

MACFARLANES

ME/6932/21

RESPONSE TO THE CMA'S PROVISIONAL FINDINGS

4 April 2022

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.

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1. Section I - Introduction and Executive Summary

- 1.1 In this response to the Provisional Findings (“Response”), CHC explains why the provisional conclusions at which the CMA has arrived are based on fundamental errors of analysis, do not reflect competitive dynamics and market realities, and are based on an incomplete and selective (and therefore deficient) assessment of the evidence as a whole.
- 1.2 In its assessment of the merger, the CMA does not deny that Babcock was not committed to maintaining a long-term presence in the market and was seeking to disengage from the provision of offshore helicopter transport services to the Oil and Gas sector.¹ The CMA also does not dispute that CHC would still face vigorous competition from Bristow and NHV after the merger.² Moreover, the CMA finds no insurmountable barriers to entry and agrees that there is significant overcapacity of helicopters with lessors.³ As a result, incumbent players and/or a new entrant can readily lease aircraft on competitive terms.
- 1.3 Asset availability is therefore not a material issue when competing for tenders and the same applies to other resources which may be required to operate in the market. The CMA also does not dispute that the overcapacity is occurring in a market which is going through a long-term decline and where demand has significantly contracted and is expected to continue to do so in the long term (and at best will remain flat in the short to medium term).⁴ Indeed, the CMA acknowledges that the industry is plagued by poor market economics, low (or indeed negative) margins, and that price squeezing is being experienced across the market.⁵
- 1.4 These negative dynamics are corroborated by potential new entrants who have confirmed to the CMA that excessive pricing pressure, loss making contracts and fierce competition, are among the main reasons for why they have so far not considered entering the market.⁶ Furthermore, according to the Provisional Findings, these negative dynamics are still likely to prevail in the future. Indeed, the CMA expects that prices will continue to fall over time even if the merger is cleared⁷ - an expectation which should, if anything, have led the CMA to conclude that customers will retain significant leverage and buyer power, and that the pricing environment will remain fiercely competitive with three operators.
- 1.5 It is therefore very difficult, particularly against the background of such factual findings, to understand how the CMA could have reached the provisional conclusion that the merger is likely to result in a substantial lessening of competition. CHC does not propose to repeat all the submissions it has previously made to the CMA. It will instead focus in this Response on the most fundamental failures, inherent contradictions, one-sided assessment of the evidence and errors of reasoning, which have driven the CMA’s flawed conclusion and which pervade its analysis of the counterfactual and the competitive impact of the merger.
- 1.6 In summary, the most important defects and shortcomings in the Provisional Findings, which are addressed in more detail in the main body of this Response, are described below.

A [REDACTED]

1.7 [REDACTED].

¹ Provisional Findings, paragraph 5.122.

² Provisional Findings, paragraph 6.154: “Bristow and NHV are effective competitors”.

³ Provisional Findings, paragraph 7.91: “barriers to entry are not insurmountable in the context of the key assets required to operate in the UK O&G Offshore Transportation Services market”; Provisional Findings, paragraph 6.43: “There appears to be a greater amount of spare capacity at lessor level. We consider this gives suppliers the opportunity to take on assets at lower prices or reduces the cost to a new supplier to enter”.

⁴ Provisional Findings, paragraph 6.36: “the evidence indicates that, while demand for UK O&G Offshore Transportation Services is in long-term decline, in the short- to medium-term demand is likely to remain broadly stable”. See also Provisional Findings, paragraph 6.26.

⁵ Provisional Findings, paragraph 7.93: “We are aware that two of the four current participants in the market have recent been through Chapter 11 bankruptcy proceedings, and that poor financial performance and price squeezing is being experienced across the market”.

⁶ Provisional Findings, Appendix E, paragraph 31(a): “One potential entrant said it has no desire to return to a sector which it left over ten years ago, and it does not consider the market to have a viable proposition. It told us the market is approaching the end of its lifecycle, and there is excessive pricing pressure producing loss making contracts”.

⁷ Provisional Findings, paragraph 7.105: “... while we do not expect a rapid decline in demand in the short-term, this is a market which is in long-term decline. In this context, the expectation is that prices will fall over time (...)”

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- 1.8 [REDACTED].
- 1.9 [REDACTED].
- 1.10 [REDACTED].
- 1.11 [REDACTED].

B The CMA's counterfactual has no evidential support, is based on speculation, and conflicts with Babcock's stated objective to end its exposure to the offshore oil and gas market

- 1.12 In finding that Babcock would have been incentivised to continue operating Offshore UK in the short to medium term and at least until the expiry of existing customer contracts, the CMA proceeds on the premise that it knows better than those who were involved in the Babcock business at the time as to what is likely to have happened to Offshore UK in the absence of the Transaction.
- 1.13 This major error of appraisal which pervades the CMA's analysis, has arisen because the CMA has chosen to base its assessment of the likely counterfactual on its own extrapolations and speculations, whilst ignoring almost everything that it has been told by Babcock, a company with no vested interest in the outcome of this investigation. Indeed, there is hardly any reference in the Provisional Findings to the testimonies and evidence provided by Babcock's senior management during the Main Party Hearing, despite the fact that it was repeatedly emphasised throughout the Main Party Hearing that Babcock's management team had received [REDACTED].⁸
- 1.14 Instead of engaging with these facts, the CMA appears to have persuaded itself that it can infer what would have been Babcock's decision, from its review and analysis of revenues and overheads, management accounts, budgets, balance sheets and profit and loss statements. In doing so, the CMA has reduced the counterfactual analysis to a mechanical accounting exercise, which is artificially detached and completely divorced from the more important and weightier commercial and strategic considerations which would have prevailed in Babcock's decision making. The CMA has effectively substituted its own decision for that which would have been made by Babcock.

C The CMA's competitive assessment unduly stretches the "substantial lessening of competition" test

- 1.15 The CMA claims that it does not apply any thresholds to market share, number of remaining competitors, or any other measure to determine whether a loss of competition is substantial. It also claims that, contrary to the Parties' submissions, it has not assessed this merger based only on the fact that it represents a reduction in the number of competitors from four to three.
- 1.16 Yet the CMA's approach to the competitive assessment is based on such an extreme and irrational interpretation of what constitutes a substantial lessening of competition for the purpose of Section 35 of the Enterprise Act 2002 (the "Act") that it is difficult to envisage circumstances in which the CMA would not object to a reduction of competitors from four to three.
- 1.17 The CMA is unable to substantiate that the merging parties will be able to raise prices in the market beyond their current level, yet its interpretation of what is a substantial lessening of competition is so extensive that it nonetheless considers that it is in a position to identify a sufficiently significant harm to competition. Indeed, the CMA identifies a substantial lessening of competition despite acknowledging that prices would most likely have continued to decline after the merger, simply by claiming that absent the merger they may have fallen even further,⁹ which would almost certainly have led to the exit of one or more of the existing players.
- 1.18 Moreover, the CMA reaches such a striking conclusion without pausing to examine whether the fact that prices are expected to continue to decline is not in itself a strong indication of the significant buyer power of customers and the fierce competition that would remain in the market after the merger. Nor does the CMA at any stage examine whether the market, as presently composed, could, despite such fierce and negative pricing dynamics, have continued to sustain four large operators. There is no analysis of market

⁸ [REDACTED].

⁹ Provisional Findings, paragraph 7.105: "In this context, the expectation is that prices will fall over time and an SLC would therefore not require prices to rise, but only to fall more slowly".

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resilience in the Provisional Findings. The CMA seeks to maximise competition in the market (without regard to the costs of doing so) whereas it should be seeking to determine if the Transaction is likely to result in a substantial lessening of competition.

- 1.19 Likewise, it is also because it radically stretches the interpretation of what is capable of amounting to a substantial lessening of competition that the CMA can claim on the one hand that downward pricing pressure in the market will remain too intense, following the merger, to incentivise new entry, while at the same time also contending that the merger will nonetheless still harm competition to a significant degree.
- 1.20 The fact that such mutually conflicting and irreconcilable findings can coexist as part of the same competition assessment in and of itself exemplifies that the CMA has misapplied the legal test. It demonstrates that the Provisional Findings rest on an excessively wide, unreasonable and ultimately unsustainable interpretation of what constitutes a substantial lessening of competition for the purpose of Section 35 of the Act.

D The CMA has mischaracterised the evidence and the competitive dynamics prevailing in the market

- 1.21 The CMA's competitive assessment also proceeds on the basis of a manifest series of errors in the appraisal of the evidence and a complete failure to understand market realities and the competitive dynamics which prevail in the industry.
- 1.22 The most significant evidential deficiencies and errors in the Provisional Findings concern in particular:
- 1.22.1 the analysis of the tender data which contains material errors of assessment, and inaccuracies, and which does not support the conclusions drawn by the CMA.¹⁰ On the contrary, an objective analysis of the data demonstrates that Offshore UK only exercised a limited and increasingly diminishing constraint on CHC and that Offshore UK had [REDACTED];
- 1.22.2 the undue weight placed on the purported reaction of customers which is not supported by the overall balance of the evidence before the CMA. That evidence is not only mixed because almost half of the customers who responded to the CMA did not raise concerns; it is also at best inconclusive since the inquiries which the CMA addressed to customers appear to have largely consisted of a request to rank all actual and potential competitors, without those customers having been asked by the CMA to consider whether the market was sustainable in its present configuration. Nor were those customers asked to consider the possibility that absent the Transaction the number of competitors presently active in the UK could go from four to three;¹¹ and
- 1.22.3 a highly selective reading of CHC's internal documents which have been cherry picked and whose content has been taken out of context and misinterpreted by the CMA to paint a distorted picture of the competitive dynamics in the O&G Offshore Transportation Services market, far removed from the fiercely aggressive pricing environment in which CHC operates.
- 1.23 An objective, fair, and consistent reading of the evidence would have confirmed the diminished competitive threat posed by Offshore UK. It is a competitive dynamic which the CMA should have recognised since it is also a logical consequence of its own purported counterfactual which is built on an assumption that Babcock would most likely have run down its existing contracts and therefore progressively withdrawn from the market.
- 1.24 Furthermore, this diminished threat of Offshore UK is not only reflected in the tender data but also in CHC's internal documents which illustrate that CHC's response to customer tenders is not driven by the threat allegedly posed by Offshore UK. It is instead driven [REDACTED], who, contrary to what the CMA suggests in the Provisional Findings, [REDACTED].

