

## MACFARLANES

# ME/6932/21 - CHC/BABCOCK – INITIAL OBSERVATIONS ON THE ISSUES STATEMENT

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Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

## 1 INTRODUCTION

- 1.1 In these initial observations, CHC would like to begin by noting that the market for the provision of O&G Offshore Transportation Services in the UK has always been concentrated and remained fiercely competitive.<sup>1</sup> For many years, there were no more than three (and sometimes two) helicopter operators in the UK with an active presence on the market. It is only since NHV started operations in the UK in 2016 that the structure of the market has evolved to comprise four active competitors.
- 1.2 By reducing the number of operators in the UK from four to three, the acquisition of the Fisher Business (the “Merger”) simply restores the three-player market structure which has typically characterised the industry for most of at least the last 30 years. Moreover, it does so by removing the weakest competitor from that market, a competitor which has not been bidding for contracts frequently over the last 18 months, and which in the absence of the merger, would in any event have exited the market. The Merger also takes place in the context of an extremely challenging market which has gone through a prolonged downturn, in which demand has significantly declined, leaving an over-supply of helicopters and in which the customers exercise substantial leverage over the operators.
- 1.3 In its Decision to refer the Merger to a phase II investigation (the “Decision”), the CMA essentially objects to the Merger on the basis of considerations that would equally apply to any other four to three merger in undifferentiated and concentrated markets. The CMA does so, despite the fact that the Enterprise Act does not require markets to have a specified minimum number of competitors in order to be competitive, but only prohibits mergers which are likely to result in a substantial lessening of competition.
- 1.4 By contrast, and in response to the key lines of inquiry set out in the Issues Statement, CHC will demonstrate to the Panel during the remaining course of the investigation, that the Merger will not give rise to a substantial lessening of competition, notwithstanding the resulting reduction in the number of competitors. In particular, CHC will demonstrate a number of points which are summarised below.

### Counterfactual

- 1.4.1 In the counterfactual, if it had not sold the Fisher Business to CHC, Babcock would have closed the business down and exited the market; in other words, the market would in any event have consolidated and the number of competitors would have gone from four to three regardless of the Merger. This is because the Fisher Business is loss-making and Babcock had [X]<sup>2, 3</sup> Babcock had decided to withdraw and end its exposure to the market in which that business operates and focus instead on its core activities. [X]

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<sup>1</sup> Terms are as defined in the CMA Phase I Decision.

<sup>2</sup> See FMN Annex 121.

<sup>3</sup> See FMN Annex 121.

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## Horizontal unilateral effects

- 1.4.2 The horizontal unilateral effects theory of harm put forward in the Decision, which the Panel is (according to the Issues Statement) proposing to investigate, is not substantiated by the evidence, and does not reflect the conditions of competition prevailing in the market.
- 1.4.3 As noted above, the market for the provision of O&G Offshore Transportation Services has for many years consisted of three or fewer operators and has always remained highly competitive. This will not change as a result of the Merger, not least because Babcock was no longer committed to the offshore transportation sector and as result, the Fisher Business was not investing in new capacity and exercised a weak constraint on CHC, whose fiercest competitors were and will remain NHV and Bristow.
- 1.4.4 Post-merger CHC will still operate in a highly competitive pricing environment characterised by contracting levels of demand, a persistent oversupply of helicopters (which are readily available for purchase or leasing on extremely cost-effective terms) and termination for convenience clauses allowing customers at any time simply to walk away from a contract and switch to a cheaper operator.
- 1.4.5 Moreover, CHC will also continue to face powerful customers intent on squeezing costs out of the supply chain and which exert significant pressure on their transport providers, many of which [REDACTED].
- 1.4.6 These underlying market dynamics are not affected by the Merger but are, if anything, even with one less operator, reinforced by the decline in demand for O&G Transportation Services in the UK and the corresponding increase in spare capacity which maintains a downward pricing pressure in the market.
- 1.4.7 In short, market conditions are and will remain extremely challenging. [REDACTED].<sup>4</sup> [REDACTED]<sup>5</sup>

