROSCO] undertakes to submit to the CC and the ORR a copy of the Revised Code of Practice as soon as possible after having made the amendments indicated in paragraphs [4] and [5] and in any case within the Principal Period and provide all other necessary documents and information as the CC or ORR requests to show compliance with the Principal Undertakings.
- 6.2 If [ROSCO] operates a website, [ROSCO] undertakes to publish the Revised Code of Practice on its website in a prominent manner with a note explaining that the Code of Practice has been amended to comply with the remedies required by the CC in the report.
- 6.3 [ROSCO] undertakes to send a copy of the Revised Code of Practice to each entity to which it currently leases passenger rolling stock and which uses any such rolling stock on franchised passenger services in Great Britain with a note explaining that the Code of Practice has been amended to comply with the remedies required by the CC in the report.
- 6.4 [ROSCO] acknowledges and accepts that the text omitted from the Code of Practice in accordance with paragraph 4 will cease to have effect.
- 6.5 [ROSCO] undertakes that, except with the written approval of the ORR, it will not reinstate into the Revised Code of Practice the omissions as specified in paragraph [4] nor any other wording that has similar effect.
- 6.6 [ROSCO] undertakes that it will report to the CC explaining the progress it has made towards satisfaction of the Principal Undertakings or on such other matters relating to compliance with the Undertakings as the CC may from time to time direct.

## **7. Effect of invalidity**

- 7.1 [ROSCO] undertakes that should any provision of these Undertakings be contrary to law or invalid for any reason [ROSCO] shall continue to observe the remaining provisions.
- 7.2 [ROSCO] undertakes that it shall not rely on any default or want of authority on the part of any of its subsidiaries or of any officer or employee thereof in the execution of these Undertakings unless directed to do so by the CC.

## **8. Provision of information to the CC and the ORR**

- 8.1 [ROSCO] undertakes that it 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 159, 160 and 167(7) of the Act.
- 8.2 [ROSCO] undertakes that it shall promptly provide to the ORR such information as the ORR may reasonably require for the purpose of performing any of its functions under these Undertakings or under sections 162, 163(6) and 167(6) of the Act.

**9. Powers of direction**

9.1 [ROSCO] undertakes to comply with such reasonable written directions as the CC or the ORR may from time to time give to take such steps within its competence for the purpose of carrying out or securing compliance with these Undertakings.

**10. Subsidiaries**

10.1 [ROSCO] undertakes to procure that its subsidiaries comply with these Undertakings as if they had been given by those subsidiaries.

**11. Extension of time limits**

11.1 The CC may, where it considers appropriate, in response to a written request from [ROSCO] showing good cause, or otherwise at its own discretion, grant an extension of any period specified in these Undertakings within which [ROSCO] must take action.

**12. Governing law**

12.1 [ROSCO] recognizes and acknowledges that these Undertakings shall be governed and construed in all respects in accordance with English law.

12.2 In the event that a dispute arises concerning these Undertakings [ROSCO] undertakes to submit that dispute to the courts of England and Wales.

**13. Termination**

13.1 [ROSCO] recognizes and acknowledges that these Undertakings shall be in force until such time as they are varied, released or superseded under the Act.

13.2 [ROSCO] recognizes and acknowledges that the variation, release or superseding of these Undertakings shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation, release or superseding.

FOR AND ON BEHALF OF [NAME OF ROSCO]

..... Signature	..... Signature
..... Name	..... Name
..... Title	..... Title
..... Date	..... Date

## Code of Practice

[Insert current ROSCO Code of Practice. Angel's Code can be accessed at:

<http://www.angeltrains.co.uk/corporate/CodeOfPractice.pdf>

Porterbrook's Code can be accessed at:

[http://www.porterbrook.com/downloads/code\\_of\\_practice.pdf](http://www.porterbrook.com/downloads/code_of_practice.pdf) ]