¹⁰ The Parties requested access to the CMA's tender data on two separate occasions, the first of which was as early as January this year. However, the request was denied on both occasions. This has prevented the Parties from identifying and informing the CMA of the significant inaccuracies in its data and analysis until now, much to the detriment of the merger investigation.

¹¹ The Parties requested that evidence received by the CMA from customers be disclosed into a confidentiality ring; but this request was also denied.

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1.25 Finally, another fundamental market reality is the significance of overcapacity of helicopter assets amongst lessors which acts as a major competitive constraint in the industry, putting significant additional downward pressure on prices. Although the CMA acknowledges that such overcapacity exists, its impact on the market dynamics is almost entirely ignored in the Provisional Findings.

E The Provisional Findings err in significantly overstating the costs and difficulties of entering the market

1.26 Even though the CMA no longer seeks to maintain that there are insurmountable barriers to entry in the market, it still overstates the costs and the difficulties that are supposedly associated with such entry. As a result, the CMA also errs in its analysis of the incentive to enter the market. The reality is that there are several capable and well organised operators who could credibly enter the market and do so on an efficient and sufficient scale and in a timely manner.

1.27 Furthermore, despite what the CMA seeks to argue in the Provisional Findings, it is simply illogical for the CMA to claim that there would be no incentive to enter such a highly competitive market while at the same time also contending that Babcock could have found a buyer other than CHC for the Fisher Business. If, as the CMA believes, the market can sustain four different competitors, there should also logically be an incentive to enter that market in the event that the number of helicopter operators goes from four to three as a result of the merger and customers are no longer obtaining the pricing levels which they expect from their suppliers.

2. Section II – [REDACTED]

2.1 [REDACTED].

2.2 [REDACTED].¹² [REDACTED].¹³

2.3 [REDACTED].¹⁴

2.4 [REDACTED].

2.5 [REDACTED].¹⁵ [REDACTED].¹⁶

2.6 [REDACTED].¹⁷ [REDACTED].

2.7 [REDACTED].

2.8 [REDACTED].

2.9 [REDACTED].

2.10 [REDACTED].¹⁸

2.11 [REDACTED].¹⁹

2.12 [REDACTED].

2.13 [REDACTED].

2.14 [REDACTED].

2.15 [REDACTED].

12 [REDACTED].

13 [REDACTED].

14 [REDACTED].

15 [REDACTED].

16 [REDACTED].

17 [REDACTED].

18 [REDACTED].

19 [REDACTED].

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3. Section III - The CMA's counterfactual has no evidential support and conflicts with Babcock's stated objective of ending its exposure to the offshore oil and gas market

- 3.1 The CMA's counterfactual is that Babcock would have retained Offshore UK in the short to medium term in the absence of the Transaction, at least until all existing contracts have expired and during that period the business would have continued to be managed for value.²⁰
- 3.2 Although the CMA claims that there are no reasons to believe that another more competitive purchaser could not have been found for the whole Fisher Business, it is no longer seriously pursuing the sale to such a third party as an alternative and relevant counterfactual. This is not surprising since aside from [REDACTED] and CHC, there were no serious expressions of interest and the CMA has cited no serious evidence that another credible purchaser could have been found at the time, who would have been willing and able to buy the entire Fisher Business and transact on terms that would have been acceptable to Babcock.
- 3.3 Indeed, the suggestion that Babcock could at the time have found another buyer for the entire Fisher Business was rejected by [REDACTED]²¹ [REDACTED].²²
- 3.4 [REDACTED] also criticised the weight placed by the CMA on the [REDACTED] that Babcock [REDACTED]. He described these [REDACTED].²³ Likewise, he confirmed why he had seen no merit in running [REDACTED].²⁴
- 3.5 The CMA is therefore right not to pursue an alternative purchaser counterfactual in view of the evidence provided by Babcock. However, the CMA still falls into error in seeking to revive that counterfactual under a different guise, by claiming that the possibility of finding another buyer "*interested in acquiring the Fisher Business had the CHC offer not been successful would have represented an additional incentive for Babcock to continue to operate the business rather than closing it down, absent the Merger*".²⁵
- 3.6 Indeed, it is not apparent how the possibility of finding an as yet unidentified alternative purchaser could have incentivised Babcock to prolong its presence in the market for the short to medium term. Babcock would have continued to lose money by staying in the market and was of the view that the possibility of finding another buyer for the Fisher Business was remote. As noted above, aside from [REDACTED] [REDACTED] and CHC, Babcock had not identified other credible purchasers. The suggestion that Babcock would, at the relevant time, have been incentivised to remain in the market in the hope that another buyer would come along and acquire the entire Fisher Business, including taking on Offshore UK's commercial liabilities and loss-making operations, is therefore misconceived.
- 3.7 The Fisher Business was regarded by Babcock as non-core.²⁶ The CMA accepts that this alone would have contributed to Babcock's incentive and willingness to exit the market.²⁷ Moreover, as the CMA also acknowledges, the evidence shows that Babcock had seriously considered withdrawing from the market, even before being approached by CHC.²⁸ The submission made by the Parties that Babcock would have left the market in the counterfactual is therefore not speculative or devoid of evidence.
- 3.8 Yet the CMA treats this evidence as inconclusive because it finds no record of a final decision having been taken to close down the Fisher Business ("*none of the internal strategic documents provided to [it] demonstrate that a decision to exit had actually been taken by Babcock when CHC approached Babcock about a potential acquisition (or in the period after November 2019), or that the Fisher Business was [REDACTED]*").²⁹ However, while it may be the case that no final decision had been taken, this is simply because

²⁰ *Provisional Findings*, paragraphs 5.77 – 5.79.

²¹ [REDACTED].

²² [REDACTED].

²³ This is consistent with the CMA's own summary of the evidence at paragraph 5.69 of the *Provisional Findings* which records that [REDACTED].

²⁴ [REDACTED].

²⁵ *Provisional Findings*, paragraph 5.111.

²⁶ On completion of the Transaction, Babcock CEO David Lockwood stated that "*this disposal is part of our plan to streamline and focus the group on our key markets*". See Babcock's statement at: <https://www.babcockinternational.com/news/sale-of-oil-and-gas-aviation-business/#:~:text=Babcock%20CEO%20David%20Lockwood%20said,we%20return%20Babcock%20to%20strength>.

²⁷ *Provisional Findings*, paragraph 5.75: "*This indicated that, while Babcock regarded the Fisher Business as non-core (and that this might have contributed to a willingness to close the business), Babcock kept a number of options in play throughout the pre-merger period, [REDACTED], and a preferred option was not indicated*".

²⁸ *Provisional Findings*, paragraph 5.81: "*We recognise that Babcock had considered exiting from O&G Offshore Transportation Services prior to the approach by CHC*".

²⁹ *Provisional Findings*, paragraph 5.77.

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there was no need for such a decision since Babcock was proceeding with the sale of the Fisher Business to CHC. It is only if that sale had fallen through, that Babcock would have needed to formalise its decision to close the business and immediately withdraw from the market.

- 3.9 As the Parties argued in previous submissions, the absence of a decision therefore does not prove that Babcock would have remained in the market.³⁰ Nor does the fact that prior to the Transaction, Babcock may have considered several options as regards the future of the Fisher Business. The fact that different options were considered does not demonstrate that Babcock was unlikely to close the business or had a long-term incentive or strategic interest to remain on the market.
- 3.10 The fact that there were different options merely begs the question of what is the most likely option that would have been pursued, given the balance of the evidence, if the sale to CHC had not materialised. Contrary to what is suggested in the Provisional Findings, posing such a question does not amount to “speculation after the event on what the new management team may or may not have done” from which “no strong evidence of the likelihood of closure” can be derived.^{31,32}
- 3.11 It is plainly incorrect to claim that the “evidence does not reveal a preferred option”.³³ The CMA has only been able to reach such a conclusion because its approach to the evidence has been selective and one-sided. In reality, there is a substantial amount of evidence to support the position advocated by the Parties; but which the CMA has chosen to ignore, including the following:
- 3.11.1 the evidence confirming Babcock’s lack of long-term commitment to the oil and gas sector, including the public statements made by Archie Bethel that Babcock did not want to invest in this industry. For example:
- 3.11.1.1 in June 2019, he explained that O&G was not a “strategic priority” for Babcock³⁴;
- 3.11.1.2 on 12 February 2020, Babcock announced that it did not intend to invest further or stay in the market and that it had been steadily decreasing the size of its O&G business³⁵; and
- 3.11.1.3 on 11 June 2020, Mr Bethel reconfirmed to investors that O&G was no longer an attractive long-term market for Babcock.³⁶
- 3.11.2 the decision as part of the manage for value strategy not to invest in the Fisher Business and to refrain from bidding on significant tenders, particularly those which would require it to take on new aircraft;
- 3.11.3 the evidence that Babcock was repositioning its business to improve profitability by focussing on its core markets and actively withdrawing from non-core and non-profitable markets. For example, Babcock noted in its [REDACTED], that once [REDACTED].³⁷
- 3.11.4 Babcock’s unequivocal commitment to its strategy and willingness under the new management of the company to accept significant write downs to the value of its assets in order to implement and deliver on that strategy. This is demonstrated, for example, by the £2 billion write off from Babcock’s balance sheet under the leadership of David Lockwood following a contract profitability and balance sheet review in January 2021, including an £817.4 million impairment attributed to the Aviation business.³⁸

³⁰ Response to Working Papers, paragraph 2.10.

³¹ Provisional Findings, paragraph 5.85.

³² Indeed, the CMA itself accepts that Babcock “would have reverted to a consideration of options” (see Provisional Findings, paragraph 5.82).