## The threat of new market entry

- 1.4.8 The competitive threat posed by new entry will also impose significant constraints on CHC. The Merger does not alter the fact that there are a number of adjacent players (e.g. Belair, Unify, Westar) not currently operating in the UK market for O&G Offshore Transportation Services, but which have sufficient experience and resources readily to enter it.
- 1.4.9 Importantly, this is a market in which successful new entry has occurred in the past, most recently in 2016 when NHV entered the UK market as a start-up operation in Aberdeen. Since that time, NHV has grown rapidly by winning a number of important contracts from major customers (e.g. Dana, Spirit, Premier Oil, Shell) and gaining significant market share. It has also pursued further investments in its operations by acquiring on highly competitive terms a large, modern, and fuel-efficient fleet of H175 aircrafts specifically designed for the offshore O&G industry, while also developing its own terminal and infrastructure in Aberdeen and expanding its geographic footprint in the UK by opening a new base in Blackpool in 2020. The ease of entry is also reflected in the fact that NHV was able to start operating in the UK and service customer contracts with its own domestic regulatory approval before subsequently obtaining full UK regulatory approval. The threat of a new operator successfully entering and rapidly expanding in the market is therefore demonstrably real and not theoretical.
- 1.4.10 Moreover, customers will always, as in the past, have the ability to facilitate such new market entry, by awarding a contract to sponsor an operator seeking to enter the market (for example as Chevron did by underwriting NHV's initial expansion into Aberdeen). If customers truly believe the market needs another operator, they can support or sponsor entry and in order

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<sup>4</sup> Because of [REDACTED], CHC agreed to complete the transaction prior to receiving CMA merger clearance since Babcock insisted on [REDACTED].

<sup>5</sup> [REDACTED]

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not to give customers an incentive to do so, CHC will have no choice but to continue to price competitively.

## 2 THE PANEL SHOULD NOT OBJECT TO THIS ACQUISITION SIMPLY BECAUSE IT IS A FOUR TO THREE MERGER

- 2.1 It would be wrong for the Panel to object to this acquisition on the ground that it is a four to three merger without considering the market dynamics and extent of the competitive constraint exercised by Babcock at present.
- 2.2 In the Decision, the CMA explains that it does not apply any thresholds relating to market share, number of remaining competitors or any other measure to determine whether a loss of competition is substantial.
- 2.3 However, upon closer analysis, it is difficult to escape the conclusion that transposing the CMA's current analysis to other four to three mergers in commoditised industries, would almost always lead to the conclusion that such mergers give rise to a substantial loss of competition and that such mergers are always *per se* problematic, even where they do not involve the market leader.
- 2.4 As regards the market for the provision of O&G Offshore Transportation Services, based on the CMA's analysis, it is difficult to envisage how any consolidation in the UK could ever be approved by the CMA.
- 2.5 The CMA does not claim in the Decision that CHC is the market leader; or that CHC and Babcock are particularly close competitors but seems to largely accept that all helicopter operators are capable of providing the same level of services across the UK<sup>6</sup> (consistent with the largely commoditised nature of the industry and with what, it seems, customers have been saying<sup>7</sup>). Closeness of competition (or the lack thereof) is not therefore a material factor in the CMA's analysis. On the contrary, the CMA claims that there are significant competitive interactions between all four operators currently operating on the market who therefore logically pose an important competitive threat to each another.
- 2.6 It follows that the conclusion reached by the CMA that CHC and Babcock are likely to pose an important competitive constraint on one another would apply equally to the parties to any other merger amongst O&G Offshore Transportation Services providers in the UK, thus effectively preventing the industry to adapt through consolidation to changing market conditions.
- 2.7 While the CMA claims that the combined market share of the merging parties is substantial, it would (in all likelihood) reach the same conclusion in relation to the combined market shares resulting from any other (four to three) merger which takes place in a concentrated market in which all four market participants exercise competitive constraints on each other.
- 2.8 Moreover, the CMA recognises that market shares are not a great indicator of market power. They are rightly regarded by the CMA as of more limited significance for the substantive assessment due to the dynamics which characterise competition in this market in which large contracts are lost or won through irregular tenders, leading to substantial shifts and fluctuations of market shares over time (see the Decision at paragraph 77 "*the nature of demand (large contracts are tendered infrequently) may mean that shares of supply at any particular point in time are not particularly probative of a supplier's competitive strength*"). It can thus be inferred from the Decision that it is not the combined market shares of the parties which lies at the heart of the CMA's analysis.
- 2.9 Instead, as noted above, the CMA has taken an approach which is almost entirely driven by the fact that the Merger would reduce the number of competitors with an active presence in the market from four to three. The CMA seems to consider that such a numerical reduction in competitors is, of itself, sufficient to identify a substantial lessening of competition, or at least a realistic prospect of such lessening for the purpose of concluding that the Merger should be referred to a Phase II investigation.