³³ Provisional Findings, paragraph 5.86.

³⁴ [Babcock-CMD-Transcript-June-2019.pdf \(babcockinternational.com\)](#)

³⁵ [Babcock-February-Trading-Update-transcript-12.02.2020.pdf \(babcockinternational.com\)](#).

³⁶ [Babcock-FY20-results-transcript-11.06.2020.pdf \(babcockinternational.com\)](#).

³⁷ [REDACTED].

³⁸ Full Year Results for Year ended 31 March 2021, page 12 <https://www.babcockinternational.com/wp-content/uploads/2021/07/Babcock-FY21-statement-30.07.21.pdf>). David Lockwood became CEO in September 2020 and following his appointment undertook a strategy review in November 2020 (see [REDACTED]).

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- 3.11.5 the evidence and direct testimonies provided by [REDACTED] and [REDACTED] at Babcock’s Main Party Hearing, including:
- 3.11.5.1 [REDACTED] unequivocal confirmation that [REDACTED] strategy, recently also illustrated by press reports that Babcock is in advanced talks to sell the bulk of its emergency aviation services arm³⁹;
 - 3.11.5.2 [REDACTED] emphasis to the Panel that he was “[REDACTED].”⁴⁰;
 - 3.11.5.3 the confirmation (again from [REDACTED]) that there was “[REDACTED]”⁴¹ and that this would be the [REDACTED] (emphasis added);⁴² and
 - 3.11.5.4 the explanation provided by [REDACTED] that the “[REDACTED].”⁴³
- 3.12 The CMA makes no serious attempt to engage with this evidence in its Provisional Findings. It is almost as if the Main Party Hearings had never occurred and no explanation for why the CMA has ignored this body of evidence can be discerned from the Provisional Findings. Indeed, the Provisional Findings cite hardly any of the evidence provided by Babcock at the Main Party Hearing. If the CMA considers that the evidence is unreliable, or lacking in probative value, it should explain why and provide reasons.
- 3.13 Babcock retains no economic or commercial interest in the outcome of the investigation since completion of the Transaction was not conditional on CMA clearance. There was nothing at stake for Babcock. It is not a party to the merger being assessed by the CMA. Furthermore, no internal Babcock documents have been identified by the CMA which contradict or otherwise invalidate the evidence and testimonies provided on behalf of Babcock at the Main Party Hearing.
- 3.14 Against this background, there is no valid justification for not engaging with the evidence. It is not only impossible to understand why the evidence has been ignored, but the CMA’s approach to the assessment of the evidence also highlights the more fundamental concern that what is presented as the counterfactual in the Provisional Findings is in reality an attempt to second guess the decisions that Babcock would have taken based on nothing more than unsupported suppositions and speculation.
- 3.15 Moreover, it is an attempt to second-guess Babcock’s decisions by drawing inferences from financial data and management accounts which are unsupported by any relevant internal documents. Indeed, the CMA argues that Babcock would have had an incentive to stay in the market for the short and medium term but there is no internal document to which the CMA can point in which any such incentives are expressed or otherwise recorded. Nor is the CMA able to refer to any internal document in which Babcock voiced concerns with or otherwise indicated that it wanted to avoid the cost that were likely be associated with a closure of the business if the sale of CHC were to fall through.
- 3.16 Accordingly, by extrapolating the counterfactual from a financial analysis of the costs allegedly involved in closing the business, the CMA is in fact saying that it knows better than the business - and in particular [REDACTED] – what would have happened. It is a transparent attempt by the CMA to substitute its own reasoning for that of Babcock. Babcock would have evaluated the merits of closing the Fisher Business primarily by reference to the strategic objectives pursued by the wider Babcock group and the importance attached to ending exposure to the oil and gas market.
- 3.17 Moreover, the inferences which the CMA extrapolates from its financial analysis of the potential cost associated with the closure of the business as regards Babcock’s purported incentives in the counterfactual are vitiated by several fundamental flaws, shortcomings, and errors of assessment.
- 3.18 For example, the Provisional Findings downplay the lack of profitability experienced by Offshore UK in recent years and its switch from a net asset to a net liability position. The CMA claims that the financial position of the business at the time, was not indicative of a negative change in operating performance.⁴⁴ It refers to past periods of profitability and argues that there is “*potential for increased profitability, for*

39 [REDACTED]. See further <https://news.sky.com/story/babcock-takes-flight-from-aviation-emergency-arm-with-sale-to-ancala-12577333>.

40 [REDACTED].

41 [REDACTED].

42 [REDACTED].

43 [REDACTED].

44 *Provisional Findings*, paragraph 5.34.

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*example as a result of improved market conditions.*⁴⁵ The CMA similarly adds that “*there are no systemic features of the UK O&G Offshore Transportation Services market that would suggest that the Fisher Business would continue to be inevitably unprofitable.*”⁴⁶

- 3.19 Yet, net operating losses incurred in the last two years are significant (£16.2m and £21.8m) and Offshore UK’s performance is impaired by significant loss-making contracts and expensive aircraft leases. These contracts and leases would have remained in place in the counterfactual. In addition, there are obvious inconsistencies in the CMA’s reasoning which, as part of its counterfactual analysis, attempts to talk up the prospect that Offshore UK could be returned to profitability on the back of improvements in market conditions (which at the relevant time would have been regarded as entirely speculative), whilst painting a different picture of the market when assessing barriers to entry and the incentives for other operators to enter the UK.⁴⁷
- 3.20 Indeed, there is no reference in the counterfactual analysis to the CMA’s expectation that prices will continue to decline in the future, yet such an expectation of price erosion is relied upon by the CMA in its assessment that there would be insufficient incentives to enter the market after the merger. It is almost as if the CMA is describing two completely different markets in the Provisional Findings: a market which suits the case advanced on the counterfactual, and a very different market which is projected to remain in long term decline and which suits the case put forward on barriers to entry and lack of entry incentives.
- 3.21 Aside from such obvious contradictions, the CMA’s analysis also suffers from material errors of appraisal and serious analytical omissions.
- 3.22 For example, the CMA relies on the prospect of the business becoming profitable in the future to suggest that the cost of remaining in the market may be less significant compared to the future losses projected in Babcock’s internal documents. However, it is wrong to extrapolate the future profitability of a business from its performance in previous, when the business may have operated under different market conditions and/or earned its revenues from different contracts which have since terminated (or are close to expiring). Instead, an assessment of the costs of continuing to operate in the market should be forward-looking and reflect the profitability of ongoing, new, and future contracts. However, no such forward-looking analysis appears to have been undertaken by the CMA.
- 3.23 When assessing the future costs of continuing to operate the business, the CMA also fails to consider that Babcock would continue to pursue a “manage for value” strategy. This means that Offshore UK would have been unlikely to bid for contracts that require the leasing of new aircraft. Babcock would instead have sought to return aircraft to lessors and scale back its presence in the market in order to wind down its activities since even on the CMA’s counterfactual, Babcock would not have remained in the market beyond the short to medium term. In turn, this means that the short term costs of continuing to operate the Fisher Business are likely to have been understated by the CMA because it has not factored in the costs that Babcock would likely have had to bear following the expiry of aircraft leases - e.g. the cost of redundancies which would have had to be borne by Babcock after its existing contracts came to an end and which are (by contrast) included in the costs associated with the scenario of an immediate closure. The failure to account for these costs undermines the CMA’s incentive analysis insofar as it relates to Babcock’s intention to remain on the market.
- 3.24 Moreover, a large component of the costs that the CMA associates with an immediate closure of the business relate to early termination charges and [REDACTED], yet no allowance is made for the possibility that these costs could be mitigated. Nor has the CMA considered how these costs would change if Babcock were to exit the business not immediately, but in the next three or four years (i.e. after some contracts have expired). For instance, while currently, customer PCG liabilities amount to [REDACTED], these would reduce to [REDACTED], thus significantly reducing Babcock’s costs of exit.⁴⁸ In other words, the CMA builds its

⁴⁵ *Provisional Findings*, paragraph 5.116.

⁴⁶ *Provisional Findings*, paragraph 5.103.

⁴⁷ *Provisional Findings*, paragraph 5.115: “we have seen no reason to indicate that the business is inherently unprofitable, and we consider that there is the potential for increased profitability, for example as a result of improved market conditions and cost-cutting measures.”; and paragraph 7.94: “we are of the view that while demand for O&G Offshore Transportation Services is in long-term decline, in the short- to medium-term demand is likely to remain broadly stable. While long-term decline is not anticipated to impact current competitive conditions in the market, we consider that a new entrant will be less incentivised to enter the market as a result of a reduced prospect of long-term growth. We are therefore of the provisional view that the combination of a decline in the market to date, an unclear path to recovery of the O&G market, alongside low margins and barriers to entry means that it is unlikely that new entrants will be looking to enter the market.”

⁴⁸ [REDACTED] and *Provisional Findings*, paragraph 5.91(b), 5.92 and 5.93.

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counterfactual around the financial incentives that would supposedly have driven Babcock to stay in the market but omits to examine how those incentives were likely to change and deteriorate in the future.

3.25 Finally, the CMA also attaches significant importance to the management fees which were paid by Offshore UK to Babcock (which are said to have represented [X] % of Offshore UK's total overheads, increasing to [X] % in 2019, [X] % in 2020 and [X] % in 2021).⁴⁹ The CMA portrays these fees as tantamount to a profit distribution to Babcock whereas they covered costs incurred for direct utilisation of services from Babcock and indirect Babcock UK aviation sector costs. The CMA also suggests that absent those management fees "*the underlying financial performance of the Fisher Business may be better than portrayed in the financial results*",⁵⁰ but fails to take into account that Offshore UK remains loss making and cash flow negative.

4. Section IV - The CMA's assessment misapplies the relevant legal test, is based on a flawed analysis of the evidence, and fails to consider relevant market conditions and competitive dynamics

4.1 The substantive competition concerns articulated by the CMA in the Provisional Findings are said to arise from the fact that CHC and Offshore UK are close competitors, that the Transaction would remove a significant competitive constraint from the market, and that the presence after the merger of two other competitors would not be enough to prevent the creation of a substantial lessening of competition. The CMA also contends that while barriers to entry are not insurmountable, the costs of entry are nevertheless material and there is no incentive for a potential entrant to incur such costs in the light of the current market conditions. The CMA claims that these concerns are corroborated by its analysis of the tender data collected during the merger inquiry, the responses to its questionnaires received from customers and potential entrants, and the internal documents disclosed by the Parties which purportedly illustrate the significant competitive constraints that CHC and Offshore UK exercise on each other.

4.2 On the contrary, the CMA's Provisional Findings are misconceived, unsubstantiated, and ill-founded on a number of different levels.

4.2.1 First, the loss of competition identified in the Provisional Findings, even if such loss could be substantiated to the requisite legal standard (which is not the case), is not nearly significant enough to amount to a substantial loss of competition within the meaning of section 35 of the Act (let alone to require the disposal of the entire Offshore UK business by way of a remedy to restore effective competition to the market). The CMA would be committing a serious legal error as well as acting irrationally if it were to maintain its Provisional Findings to the contrary.

4.2.2 Second, the evidential foundations on which the CMA rests its Provisional Findings are fundamentally defective and do not support the case advanced against the merger. For example, the analysis of the tender data suffers from serious flaws (as described further below) and does not support the conclusions drawn by the CMA. Similarly, the weight put on the responses which the CMA has received from customers is misplaced. Properly interpreted, that evidence is in fact, inconclusive at best. Likewise, the CMA reaches the wrong conclusion from its assessment of CHC's internal documents which is largely selective, one sided, and errs in finding that Offshore UK is a significant competitor of equal importance to CHC as Bristow and NHV. A fair and proper assessment of the evidence as a whole in fact demonstrates the increasingly diminished competitive constraints which Offshore UK exercises on the market.

4.2.3 Third, the CMA's assessment is also divorced from market realities and continues to ignore the significant impact of overcapacity on the competitive market dynamics and the supplemental pricing pressure which such overcapacity imposes on CHC.

A The loss of competition identified by the CMA is not sufficient to amount to a substantial lessening of competition

⁴⁹ Provisional Findings, paragraph 5.31.

⁵⁰ Provisional Findings, paragraph 5.98.

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- 4.3 The Act does not prohibit every merger that restricts competition; but only those that are likely to result in a substantial lessening of competition. This means that the restriction of competition must be significant otherwise the Act does not apply.⁵¹
- 4.4 According to the Provisional Findings, the CMA has not applied any thresholds relating to market shares, number of competitors, or any other measure, to identify a substantial loss to competition. The CMA claims that the merger was not assessed based only on the fact that it will reduce the number of competitors in the market from four to three.
- 4.5 However, the loss of competition identified by the CMA falls far short of what is required in terms of significance to amount to a substantial lessening of competition. It is almost impossible to envisage any four to three merger that would not give rise to a substantial lessening of competition based on the approach adopted in the Provisional Findings. The CMA stretches the notion of a substantial lessening of competition to cover almost any loss of competition that could arise where the number of competitors present in the market is reduced and goes from four to three. Accordingly, even though it insists that it has not based its assessment only on the fact that the Transaction will reduce the number of competitors in the market from four to three, the CMA has, in reality, expanded the substantial lessening of competition test beyond its proper boundaries.
- 4.6 It is evident from the Provisional Findings that the CMA is unable to establish that the Transaction will enable the merging parties to increase prices. There is simply insufficient evidence to support a concern that prices would increase since the market is highly commoditised, characterised by significant downward pricing pressures and entrenched overcapacity. It is a market in which customers dictate prices and which has resulted in [redacted].
- 4.7 Indeed, in its assessment of barriers to entry, the CMA concedes that it expects that prices will continue to decline after the merger.⁵² However, instead of recognising such aggressive pricing dynamics as a clear sign of a market in which competition will remain fierce and in which customers will retain significant leverage, the CMA argues instead that absent the merger prices would decline even faster and equates a reduction in the velocity of price erosion to a substantial lessening of competition.
- 4.8 Against this background, it is submitted that there must be a limit to what is capable of amounting to a substantial loss of competition and that this limit is manifestly attained and exceeded in circumstances where:
- 4.8.1 the existence of a substantial lessening of competition is derived not from evidence that the merging parties are each other's closest competitors but simply from evidence that the Parties are competitors in the same way that they are competitors with other remaining players on the market, with similar evidence of closeness of competition likely to exist in most, if not all, four-to-three mergers, particularly where those mergers take place in industries where market shares are won or lost as a result of highly competitive tenders run by sophisticated and powerful customers and for which the incentive to compete is at its maximum;
- 4.8.2 the intensity of competition remaining in the market after the merger is so severe that prices are not expected to increase but are expected to continue to decline over time and this projected downward pricing pressure is in turn predicted to act as a significant barrier to entry – simply put, there cannot be a substantial lessening of competition in circumstances where price competition is likely to remain so fierce after a merger that there will be no incentive for a new operator to enter the market;
- 4.8.3 the market is one in which demand has contracted - and is expected to continue to decline in the long-term - and which has historically and for long periods of time not been able to sustain more than three major operators (even at times when levels of demand were significantly higher);
- 4.8.4 the prevailing market economics are such that the operators which are currently in the market are [redacted]; and

⁵¹ Enterprise Act 2002, section 35.

⁵² Provisional Findings, paragraph 7.105: "In this context, the expectation is that prices will fall over time and an SLC would therefore not require prices to rise, but only to fall more slowly".

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4.8.5 the CMA has, despite clear evidence to the contrary, and even though in its own counterfactual Babcock is not predicted to remain in the market beyond the short to medium term, not even attempted at any point to undertake an assessment of whether the market is likely to be able to sustain four major operators in its present configuration.

4.9 It is therefore submitted that the CMA should reconsider its substantive competition assessment. The objections raised in the Provisional Findings against the Transaction can only be regarded as irrational and based on an extreme and ultimately unsustainable extension of the substantial lessening of competition test. The market in its current constellation is in desperate need of consolidation. The statutory task entrusted to the CMA under the Act is to preserve effective competition in a resilient market. It is not to maximise competition at all costs and seek, in vain, to preserve the present unsustainable and unhealthy market conditions [REDACTED].

B The defective evidential foundations of the Provisional Findings: the flawed analysis of the tender data

4.10 The CMA also rests the case advanced in the Provisional Findings on an analysis of the evidence which is defective and not reflective of the key competitive dynamics.

4.11 This evidence includes the tender data which according to the Provisional Findings provides evidence of the strength of rivalry that will be lost due to the merger.⁵³ In particular, the CMA claims that its tender analysis shows that Offshore UK was an important constraint on CHC and vice versa in tenders from 2017 onwards.⁵⁴ This provisional conclusion has been reached by the CMA on the basis of an analysis of the tender data in which it has sought to establish (i) how often the Parties and other suppliers bid against each other; and (ii) how often the Parties and other suppliers win contracts from one another or come first and second in tenders.⁵⁵

4.12 A closer review of the analysis performed by the CMA, however, reveals significant errors of assessment and show that the CMA has drawn the wrong conclusions.

4.13 First, some of the information provided by the CMA in the confidentiality ring is not consistent with evidence held by the Parties. For example:

4.13.1 [REDACTED].⁵⁶ [REDACTED].⁵⁷ [REDACTED].

4.13.2 [REDACTED].⁵⁸ [REDACTED].

4.13.3 [REDACTED].⁵⁹ [REDACTED].

4.14 Secondly, even leaving aside these important inconsistencies, it is clear that the analysis of the tender data does not support the CMA's provisional conclusion that Offshore UK exercises a significant constraint on CHC. On the contrary, it demonstrates that Offshore UK is a limited and diminishing threat. In particular, the analysis of the tender data shows that Offshore UK has been a weak competitor in recent years and has not competed frequently against CHC in recent tenders. It also shows that NHV and Bristow are important constraints and will remain so post-Transaction.

Participation Rates

4.15 The CMA has considered how often the Parties and other suppliers bid against each other over the period 2017 to 2021. In relation to the participation rate of Offshore UK, the CMA argues that there is no evidence that Offshore UK has been a less active bidder for the following reasons:

⁵³ As explained above, the Parties requested access to the CMA's tender data on two separate occasions, the first of which was as early as January this year. However, the request was denied on both occasions, despite this data being key to the CMA's analysis. It extremely unfortunate that the CMA has prevented the Parties from identifying and informing the CMA of the material inaccuracies in its data and analysis until such a late stage of the merger investigation.

⁵⁴ *Provisional Findings*, paragraph 6.73.

⁵⁵ *Provisional Findings*, paragraph 6.59.

⁵⁶ See [REDACTED].

⁵⁷ See slide 1 of Annex 1 to this Response which says "[REDACTED]." This document was identified following further analysis undertaken after the CMA's tender data was disclosed to CHC's external advisors.

⁵⁸ This relates to [REDACTED].

⁵⁹ See opportunity [REDACTED].

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- 4.15.1 it is commonplace for suppliers not to bid on each tender. On average the CMA finds that there were three participants per tender;⁶⁰
- 4.15.2 although Offshore UK and NHV bid on fewer tenders than the other UK incumbents, they won a somewhat higher proportion of the tenders in which they participated;⁶¹
- 4.15.3 while all suppliers are somewhat selective in bidding, all have been actively bidding throughout the period.⁶²
- 4.16 These conclusions are not supported by the evidence. First, [redacted] and this is the main factor driving the low average number of participants per tender. The table below summarises the participation rate of each supplier and the number of tenders won as a proportion of tenders in which each supplier participated over the period 2017 to 2021.

Table 1 Participation in tenders by supplier and % of tenders won, 2017 to 2021

	Participation in tenders	Participation rate (%)	Tenders won	Tenders won as % of tenders participated in
CHC	[redacted]	[redacted]%	[redacted]	[redacted]%
Bristow	[redacted]	[redacted]%	[redacted]	[redacted]%
NHV	[redacted]	[redacted]%	[redacted]	[redacted]%
Offshore UK	[redacted]	[redacted]%	[redacted]	[redacted]%
Total	[redacted]	100%		

Source: CRA analysis of the [redacted].