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<sup>6</sup> See para 6 of the Decision: "*The CMA also found that all current UK suppliers are able to bid and win contracts across the UK with their respective helicopter offerings.*"

<sup>7</sup> See para 73 of the Decision: "*The evidence from customers and the other incumbents supports the Parties' submissions that the supply of O&G Offshore Transportation Services is relatively commoditized, with the majority of third parties noting that all four incumbents have similar capabilities and can bid for all opportunities.*"

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- 2.10 The Panel should not endorse the CMA's approach in Phase I which effectively introduces a *de facto* prohibition against four to three mergers even though the Enterprise Act does not prohibit any particular category of mergers, nor does it prohibit mergers which could result in a reduction in the number of competitors in the market below a certain number. As noted, above, the Enterprise Act only prohibits mergers which are likely to substantially lessen competition. Each case and each market must be analysed on its own merits.

## 3 BABCOCK WOULD HAVE EXITED THE MARKET IN THE ABSENCE OF THE MERGER

- 3.1 As recognised in the Issues Statement, one of the important issues in this case is the counterfactual. In Phase I, the CMA can conservatively choose the worst-case scenario but in Phase II the CMA must select the counterfactual that is most likely to occur.<sup>8</sup>

- 3.2 There are two important questions which the Panel will accordingly need to consider.

- 3.3 The first question concerns the likelihood of the Fisher Business' exit from the market in the absence of the merger since the Panel will need to establish, on a balance of probabilities, whether the most likely counterfactual is one in which Babcock would have exited the market had it not sold the Fisher Business to CHC.

Babcock's clear intention to withdraw from a loss-making business and exit the market

- 3.4 The evidence demonstrates that Babcock was determined to exit the O&G Offshore Transportation Services market. Babcock publicly confirmed its intention to withdraw from the market on several previous occasions and there is little doubt that it would have done so absent the Merger, even if this meant winding down the business over a period of time.<sup>9</sup>

- 3.5 Babcock's stated strategy is to focus on its key markets in the defence, aerial emergency services and civil nuclear sectors. It has publicly announced its intention to rationalise its business portfolio by disposing of non-core activities in order to increase focus and the effective use of its capital. Babcock has also repeatedly confirmed that the Fisher Business is situated outside its core business perimeter and no longer fits its strategy.

- 3.6 Indeed, the Fisher business has been described by Babcock as [REDACTED].<sup>10</sup> The business is [REDACTED], has been making substantial losses for several years, and, as was explained to the CMA during the Issues Meeting, has [REDACTED].

- 3.7 The evidence also indicates that [REDACTED]. [REDACTED] and which concluded that running the business [REDACTED], whereas an orderly and complete exit from the market [REDACTED]. It is against that background that Babcock decided to pull out of the market either by selling or by closing the business.<sup>11</sup> The Fisher Business was viewed as a "nightmare" of a business, with Archie Bethel, former Babcock CEO, stating when confirming Babcock's intention to extract itself from the business: "I think we are doing a great thing putting it behind us. Maybe I should get a medal for getting us out of it".<sup>12</sup>

- 3.8 [REDACTED].<sup>13</sup> [REDACTED].

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<sup>8</sup> CMA Merger Assessment Guidelines, paragraph 3.13 and 3.14 ("In Phase 1 investigations, if the CMA must consider multiple potential counterfactual scenarios where each of those scenarios is a realistic prospect, it will choose the one where the merger firms exert the strongest competitive constraint on each other, and where third parties exert the weakest competitive constraints on the merger firms. At Phase 2, the CMA has to make an overall judgement as to whether or not an SLC has occurred or is likely to occur. To help make this assessment the CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger.")

<sup>9</sup> See, for example, para 30 and para 123 of the Decision.

<sup>10</sup> See FMN Annex 215, [REDACTED] (submitted to the CMA on 16 September 2021 together with the Counterfactual Submission)

<sup>11</sup> As Babcock has previously explained to the CMA, see Counterfactual Submission submitted on 16 September 2021, at paragraph 2.6. The decision to withdraw from the market was also confirmed by Babcock during the Issues Meeting.

<sup>12</sup> See FMN Annex 310, provided to the CMA together with the Counterfactual Submission on 16 September 2021, [REDACTED]

<sup>13</sup> See Annex 062 to the Merger Notice.