- 4.17 As seen in the table above, Offshore UK' participation rate is [redacted]%, which is [redacted] compared to [redacted]% for NHV, [redacted]% for Bristow, and [redacted]% for CHC. It is the [redacted] participation rate of Offshore UK that is driving the low average number of participants per tender cited by the CMA. Indeed, looking across the [redacted] tenders for which Babcock bid, the average number of participants was [redacted] – and therefore close to 4; while the average number of participants across the [redacted] tenders for which Babcock did not bid, is significantly lower at [redacted]. As a result, it is predominantly Babcock's lower participation rate which drives the CMA's conclusion that there are on average only 3 bidders per tender. As such the correct interpretation of the tender data is not that it is commonplace for competitors not to bid, but that Babcock has been a particularly weak competitor relative to other market participants, especially over the more recent period.
- 4.18 Second, and related to the above, the CMA's observation that Offshore UK's won a higher proportion of the tenders in which it participated is simply driven by the fact that, on the basis of its 'manage for value' strategy, it has been bidding much more selectively on tenders. As can again be seen in the table above, Offshore UK won [redacted], while Bristow won a lower [redacted], simply because Offshore UK bid for fewer tenders, not because it won a greater number of tenders compared to other competitors. In total, out of the 21 tenders, Offshore UK won [redacted] tenders⁶³ while all other competitors were [redacted] successful with [redacted].
- 4.19 Third, the CMA is also wrong to assert that Offshore UK has been bidding with the same frequency throughout the period. The CMA's error can be seen from the figure below, which shows the participation frequency by supplier over time.⁶⁴

⁶⁰ *Provisional Findings*, paragraph 6.63(a).

⁶¹ *Provisional Findings*, paragraph 6.63(c).

⁶² *Provisional Findings*, paragraph 6.64.

⁶³ Of these [redacted] tenders, as discussed in more detail below the [redacted] tenders won by Offshore UK were the IAC and Total tenders, which were won at unsustainable prices in order to improve the utilisation of Offshore UK's existing assets.

⁶⁴ We note that the figure is based on the date when the bid was made (based on CHC's submission bid dates) so the dates do not perfectly align to the CMA's data, which use the contract start dates.

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Figure 1 [REDACTED]

[REDACTED]

Source: CRA analysis of the [REDACTED]

4.20 It is clear from the above that the participation of Offshore UK [REDACTED] since 2020, while all other suppliers have been active in the market throughout the period. In 2020, Babcock bid for only [REDACTED]. In contrast, the participation rates of all other suppliers have been [REDACTED], with CHC, Bristow and NHV bidding for [REDACTED] in 2020 and 2021.

Frequency of winning contracts or being ranked first and second in tenders

4.21 The CMA also considered how frequently the Parties and other competitors win contracts from one another or come first and second in tenders. The CMA argues that this shows that Offshore UK was an important constraint on CHC in tenders from 2017 onwards and vice versa. According to the CMA this is because Offshore UK often competed against CHC and won a number of tenders from it and vice versa.⁶⁵

4.22 Whilst CHC lost a small number of contracts to Offshore UK (most notably the Total and IAC contracts in 2020), these losses must be seen in the specific context of Babcock's 'manage for value' strategy. The CMA is therefore wrong to claim that the Parties are an important constraint on each other, especially when looking at more recent tenders.

4.23 First, to assess the constraint of Offshore UK on CHC, the CMA looked at who CHC lost tenders to (over the period 2017 to 2021, CHC lost [REDACTED] tenders) and in tenders won by CHC ([REDACTED] tenders over the same period) who was ranked second. This evidence is summarised in the table below.

⁶⁵ Provisional Findings, paragraph 6.73.

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Table 2 Winner in tenders lost by CHC and second ranked supplier in tenders won by CHC, 2017 to 2021

Winner	CHC's lost tenders			Identity of second ranked bidder in tenders won by CHC		
	Number	% number	% value	Number	% number	% value
Babcock	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]%	[REDACTED]%
NHV	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]%	[REDACTED]%
Bristow	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]%	[REDACTED]%
Total	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]%	[REDACTED]%
Total value			[REDACTED]			£[REDACTED]

Source: CRA analysis of the [REDACTED]

- 4.24 The table shows that CHC lost a total of [REDACTED] to Offshore UK, while it lost [REDACTED]. The most recent tenders lost to Offshore UK were the IAC and Total in 2020 and the Parties have explained to the CMA that Offshore UK bid at unsustainable prices as a result of its 'manage for value' strategy (discussed in more detail at section 4D below). Excluding these two tenders, losses to Offshore UK would be [REDACTED]. Accordingly, aside from these two tenders, there is no real evidence that Offshore UK has been a particularly strong constraint on CHC, especially as Offshore UK has been unsuccessful in winning contracts since the IAC and Total tenders.
- 4.25 Second, to assess the constraint of CHC on Offshore UK, the CMA looked at who Offshore UK lost tenders to (over the period 2017 to 2021, Offshore UK lost [REDACTED] tenders) and in tenders won by Offshore UK ([REDACTED] tenders over the same period) who was ranked second. This evidence is summarised in the table below.

Table 3 Winner in tenders lost by Offshore UK and second ranked supplier in tenders won by Offshore UK, 2017 to 2021

Winner	Offshore UK's lost tenders			Identity of second ranked bidder in tenders won by Offshore UK		
	Number	% number	% value	Number	% number	% value
CHC	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]%	[REDACTED]%
NHV	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]	[REDACTED]
Bristow	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]%	[REDACTED]%
Total	[REDACTED]	[REDACTED]%	[REDACTED]%	[REDACTED]	[REDACTED]%	[REDACTED]%
Total value			£[REDACTED]			£[REDACTED]

Source: CRA analysis of the [REDACTED]

- 4.26 The above table also shows that CHC has not been a strong competitive constraint on Offshore UK. In particular, Offshore UK lost [REDACTED] to CHC ([REDACTED]); while it lost [REDACTED] tenders to NHV ([REDACTED]) and [REDACTED] tenders to Bristow ([REDACTED]). In terms of rankings, CHC was ranked second in [REDACTED] tenders won by Offshore UK. However, as explained above, [REDACTED].

Offshore UK's bidding strategy after it won the IAC and Total tenders

- 4.27 Finally, the CMA has also examined Offshore UK's bidding strategy after it knew that it had won the IAC and Total tenders in [REDACTED].⁶⁶ The CMA argues that the evidence shows that Offshore UK did not change its strategy after [REDACTED]. The CMA claims that Offshore UK continued to bid for contracts after [REDACTED], as it had done previously, on a selective basis and bid on [REDACTED].⁶⁷
- 4.28 The Parties do not agree with the interpretation of this evidence. First, the evidence is clear that Offshore UK did change its strategy. [REDACTED], there were a total of [REDACTED] tenders due to start in [REDACTED]: these were the tenders for [REDACTED]. Offshore UK only bid on [REDACTED] contracts, while, according to the CMA's data, Bristow and

⁶⁶ Provisional Findings, paragraph 6.70.

⁶⁷ Provisional Findings, paragraph 6.71.

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CHC bid for [REDACTED], whereas NHV bid for [REDACTED].⁶⁸ [REDACTED] or its rates prior to [REDACTED]. Furthermore, as discussed for each of the tenders below, Offshore UK's reasons for not bidding or not bidding on these tenders are entirely consistent with the Parties' explanation of the 'manage for value' strategy. Specifically:

4.28.1 [REDACTED].⁶⁹ [REDACTED].⁷⁰

4.28.2 [REDACTED].⁷¹ The decision not to bid is therefore again [REDACTED].

4.28.3 [REDACTED].⁷² [REDACTED].⁷³ [REDACTED].⁷⁴ [REDACTED].

4.28.4 [REDACTED]. This was an opportunity valued at £[REDACTED] that appears in Offshore UK's pipeline data. Offshore UK was therefore aware of this opportunity.⁷⁵ However, Offshore UK did not bid whilst all [REDACTED]. This is again consistent with a manage for value strategy.

4.28.5 [REDACTED]. This was a relatively small tender (valued at £[REDACTED]) for which CHC submitted a bid in [REDACTED]. There is no discussion about this tender in the CMA's analysis. This is again another opportunity for which Offshore UK did not bid while all other supplier submitted bids. This is again consistent with Offshore UK bidding less frequently than other operators.

4.29 In summary, the tender data is consistent with the submissions previously made by the Parties; that Offshore UK would refrain from bidding unless there was an opportunity to utilise spare capacity that could not be returned. This is consistent with the fact that Offshore UK had become a diminished competitive force in the market and therefore exercised only a limited constraint on CHC. These dynamics would have continued to prevail in the counterfactual posited by the CMA in which Babcock would have maintained its presence in the market only for the short to medium term and in which its already limited competitive significance in the market would have reduced even further over time because Babcock would have been winding down its activities in the market.

C The defective evidential foundations of the Provisional Findings: the customer responses

4.30 The CMA also attaches significant weight to the responses it has received from customers to its market enquiries. It claims that these responses show that customers did not regard Offshore UK as a weakened competitor but considered the Parties to be close rivals to each other.

4.31 This overstates and mischaracterises the evidence that the CMA has received from customers which far from supporting the case advanced in the Provisional Findings is at best mixed and inconclusive.

4.32 The CMA argues that customers viewed the Parties as close alternatives to each other.⁷⁶ However, based on the scores given by customers on closeness to CHC, Bristow (4.7) and NHV (4.4) ranked higher than Offshore UK (4.2); and on closeness to Offshore UK, Bristow (4.8) was ranked higher than CHC (4.7).⁷⁷ Three customers also ranked Bel Air and Uni-Fly as a close alternative (ranked 4 or more).⁷⁸

4.33 Even more importantly, whereas 14 out of 26 customers are said to have raised concerns about the merger, 12 did not with some also expressing their support for the merger⁷⁹ and out of the 44 customers who received the CMA's questionnaires in Phase II, 18 did not respond and so presumably have no serious concerns about the merger. The evidence is not only mixed because almost half of those customers who responded to the CMA did not raise concerns, but the Provisional Findings also do not reveal why the

68 [REDACTED].

69 *Provisional Findings*, paragraph 6.70(b).

70 See Annex 2 to this Response. This document was identified following further analysis undertaken after the CMA's tender data was disclosed to CHC's external advisors.

71 *Provisional Findings*, paragraph 6.138: "It is clear that the need for additional aircraft was not the sole reason for declining to bid in the [REDACTED] tender [...] although the final no-bid decision referred to [REDACTED]". See also [REDACTED].

72 *Provisional Findings*, paragraph 6.138.

73 [REDACTED]

74 [REDACTED].

75 The data submitted to the CMA included tenders for which at least one Party submitted a bid. [REDACTED].

76 *Provisional Findings*, paragraph 6.111 and Appendix E, paragraph 7.

77 *Provisional Findings*, Appendix E, paragraph 8 and Table 2.

78 *Provisional Findings*, Appendix E, paragraph 10.

79 *Provisional Findings*, paragraph 6.110. Moreover, as part of the Transaction [REDACTED]. The revealed preference of these customers has also not been taken into account by the CMA.

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CMA has preferred the evidence of customers who raised concerns over that provided by customers who did not.

4.34 It is all the more difficult to understand how the CMA came to such an assessment since it refused to disclose the responses received from customers. In order to justify its refusal to disclose the relevant documents, the CMA states that its summary of the customer replies is comprehensive and fair and reflects the “*divergent replies and inconsistencies in the responses received by the CMA to some of its questions*.”⁸⁰ However, this still does not explain why the CMA has chosen to rely on some replies but not on others -- and the fact that the CMA appears to have spoken to only two of the customers who responded to its questionnaires, reinforces the concern that the CMA has not sought to grapple with the inconsistencies and tensions which characterise the evidence received from customers.

4.35 Moreover, according to the explanations provided in the Provisional Findings, the focus of the CMA questionnaires appears to have been on how customers would rank the different operators currently present on the market, predicated on the assumption that absent the merger the market would continue to comprise four different competitors. This assumption underpinned the CMA’s inquiries even though the evidence does not support such an assumption. As a result, customers do not appear to have been asked to consider whether the present market structure may in fact be unsustainable or if [REDACTED]. It follows that the customer evidence is not only mixed and inconsistent; it is also inconclusive and therefore does not assist the CMA.

D The defective evidential foundations of the Provisional Findings: the internal documents and the CMA’s failure to consider the competitive dynamics

4.36 This leaves the internal documents which the CMA also relies on in support of its assessment.

The CMA misinterprets internal documents regarding Offshore UK

4.37 The CMA has provisionally concluded that CHC’s internal documents show that CHC was:

4.37.1 monitoring Offshore UK (alongside Bristow and NHV);

4.37.2 competing with Offshore UK; and

4.37.3 considered Offshore UK submitting bids.⁸¹

4.38 In reaching this conclusion, the CMA has relied upon documents dating back from the middle of 2019 (focusing on the IAC and Total tenders) and documents produced after the Total tender was awarded to Offshore UK.⁸²

The IAC and Total tenders

4.39 According to the CMA, the IAC tender shows that Offshore UK was likely to be setting the main pricing benchmark for CHC because although [REDACTED] aircraft not an S92.⁸³ The CMA states that “*in late 2019, CHC considered it was [REDACTED]. CHC’s internal documents indicate that it considered that [REDACTED].*”⁸⁴

4.40 The Parties do not agree with this assessment. In saying that “[REDACTED]”, the CMA implies that CHC did not expect [REDACTED] to be a serious competitor. Yet the document cited by the CMA⁸⁵ clearly states that [REDACTED] was expected to set the lowest price point and that [REDACTED] would “[REDACTED]”. It is also incorrect for the CMA to argue that [REDACTED] was only considered “[REDACTED]” when it was clearly considered on an equal basis to both [REDACTED].

4.41 As the CMA is aware, the H175 is typically a credible alternative and interchangeable with the S92. The pricing of the H175 therefore also drives the pricing of S92s. As evidenced by the [REDACTED],⁸⁶ and CHC also considered multiple scenarios [REDACTED].⁸⁷ The constraint from [REDACTED] is also accepted in the CMA’s assessment

⁸⁰ Email from Rob Fitzgerald-Crisp to Macfarlanes LLP on 25 March 2022 at 17:45.

⁸¹ *Provisional Findings*, paragraph 6.88.

⁸² *Provisional Findings*, paragraph 6.86.

⁸³ *Provisional Findings*, paragraph 6.89.

⁸⁴ *Provisional Findings*, paragraph 6.89.

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

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of CHC's bid pricing since the CMA acknowledges that "[REDACTED]".⁸⁸ It is therefore not appropriate to put lower weight on the constraint from [REDACTED] for this particular contract.

- 4.42 It is accordingly also not appropriate for the CMA to claim that "[REDACTED]".⁸⁹ The slide relied upon by the CMA in support of this claim is specifically entitled "[REDACTED]" and while [REDACTED] does not use [REDACTED] aircraft in the UK, [REDACTED] the same internal document (entitled "[REDACTED]"), in which it is noted that "[REDACTED]".⁹⁰
- 4.43 It is also incorrect for the CMA to suggest that CHC did not consider the "exit scenario" of Offshore UK in detail in relation to the IAC tender.⁹¹ The relevant internal document clearly shows that CHC considered Offshore UK [REDACTED]. Indeed, whilst CHC noted a possible scenario in which Offshore UK could [REDACTED], it equally recognised and predicted that Offshore UK could exit or [REDACTED]. Accordingly, CHC was aware of the possibility that Offshore UK might leave the market and factored this into its tender analysis.
- 4.44 As for the [REDACTED] tender, the CMA accepts that [REDACTED] when CHC submitted its initial bid, specifically, in a presentation to agree final bid terms in [REDACTED], CHC evaluated competitive pricing and placed [REDACTED].⁹² [REDACTED].⁹³
- 4.45 Over the course of the negotiations, CHC reduced its initial bid price because it was apparent that its bid was not competitive. A number of documents cited by the CMA state that the price offered [REDACTED].⁹⁴ However, as explained previously to the CMA, during the later stages of the negotiations, [REDACTED].⁹⁵ [REDACTED].
- 4.46 Neither can the CMA ignore the fact that CHC regarded Offshore UK as having won the IAC and Total contracts on unsustainable prices (i.e. "[REDACTED]") and as having difficulties in servicing [REDACTED]. Again, this is confirmed by the internal documents: for example, in one of its internal documents from March 2021, CHC refers to Offshore UK as "[REDACTED]".⁹⁶

Documents after the Total tender

- 4.47 The CMA also relies upon CHC's documents produced after the Total contract was awarded to Offshore UK and concludes that CHC did not consider that Offshore UK was no longer a relevant competitor but continued to monitor and respond to Offshore UK up to the time of the Transaction.⁹⁷
- 4.48 CHC does not deny that in some of the board pack documents cited by the CMA, CHC refers to Offshore UK's strategy (immediately after Offshore UK had won the IAC and Total tenders) as being to "[REDACTED]".⁹⁸ If anything, this corroborates that CHC regarded Offshore UK's [REDACTED]. This is also consistent with the views expressed by CHC after Offshore UK [REDACTED]. This is confirmed by some of the evidence cited by the CMA. For example, by March 2021, CHC refers to the distractions faced by Offshore UK.⁹⁹
- 4.48.1 An internal email on the state of industry competition in the UK [REDACTED].¹⁰⁰
- 4.48.2 A plan for where to target CHC's competitive efforts in the UK for the next year included [REDACTED]. In this assessment, CHC considered Offshore UK [REDACTED]' and continued to refer to [REDACTED]. Moreover, the CMA ignores the fact that the document also explains that Offshore UK was [REDACTED].¹⁰¹
- 4.49 Offshore UK's difficulties with performance and servicing the contracts it had won also coincided with public statements made by Babcock's then CEO about deprioritising and exiting the O&G sector. For example, on 12 February 2020, Babcock announced that it did not intend to invest further or stay in the market and that it had been steadily decreasing the size of its O&G business ("*I think the well-run route of oil and gas aviation for us is that we don't intend to invest further, or stay in that market and I think we've been steadily*

⁸⁸ *Provisional Findings*, paragraph 6.79(c).
⁸⁹ *Provisional Findings*, Appendix F, paragraph 11, with reference to [REDACTED].
⁹⁰ [REDACTED].
⁹¹ *Provisional Findings*, paragraph 6.92, with reference to [REDACTED].
⁹² *Provisional Findings*, Appendix F, paragraph 12(b).
⁹³ See [REDACTED].
⁹⁴ *Provisional Findings*, paragraph, Appendix F, paragraphs 15 and 16.
⁹⁵ See [REDACTED].
⁹⁶ *Provisional Findings*, Appendix F, paragraph 21(b). See also [REDACTED].
⁹⁷ *Provisional Findings*, paragraph 6.93.
⁹⁸ *Provisional Findings*, Appendix F, paragraphs 12(a), 18(a) and 18(b).
⁹⁹ *Provisional Findings*, Appendix F, paragraphs 12(b) and 21.
¹⁰⁰ *Provisional Findings*, Appendix F, paragraph 21(a). See also [REDACTED].
¹⁰¹ *Provisional Findings*, Appendix F, paragraph 21(b). See also [REDACTED].