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- 3.9 The manage for value strategy meant that Babcock severely limited its investments into the business, sought to downsize its fleet of aircraft [REDACTED], and restricted its participation in tenders by generally only bidding on tenders which created an opportunity to make use of unutilised capacity in order to minimise its continuing losses (in which case Babcock even entered into UK contracts with pricing it knew was going to be loss making).<sup>14</sup>
- 3.10 In short, Babcock wanted to minimise its losses and exit the market. This is why it ultimately sold the Fisher Business (which accounted for a substantial part of the Avincis business which Babcock acquired in 2014 for £1.6 billion) to CHC for £10 million.
- 3.11 The main reason put forward by the CMA for rejecting the aforementioned evidence is that it is derived from public statements and internal strategic documents which were prepared after the Merger was already in contemplation and which, according to the CMA, therefore carry only limited evidential weight.
- 3.12 However, this is incorrect. For example, see:
- 3.12.1 Slide 8 of FMN Annex 264 [REDACTED], which refers to Babcock proposing [REDACTED];
- 3.12.2 in June 2019, Babcock explained that the business was not a "strategic priority";<sup>15</sup>
- 3.12.3 Slide 18 of FMN Annex 270 [REDACTED] refers to the Fisher Business being operated "[REDACTED]"; and
- 3.12.4 [REDACTED] before CHC had expressed an interest in acquiring the Fisher Business.
- 3.13 Moreover, it is difficult to understand, why the fact that relevant evidence derives from documents prepared by Babcock after the Merger may already have been in contemplation should, for this reason alone, necessarily be disregarded.
- 3.14 While they may have been created while the Merger was in contemplation, this does not detract from the fact that the documents in question were prepared for and/or by senior management in the ordinary course of business, contain a clear strategic roadmap, and concern various matters of significance to Babcock's wider business portfolio beyond the Fisher Business. The CMA has put forward no reason why the content or accuracy of those documents should be questioned.
- [REDACTED]
- 3.15 The second question which the Panel must consider, which is also raised in the Issues Statement, is whether there would have been an alternative purchaser than CHC for the Fisher Business. The evidence on this issue is also clear and shows that [REDACTED].
- 3.16 [REDACTED]
- 3.17 [REDACTED]
- 3.18 The [REDACTED] and a proper analysis of the counterfactual therefore demonstrates that the Merger is incapable of resulting in a substantial of competition.
- 4 THE MARKET HAS PREVIOUSLY CONSISTED OF THREE OPERATORS AND HAS BEEN HIGHLY COMPETITIVE AND THESE DYNAMICS WILL NOT CHANGE**
- 4.1 Aside from the counterfactual, CHC is also concerned that the CMA's competitive assessment has largely been conducted in a vacuum. As noted above, the CMA has so far derived the anti-competitive harm allegedly resulting from the merger simply from the fact that the merger would reduce the number of competitors active in the market from four to three.

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<sup>14</sup> See Issues Letter response, paragraph 3.5.

<sup>15</sup> Babcock International Group Plc Capital Markets Day transcript June 2019, <https://www.babcockinternational.com/wp-content/uploads/2019/06/Babcock-CMD-Transcript-June-2019.pdf>.

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- 4.2 In doing so, the CMA is choosing to ignore the fact that there has only ever been a small number of competitors with an active presence in the UK, and that the market for O&G Offshore Transportation Services can be highly competitive with three active participants, not least because the customer base, comprised primarily of large, international oil companies, has substantial pricing and operational leverage. The CMA is wrong to attach no material weight to this evidence and to consider it as largely irrelevant to its assessment.
- 4.3 The CMA claims that the assessment of a merger should not be made by reference to whether the presence of a certain number of competitors means the market is competitive enough but should instead involve a comparison of the prospects for competition with the merger against a competitive situation without the merger.<sup>16</sup> However, the CMA is not simply required to compare competition after the merger with the level of competition that would have prevailed had the merger not occurred; it is also required to determine whether there is a lessening of competition which is substantial.
- 4.4 In assessing what is “substantial”, and whether Bristow and NHV will exercise sufficiently effective competitive constraints on CHC after the Merger, the CMA cannot ignore the fact that for many years, the market consisted of three or even fewer operators and yet remained highly competitive. Indeed, the Panel will recall that in 2000 when the Competition Commission (“CC”) approved the acquisition by Brintel Helicopters Limited of Bond Helicopters Limited (“Bond”), it was found that the competitive dynamics in the industry were such that the presence post-merger of only two operators in the UK would deliver effective competition because oil companies would and could encourage new entry.
- 4.5 The Panel will also recall that such entry subsequently occurred in 2004 when the previous management team of Bond was sponsored by BP to re-enter the market. Such re-entry was subsequently described in an ex post-merger evaluation report prepared by PricewaterhouseCoopers LLP (“PWC”), for the OFT in 2005 as having “...ensured that there is effective competition in the market for [O&G Offshore Transportation] Services.”
- 4.6 Against this background, the CMA cannot simply assume that the Merger will substantially lessen competition by reducing the number of active competitors to three in circumstances where such a reduction merely returns the industry to market conditions which in the past have proven capable of delivering vigorous competition. Indeed, it has been shown that rivalry between three operators can create an intense and highly effective competitive environment. There is no reason why this should not also be the case now since the Merger will not alter the fundamental competitive dynamics which underpin the provision of O&G Offshore Transportation Services in the UK.
- 4.7 Indeed, in assessing whether the Merger is likely to result in a “substantial” lessening of competition, the CMA must take into account that the Fisher Business has suffered from a prolonged lack of investment and has been a diminished competitive presence for a number of years while NHV and Bristow have been CHC’s real competitors in the UK as shown by the tender analysis undertaken by CRA which has previously been provided to the CMA.<sup>17</sup>
- 4.8 In particular, the Fisher Business lost a number of important contracts between 2017 and 2019, including [REDACTED]. The pricing pressure from customers meant that it could not compete for those contracts and achieve a sufficient margin, not least because its [REDACTED]. As a result, the Fisher Business could not compete effectively and on a sustainable basis in an aggressive pricing environment.
- 4.9 Losing those aforementioned contracts reinforced Babcock’s determination to withdraw from this loss-making business. Consistent with its decision to withdraw from a market in which it was unable to make a profit, Babcock therefore limited the tendering activities of the Fisher Business and as part of the manage for value strategy, prevented it from bidding on a number of contracts (e.g. [REDACTED]) which were recently put out for tender.
- 4.10 This is reflected in Babcock’s participation in UK tenders which fell from [REDACTED].<sup>18</sup> This decline is also consistent with the fact that Babcock was generally only prepared to approve bids for contracts if there was

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<sup>16</sup> See para 136 of the Decision.

<sup>17</sup> See e.g. Response to the Issues Letter: a review of the tender analysis by CRA, 28 October 2021 and Annex CHC189 submitted as part of CHC’s response to Q3 of S109 RFI of 6<sup>th</sup> December 2021.

<sup>18</sup> Response to the Issues Letter: a review of the tender analysis by CRA, 28 October 2021.

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an opportunity to utilise spare capacity within the Fisher Business and which contributed to cost recovery. In short, Babcock lacked a long-term profit maximising strategy and only sought to minimise the continuing financial losses suffered by the Fisher business until it could exit the market.

- 4.11 CHC considered that Babcock [REDACTED].<sup>19</sup> Moreover, CHC regarded Babcock as having only secured the [REDACTED] contracts (essentially the [REDACTED] secured by Babcock since 2017, accounting for [REDACTED]% of the value of all tenders won by Babcock during this period) by going into those tenders with unsustainable prices.<sup>20</sup>
- 4.12 CHC's perception that Babcock was not a particularly serious competitive threat is also illustrated by the fact that CHC [REDACTED], as shown by the analysis previously undertaken by CRA which [REDACTED].<sup>21</sup>
- 4.13 Whereas Babcock did not exercise a close competitive constraint on CHC, the evidence shows, by contrast, that Bristow and NHV are significant constraints on CHC. An analysis of the tender data<sup>22</sup> shows, for example, that CHC lost over [REDACTED] in potential business to Bristow between January 2017 and April 2021, representing around [REDACTED]% of the tenders (in value) lost by CHC during this time period.<sup>23</sup> For example, Bristow won / retained [REDACTED] of the largest contracts which were tendered in recent years ([REDACTED]).
- 4.14 The same tender data also illustrates the success of NHV since its entry into the market in 2016. Overall, around [REDACTED]% of the tenders (in value) lost by CHC between January 2017 and April 2021 were lost to NHV. An analysis of the tender data further shows that NHV was particularly successful in 2018 and 2020: winning [REDACTED] contracts in 2018 (from which two were partial wins) and [REDACTED] contracts in 2020.<sup>24</sup>
- 4.15 Moreover, in addition to its rapid expansion, NHV's entry coincided with the launch of the H175 and reset the competitive price level in the market by giving customers the ability to choose H175 aircraft which were available on very competitive terms compared to S92s. The introduction of the H175, an aircraft designed and built by Airbus specifically for the O&G industry, has altered and is continuing to reshape the competitive dynamics in the market. It is a highly effective alternative to the traditional S92 aircraft, more fuel efficient and capable, in the same weather conditions, to fly longer distances than S92s whilst having the capacity to carry almost as many passengers as S92s.<sup>25</sup>
- 4.16 As a result, S92s are increasingly losing ground to H175s and other super medium aircraft, thus creating fierce competition in the market. NHV with its lean and efficient cost structure has been able to expand and increase its share in a difficult and contracting market and the increasing success of super medium aircrafts and the fact that more and more customers are seeing the advantage of using H175s puts NHV in an even stronger competitive position for the future.<sup>26</sup>