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over the last four years now decreasing the size of that business.”).¹⁰² This was reiterated again on 11 June 2020 when Mr Bethel reconfirmed to investors that O&G was no longer an attractive long-term market for Babcock.¹⁰³

- 4.50 Consistent with the above, CHC’s tender documents produced since 2020, either do not refer to Offshore UK (see e.g. the [REDACTED]) or do not identify Offshore UK as the main competitive threat ([REDACTED]):
- 4.50.1 [REDACTED]: the CMA acknowledges that CHC’s bid deck does not list Offshore UK as a competitor. Yet it attaches no weight to this point arguing that [REDACTED].¹⁰⁴ This is not a correct assessment of the evidence: the bid deck indicates that [REDACTED]¹⁰⁵ and elsewhere in its Provisional Findings, the CMA accepts that suppliers bid for work in bases outside Aberdeen where they do not have a current presence. Accordingly, the CMA cannot claim that this is not a relevant contract for the purpose of determining the constraints faced by CHC when competing for work in the UK.
- 4.50.2 [REDACTED]: This was a small contract, and the CMA acknowledges that CHC at the time considered that [REDACTED] were credible bidders.¹⁰⁶ There is no evidence that Offshore UK was the main pricing constraint on CHC.
- 4.50.3 [REDACTED]: The CMA notes that CHC mainly discusses [REDACTED] in relation to this tender, but states that “[REDACTED].”¹⁰⁷ The CMA, however, fails to recognise that it was [REDACTED] predicted price that was the binding constraint on CHC. Indeed, the document referenced by the CMA¹⁰⁸ clearly states that “[REDACTED]” – i.e., undercutting [REDACTED] rather than that of Offshore UK.¹⁰⁹ The same document describes Offshore UK as having a “[REDACTED]” with [REDACTED] and [REDACTED].¹¹⁰
- 4.50.4 [REDACTED]: the CMA acknowledges that CHC described [REDACTED] but notes that CHC saw [REDACTED].¹¹¹ However, the [REDACTED] does not mean that its offer was weaker. In fact, the same document describes the bids from [REDACTED] and the bid from Offshore UK as “[REDACTED]”. It also flags potential issues with Offshore UK: “[REDACTED]”.
- 4.51 It follows from the above that contrary to the Provisional Findings, a neutral reading of the evidence shows that Offshore UK was clearly perceived by CHC to be a weaker constraint during this period.

The alleged constraint of CHC on Offshore UK

- 4.52 The CMA argues that CHC poses a competitive constraint on Offshore UK because CHC [REDACTED]. According to the CMA, this implies that CHC poses a constraint because Offshore UK risks losing customers to CHC if it does not meet their expectations.¹¹²
- 4.53 However, it is not surprising that CHC [REDACTED], particularly since its market intelligence was that Offshore UK was [REDACTED]. In relation to [REDACTED],¹¹³ [REDACTED],¹¹⁴ [REDACTED].¹¹⁵ This strategy was triggered by [REDACTED]. This is what led to CHC exploring what was a one off [REDACTED]. This conduct is not a reflection of strong competitive rivalry between CHC and Offshore UK. On the contrary, CHC engaged in such opportunistic conduct because it regarded Offshore UK as being in a weakened competitive position, hence why there was a chance that customers may switch.

E The CMA failure to consider the impact of overcapacity on the competitive dynamics

- 4.54 The CMA does not dispute that there is significant overcapacity in the market. The number of idle helicopters available from lessors far exceeds the demand for the leasing of aircrafts. The CMA accepts

102 [Babcock-February-Trading-Update-transcript-12.02.2020.pdf \(babcockinternational.com\)](#).

103 [Babcock-FY20-results-transcript-11.06.2020.pdf \(babcockinternational.com\)](#).

104 *Provisional Findings*, Appendix F, paragraph 14.

105 [REDACTED].

106 *Provisional Findings*, Appendix F, paragraph 17(a).

107 *Provisional Findings*, Appendix F, paragraph 17(b).

108 [REDACTED].

109 [REDACTED].

110 *Provisional Findings*, Appendix F, paragraph 17(b).

111 *Provisional Findings*, Appendix F, paragraph 20(b).

112 *Provisional Findings*, paragraph 6.94.

113 *Provisional Findings*, Appendix F, paragraph 22(a)(i) and [REDACTED].

114 *Provisional Findings*, Appendix F, paragraph 23(a)(iii) and [REDACTED].

115 *Provisional Findings*, Appendix F, paragraph 23(a) and [REDACTED].

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that the “*challenging commercial environment in the industry more broadly was driven by the reduction in the oil price in 2014 [which] resulted in a collapse in demand which led to overcapacity in the UK O&G Offshore Transportation market and subsequent pressure on contract prices.*” The CMA also accepts that these negative features “*take time to work themselves out*” given the long-term nature of helicopter and customer contracts. Yet the CMA concludes that overcapacity does not create a competitive constraint on the market.¹¹⁶

- 4.55 It is difficult to discern from the Provisional Findings how the CMA has reached such a conclusion. It is not a conclusion which can be based on the alleged existence of “*an improved balance between demand and capacity.*”¹¹⁷ Any suggestion that there is now an improved balance in the relationship between demand and capacity is not supported by the evidence, particularly since the CMA considers that the market will continue to decline over the long term and admits having received mixed evidence from lessors as to how demand has evolved in the UK over the last five years.¹¹⁸ Indeed, one lessor submitted that there had been no substantive change in the market; another confirmed that demand reduced rapidly in 2015 to 2016 and that COVID-19 only caused a modest decline in demand; while yet another indicated that there had been reduced demand leading to excess capacity. Two lessors are also said to expect a decline in demand, and another has refused to rule out a change in demand over a longer time horizon: with only one lessor expecting a modest growth in the market.
- 4.56 It would also be misconceived for the CMA to argue that overcapacity is not a competitive constraint because the overcapacity is with the lessors and does not constrain the operators which tend to operate at full capacity. Overcapacity does not become irrelevant to the competitive dynamics simply because it sits with the lessors and not the operators. Lessors have every incentive to lease their idle aircraft and thus will continue to exert significant downward pricing pressure in the market.
- 4.57 The overcapacity in the market together with the decline in demand for helicopter services contributes to the incentive for competitors to bid aggressively for the smaller number of tenders that will remain in the market. The CMA has no reliable evidence that overcapacity will not continue to be an entrenched feature of the market for the foreseeable future. This overcapacity will amplify the significant competitive constraints which CHC would still face in the future and prevent any ability or incentive to increase prices post-merger. As a result, CHC will still operate in a highly aggressive pricing environment [§].

5. Section V – The Provisional Findings overstate barriers to entry and err in its analysis of the incentives to enter the market

- 5.1 According to the Provisional Findings, whilst “*barriers to entry are not insurmountable in the context of the key assets required to operate in the UK O&G Offshore Transportation Services market, they are sufficiently material to constrain the timeliness, likelihood or sufficiency of any potential entry.*”¹¹⁹ The CMA also provisionally concludes, based on current and projected market conditions, that potential entrants, including those who may have expressed an interest in entering, have no incentive to enter the market.¹²⁰
- 5.2 Even though it accepts that there are no insurmountable barriers to entry, the CMA still overstates the investment and time needed to come into the market and consequently also errs in its analysis of entry incentives. In addition, the CMA’s analysis of the lack of incentives to enter the market is inconsistent not only with the CMA’s purported counterfactual but also with the competitive assessment of the Transaction. Simply put, there can be no substantial lessening of competition if the downward pricing pressure that will remain after the merger will be so significant as to disincentivise new operators from entering the market.

A Potential entrants have the ability to enter the market

- 5.3 A reading of the evidence before the CMA confirms the submissions previously made by the Parties that there are no material barriers which would prevent another operator from being able to enter the market. The CMA’s assessment to the contrary in the Provisional Findings is unsustainable and based on a selective interpretation of the evidence.

The post Brexit regulatory framework is not a barrier to entry

¹¹⁶ *Provisional Findings*, paragraph 6.43.

¹¹⁷ *Provisional Findings*, paragraph 5.100.

¹¹⁸ *Provisional Findings*, paragraph 6.42.

¹¹⁹ *Provisional Findings*, paragraph 7.91.

¹²⁰ *Provisional Findings*, paragraph 7.108.

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5.4 The Parties have previously provided evidence that a UK AOC can be secured within 6-9 months.¹²¹ This has now also been explicitly confirmed by the CAA, who as the regulatory body responsible for processing applications and granting UK AOCs is of course best placed to confirm and provide evidence on the most likely timeframe.¹²² In addition, and consistent again with the Parties' own submissions, the CMA has also confirmed that in the aftermath of Brexit a "potential entrant could temporarily undertake operations in the UK with a European AOC while their UK application is being processed...which could apply to any third party provider."¹²³

5.5 There is no good reason or justification for the CMA not to endorse such evidence and to cite instead a timeline of between 12 to 24 months for obtaining an AOC; a timeline which appears to rely solely on the speculation of a single customer¹²⁴ - who it would seem is the same customer who told the CMA that a "European Aviation Safety Agency's AOC is not sufficient"¹²⁵, even though the CAA (whose evidence should clearly carry more weight) has confirmed that it would accept such an AOC on an interim basis while the process for granting of a UK AOC is ongoing.

There is no lack of hangarage and/or terminal space

5.6 The CMA relies upon a statement made by Babcock that passenger terminals, hangars and leased fleet in Aberdeen are "[redacted]" and, North Sea crew change management, operation and technical personnel are "[redacted]"¹²⁶ in order to conclude that set up costs in the UK are "significant." However, the fact that certain assets or employees may be key to operating in the market does not mean that it is difficult or costly to acquire such assets and/or recruit such employees.

5.7 The Parties have provided evidence to demonstrate that there is available hangar space in Aberdeen, Sumburgh and Norwich.¹²⁷ In particular, Aberdeen Airport confirmed that there are currently two available hangars and that a passenger terminal could be built within the airport's existing perimeter or constructed using modular structures.¹²⁸ In addition, if the Transaction is cleared, additional terminal capacity will become available as CHC and Offshore UK consolidate their operations. The Parties have also provided evidence of significant numbers of unutilised aircraft available for leasing on competitive terms (for example, approximately 20 S92s are available for leasing).¹²⁹

5.8 The CMA acknowledges and does not dispute this evidence, but again, chooses to ignore it. The Provisional Findings note instead that "it took NHV four to five years to obtain the relevant facilities at Aberdeen Airport."¹³⁰ This is misleading and factually incorrect since NHV's entry into the market coincided with the award of a contract by Chevron.¹³¹ It also fails to grasp that the present starting point in terms of capacity is different; while there may have been no capacity and a lack of hangarage at Aberdeen when NHV initially entered; so that it had to build its own facilities,¹³² this is not the case today. Even more remarkably, the CMA says that it has been told by NHV that it would be difficult to enter unless new hangarage becomes available,¹³³ a statement on which it relies, despite knowing it to be misleading and incorrect given the information provided by Aberdeen Airport.¹³⁴

PCGs are not a barrier to entry

121 See [redacted].

122 The CMA noted the CAA's own estimate that six months is the "fastest realistic expectation of entry" and nine months is a "reasonable average" (see Provisional Findings, paragraph 7.63).