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<sup>19</sup> See [REDACTED].

<sup>20</sup> <https://www.energyvoice.com/oilandgas/north-sea/257017/chc-helicopter-safety-total-oil/>.

<sup>21</sup> Response to the Issues Letter: a review of the tender analysis by CRA, 28 October 2021 and Annex CHC189 submitted as part of CHC's response to Q3 of S109 RFI of 6<sup>th</sup> December 2021.

<sup>22</sup> This is based on the sample of [REDACTED] opportunities bid between January 2017 and April 2021 that represent CRA's attempt to replicate the CMA's sample to best of abilities. Please note that [REDACTED] (see Babcock's updated bidding data submitted to the CMA in response to Q6 of S109 RFI1 of 6<sup>th</sup> December 2021). See Annex CHC189 submitted as part of CHC's response to Q3 of S109 RFI of 6<sup>th</sup> December 2021.

<sup>23</sup> Whilst [REDACTED]% of the tenders (in value) lost by CHC during the same period were lost to Babcock, these losses are made up almost entirely ([REDACTED]%) by the [REDACTED], both of which were bid at margins which would not have been bid at but for Babcock's 'manage for value' strategy.

<sup>24</sup> See Annex CHC189 submitted as part of CHC's response to Q3 of S109 RFI of 6<sup>th</sup> December 2021.

<sup>25</sup> There is a small difference in the number of passengers that can travel in heavy helicopters and super medium helicopters (19 v16 people) but customers do not typically operate helicopters with a full payload.

<sup>26</sup> Steffen Bay, NHV's CEO, recently stated in an interview that "We have 95% of all of the H175 operating hours to date and we have been working with Airbus and adjusting our programs to get the aircraft as mature as possible. In previous roles I have worked with the introduction of other new aircraft and I can say it was much tougher than what we have seen with the H175. The 175 was designed and developed based on input from the oil industry... our experience is that end users of the aircraft are very happy with it.", see "The Rise of Super-Medium Helicopters in Offshore Oil & Gas" <https://www.airandseanalytics.com/insighthnv>.

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- 4.17 These competitive dynamics will not change after the Merger. Nor will the fact that those dynamics are reinforced by a persistent over-capacity of aircraft, the increased willingness of customers to relax their requirements concerning the maximum age of aircraft, and the presence of well-established, highly competitive leasing companies (e.g. Milestone, Macquarie, LCI) with a large pool of assets which can provide access to aircraft on extremely cost efficient and flexible terms. CHC estimates that there are currently 19 S92s and seven super-mediums (i.e. H175s/AW189s) available for purchase or leasing in the open market.
- 4.18 It follows that CHC will continue to deal with sophisticated customers which can easily move contracts to other helicopter operators. Those customers, which face limited switching costs and benefit from early termination clauses in their contracts, will continue to control the terms on which they choose to procure helicopter transport services and their ability to run highly competitive tenders will be undiminished.
- 4.19 Each operator will have an incentive to compete on those tenders given the overall decline in demand and the number of idle aircraft available in the market. The decline in demand for O&G Offshore Transportation Services only reinforces the incentive to compete since no operator would wish to lose out on a contract and/or be left with under-utilised assets if the overall demand for services in the market is depressed.
- 4.20 The combination of these factors creates an extremely challenging environment in which operators are struggling. It is accordingly unsurprising that some third parties are advocating a restructuring of the market and for example have explained to the CMA that “*consolidation is required to tackle financial pressure on services providers*” and that “*customers would be better served by fewer but financially stronger providers than is currently the case*”.<sup>27</sup>
- 4.21 Ultimately, the Panel is not required to decide whether the market could currently sustain more than three competitors on an economically viable basis, though the precarious financial position of many incumbent operators and the losses they have suffered and in some cases continue to suffer suggest that market consolidation is inevitable.
- 4.22 The Panel is only required to decide whether the Merger is likely to give rise to a substantial lessening of competition and an analysis of the history and present competitive dynamics in this market, as well as an objective review of the evidence, demonstrate that this is not the case.

## 5 CHC WILL CONTINUE TO BE CONSTRAINED BY THE REALISTIC PROSPECT OF NEW ENTRY

- 5.1 As noted in the Issues Statement, the Panel will also need to decide whether the threat of entry acts as a material competitive constraint on the current incumbent UK suppliers of O&G Offshore Transportation Services.
- 5.2 So far, the CMA has dismissed the threat of entry as a relevant competitive threat because it claims that it has seen no evidence of any potential entrant having won any contracts in the UK and because the majority of customers who responded to the CMA merger investigation have stated that they would not invite potential entrants to compete for contracts in the UK.
- 5.3 However, there are clearly examples of new entrants winning contracts and entering the market. It is well known, for example, that the management team of Bond has previously been successfully sponsored to re-enter the market by BP. It is also well known that NHV entered the market as a new competitor in 2016 and while such entry was sponsored by Airbus as part of its launch exercise for the H175, it was ultimately Chevron's decision to award a contract to NHV which made it possible for NHV to come onto the market by expanding into Aberdeen, where NHV initially operated using temporary facilities before investing in developing its own terminal and infrastructure. NHV was also able to start operating in the UK with a foreign AOC before obtaining its own UK regulatory approval and this regulatory flexibility remains available post-Brexit.
- 5.4 These examples of successful entry are no less real or relevant simply because they occurred sometime ago (although in the case of NHV only in 2016). Moreover, the constant threat of new entry is also reflected in the recent participation by the Bond Brothers in a tender organised by Perenco.<sup>28</sup> It is also illustrated by the fact that in previous tenders, CHC seriously considered the risk that Bel-Air or Westar could submit

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<sup>27</sup> See para 171 of the Decision.

<sup>28</sup> See CHC's response to the Section 109 Notice dated 6 December 2021.



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competitive bids.<sup>29</sup> Both operate in Europe, including in connected markets such as Holland and Denmark, and are thought to have bid for both joint UK contracts and UK contracts in the past. In addition, CHC also understands that Unify, who are present in the renewables sector, but with some previous exposure to O&G, are in the process of applying for a UK AOC.

- 5.5 In short, there are a number of players which have the experience and resources to enter the market and which, if necessary, can be supported or sponsored by customers as has occurred in the past.
- 5.6 It is also important to note that it is not a requirement for the threat of sponsored entry to be real and effective that all customers must be willing and able to sponsor such entry. The fact that a majority of customers (who may simply be content with the current service on offer) may have indicated to the CMA that they are not looking to invite potential entrants to participate in tender contests therefore does not indicate that the threat of customer sponsored entry does not exist. The mere fact that some customers are not ruling out the possibility of sponsoring entry, in itself further demonstrates that the threat is present and real.
- 5.7 Finally, as regards the cost of entry (which has come down substantially due to the large pool of helicopters, including distressed assets, which are available for purchase or leasing on competitive terms due to the contraction in demand for offshore transportation services), the regulatory issues and the time it takes to come onto the market, are not matters which create insurmountable barriers to entry. Ultimately, customers can, if necessary, underwrite some of the required investment. Customers can also ensure that there is sufficient time between the award of a tender and the start date of a contract to allow a new entrant to address any relevant regulatory issues.
- 5.8 The risk of sponsored entry therefore remains a real feature of this market and the absence of such entry into the market since NHV started its operations in Aberdeen is simply a reflection of the highly competitive nature of the provision of O&G Offshore Transportation Services in the UK.

**Macfarlanes LLP**  
**4 January 2022**

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<sup>29</sup> This was the case for [REDACTED] and for the [REDACTED].