123 Provisional Findings, paragraph 7.64.

124 The CMA notes that "one customer confirmed that one of the main barriers...is the acquisition of a UK AOC licence... [and] estimated that obtaining a UK AOC takes approximated 12 to 24 months." (see Provisional Findings, paragraph 7.88).

125 Provisional Findings, paragraph 7.88.

126 Provisional Findings, paragraph 7.81, with reference to [redacted].

127 [redacted].

128 Provisional Findings, paragraph 7.25. See also [redacted].

129 [redacted].

130 Provisional Findings, paragraph 7.86.

131 [redacted] and

<https://nhv.be/about/news/nhv-strengthens-its-presence-in-the-uk-providing-aberdeens-base-with-new-ai>

132 Provisional Findings, paragraph 7.61.

133 Provisional Findings, paragraph 7.61.

134 Provisional Findings, paragraph 7.61: "In terms of the potential for a new entrant to secure space in Aberdeen, NHV told us that unless new hangarage becomes available, which historically has not happened, it is 'virtually impossible' for potential entrants to set up in Aberdeen."

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- 5.9 Parent company guarantees (“PCGs”) are “[REDACTED]”.¹³⁵ PCGs do not require a financial test or threshold and do not require an operator to provide capital or any other form of security. A PCG is merely a contractual provision stating that the operator will stand behind its performance of the contract. It is in no way a barrier to entry.
- 5.10 The CMA cannot assert that the expense related to leasing new aircraft will operate as a barrier to entry by relying on evidence from Uni-Fly that “*lessors require security capital to secure the lease*”.¹³⁶ Nor can the CMA assert that its concerns are supported by the [REDACTED] million of PCGs guaranteed by CHC to support the Fisher Business. The CMA fails to consider the various forms in which security for aircraft leases can be obtained¹³⁷ and ignores the explanations given by the Parties that PCGs do not require strong financial backing. [REDACTED].
- 5.11 As previously explained to the CMA, potential entrants operating in other jurisdictions or adjacent markets are accustomed to PCGs and will most likely have provided such guarantees in the past when leasing aircraft. The CMA argues that “*it does not follow that having experience of PCGs will lead to a potential entrant being willing to agree to any level of PCG in order to secure a lease*”,¹³⁸ but fails to produce evidence from any relevant third parties to demonstrate that potential entrants cannot offer a PCG in order to enter the market. The CMA only refers to Uni-Fly, yet Uni-Fly does not appear to have said to the CMA that it would not be able to enter the market due to PCGs. Uni-Fly has simply observed that “*lessors require security capital to secure the lease, which in turn restricts the ease with which a new entrant could obtain access to the relevant assets*.”¹³⁹ This is not evidence that Uni-Fly itself would not enter the market due to PCGs, nor is it relevant evidence for what other companies would do. In fact, CHC understands that Uni-Fly is in the final stages of securing a full UK AOC and has already started planning to bring additional aircraft into the UK market. In addition, CHC is aware that Uni-Fly has started to advertise roles for its own support service functions, for example, engineers.¹⁴⁰
- 5.12 The CMA has therefore again failed to make relevant inquiries. It cannot say that “*having experience of PCGs will [not] lead to a potential entrant being willing to agree to any level of PCG in order to secure a lease*” without having investigated the nature, scope, and size of PCGs in other segments of the market.¹⁴¹ The CMA also refused to disclose copies of *inter alia* the replies from potential entrants to its questionnaires, arguing that the information set out in the Provisional Findings is more than adequate to understand the gist of the case and make worthwhile representations.¹⁴² Yet it is abundantly clear that the CMA’s conclusions are not corroborated by evidence and without access to the underlying responses received from potential entrants, it is not possible to verify if evidence has been overlooked or attributed insufficient weight.

B The CMA’s analysis on incentives is flawed

- 5.13 The fact that the CMA has erred in assessing the nature and scale of the cost and difficulties associated with market entry also means that it has erred in assessing the incentives to enter the market since the two are inextricably linked.
- 5.14 Moreover, the CMA incorrectly represents the evidence despite clear indications that at least some potential entrants are contemplating market entry.
- 5.14.1 The CMA says that “*third parties have not expressed an interest in entering the market under any conditions*”¹⁴³ while simultaneously acknowledging evidence that a third party would in fact consider entering the market “*if customers focused more on high service, reliability and safety than price*.”¹⁴⁴ Likewise, the CMA disregards evidence that suggests there are suppliers already making attempts to enter. For example, one potential entrant indicated that it would

¹³⁵ [REDACTED].

¹³⁶ *Provisional Findings*, paragraph 7.82.

¹³⁷ For example, bank guarantees or performance bonds.

¹³⁸ *Provisional Findings*, paragraph 7.82.

¹³⁹ *Provisional Findings*, paragraph 7.82.

¹⁴⁰ See, for example, a recent Uni-Fly job advert for Rotary Wing Aircraft Engineers on LinkedIn: https://www.linkedin.com/posts/uni-fly_join-a-strong-agile-professional-team-activity-6914198607743127552-DxLP?utm_source=linkedin_share&utm_medium=member_desktop_web

¹⁴¹ *Provisional Findings*, paragraph 7.82.

¹⁴² The Parties’ advisors also requested copies of the evidence received by customers to be disclosed into a confidentiality ring which was similarly denied.

¹⁴³ *Provisional Findings*, paragraph 7.105.

¹⁴⁴ *Provisional Findings*, paragraph 7.70.

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have an interest in entering but its limited efforts so far had been unsuccessful¹⁴⁵ and one potential entrant previously bid on a tender but was not shortlisted.¹⁴⁶

5.14.2 In addition, as the CMA is also aware, there is clear evidence that PHI has hired a number of individuals in recent months, including a commercial manager for the UK, [REDACTED]. Recent media reports confirm that PHI is actioning its strategy to set up a headquarters in London, which will run its European, Middle-East and African operations.¹⁴⁷ PHI has a history of success with entry into new markets, entering Australia by direct award of a contract in 2016, before going on to secure additional major contracts (including one as recent as this year)¹⁴⁸ and becoming a significant operator in the market. [REDACTED].¹⁴⁹

5.14.3 Nor is it necessary for each customer to be willing to support or sponsor entry, even though the evidence gathered by the CMA shows that a majority would be willing to do so. For example:

5.14.3.1 a number of customers confirmed that they would consider bids from new entrants;¹⁵⁰

5.14.3.2 eight customers confirmed they may invite a wider set to bid than the four incumbents (which included a variety of competitors such as Uni-Fly, Wiking, Bel Air, BIH, Draken, and Weststar);¹⁵¹

5.14.3.3 three customers ranked Bel Air and Uni-Fly as a close alternative to the Parties (i.e. gave a score of 4 or more);¹⁵² and

5.14.3.4 two customers also told the CMA that they might be willing to support entry if “(...) the current level of supply was poor, or there was a monopoly in the market driving up prices, as has been the case in the past, or (b) there is clear demand in the long term.”¹⁵³

5.15 The CMA’s analysis of the incentives of potential competitors to enter the market is also inconsistent with its wider competitive assessment. There is an obvious contradiction in saying that, on the one hand, there will be a substantial lessening of competition post-merger while simultaneously concluding that there is no incentive to enter because prices will continue to decline over time due to severe downward pricing pressure.¹⁵⁴ In addition, the CMA’s analysis on entry is predicated on an assumption that the market is unlikely to be attractive to a fourth player after the merger but, conversely, its competitive assessment is predicated on an assumption that without the merger the market will have no problem in continuing to sustain the present four existing operators. Nowhere are these contradictions resolved in the Provisional Findings.

5.16 Furthermore, there is also a tension between the CMA’s position on entry and its purported counterfactual.¹⁵⁵ The CMA considers that “the assessment within the countervailing factors assessment is different to the question of whether a potential purchaser would buy the Fisher Business” which “has a value based on its position as an established business”¹⁵⁶, and it argues that “a company considering organic new entry will want to see a prospect of long-term profitability before entering the market” which, in its view, is unlikely¹⁵⁷. Yet it is not only a new entrant who would want to see a prospect of long-term profitability; in the counterfactual a third-party purchaser would also have wanted to see such a prospect before committing to acquire the whole of the Fisher Business.

¹⁴⁵ Provisional Findings, paragraph 7.99.

¹⁴⁶ Provisional Findings, paragraph 6.116. [REDACTED].

¹⁴⁷ See: <https://www.nzherald.co.nz/business/phi-international-new-zealand-helicopter-company-moving-management-overseas/2FML66LFSI2XMOX7CRCTGIBWP4/>

¹⁴⁸ See: <https://verticalmag.com/press-releases/phi-international-secures-contract-with-woodside/>.

¹⁴⁹ [REDACTED].

¹⁵⁰ Provisional Findings, paragraph 7.74.

¹⁵¹ Provisional Findings, Appendix E, paragraph 14.

¹⁵² Provisional Findings, Appendix E, paragraph 10.

¹⁵³ Provisional Findings, paragraph 7.74.

¹⁵⁴ Provisional Findings, paragraph 7.105.

¹⁵⁵ Provisional Findings, paragraphs 7.112 – 7.114.

¹⁵⁶ Provisional Findings, paragraph 7.114.

¹⁵⁷ Provisional Findings, paragraph 7.113.