



EUROPEAN COMMISSION  
DG Competition

***Case M.7949 - NORWEGIAN / SHIPHOLD / OSM  
AVIATION***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 31/05/2016

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## EUROPEAN COMMISSION

Brussels, 31.5.2016  
C(2016) 3442 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

### **To the notifying parties:**

Dear Sir/Madam,

**Subject: Case M.7949 – NORWEGIAN / SHIPHOLD / OSM AVIATION  
Commission decision pursuant to Article 6(1)(b) of Council Regulation  
No 139/2004<sup>1</sup> and Article 57 of the Agreement on the European Economic  
Area<sup>2</sup>**

- (1) On 21 April 2016, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation and following a referral pursuant to Article 4(5) of the Merger Regulation by which the undertakings Norwegian Air Resources Holding Ltd ('NARH', Ireland), controlled by Norwegian Air Shuttle ASA ('Norwegian', Norway), and OSM Aviation Group Ltd ('OSM Aviation Holding', Cyprus), controlled by Shiphold Ltd ('Shiphold', Cyprus), acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of the whole of the undertaking OSM Aviation Ltd ('OSM Aviation',

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

Cyprus) by way of purchase of shares<sup>3</sup>. NARH and OSM Aviation Holding are collectively designated hereinafter as the 'Parties'.

## **1. THE PARTIES**

- (2) NARH is a resource company providing, through its subsidiaries, crew and crew management services exclusively to its parent, Norwegian Air Shuttle ASA (Norway), and its affiliates (together 'Norwegian'). Norwegian's operations are separated into a commercial airline group with the appropriate Air Operator Certificate holders ('AOC holders'), an asset group, a resource group and other activities.
- (3) OSM Aviation Holding is a holding company controlled by Shiphold. Shiphold is a group mainly active in (i) maritime services, (ii) aviation services, and (iii) ship owning.
- (4) OSM Aviation offers a full range of crew management services to AOC holders including provision of personnel, recruitment, planning and re-planning, wage payment, training and HR.

## **2. THE TRANSACTION**

- (5) The Transaction consists in the indirect acquisition by NARH of 50% of the shares in OSM Aviation from OSM Aviation Holding. OSM Aviation will after the Transaction be jointly controlled by its current parent, OSM Aviation Holding (and indirectly Shiphold), and by its new parent, NARH (and indirectly Norwegian).
- (6) Additional transactions are due to take place on 1 July 2016, on the day when the joint venture is planned to become operational (the 'operational closing'). Those transactions include the transfer of 100% of the shares in one of NARH subsidiaries, Norwegian Air Resources Asia Pte. Limited ('NAR Asia'), from NARH to OSM Aviation. Pursuant to the Shareholders' Agreement between NARH and OSM Aviation Holding, NAR Asia will be jointly controlled by the Parties.
- (7) The additional transactions due to take place at operational closing also include the transfer to OSM Aviation Holding of 51% of the shares in the OSM Aviation entity being party to the contract with Finnair. That entity will however remain under the control of OSM Aviation, thus will fall under the Parties' joint control.
- (8) Since the change from sole to joint control over OSM Aviation and the transactions due to take place at operational closing (change from sole to joint control by the Parties over NAR Asia and over the OSM Aviation entity being party to the contract with Finnair) are interrelated, they constitute a single concentration for the purposes of Article 3 of the Merger Regulation<sup>4</sup>.

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<sup>3</sup> Publication in the Official Journal of the European Union No C 153, 29.4.2016, p. 14.

<sup>4</sup> The Shareholders' agreement also foresees that, at operational closing, 49% of the shares in the three NARH subsidiaries other than NAR Asia (Norwegian Air Resources Spain, Norwegian Air Resources UK Limited and Ab Norwegian Air Resources Finland Ltd) will be transferred from NARH to OSM Aviation. However, those subsidiaries will remain under Norwegian's sole control. The transfer of shares does not result in a change of control over those three NARH subsidiaries and will thus not be considered as part of the concentration for the purposes of this decision.

- (9) The Transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

### **3. UNION DIMENSION**

- (10) The Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation as the Parties' turnover does not meet the thresholds of Articles 1(2) or 1(3) of the Merger Regulation. However, it fulfilled the conditions set out in Article 4(5) of the Merger Regulation and Article 6(5) of Protocol 24 EEA for the Parties to request referral of the case to the Commission, as it was reviewable under the merger control laws of three Member States (Finland, Germany and Sweden) as well as of Norway.
- (11) Following the notification of a reasoned submission by the Parties on 23 March 2016, the Transaction acquired an EEA dimension on 19 April 2016, since none of those three Member States nor Norway expressed their disagreement to a referral of the case to the Commission.

### **4. MARKET DEFINITION**

- (12) OSM Aviation acts as an intermediary between crews (pilots and cabin crew members) and AOC holders and provides temporary and permanent employment services and related HR management services to AOC holders.
- (13) OSM Aviation's new parent, Norwegian, is not present on the same markets as OSM Aviation. However, it is active on the downstream market for air transport of passengers.

#### **4.1. Employment services**

##### *4.1.1. Relevant product market*

- (14) The Parties argue that the relevant product market is the market for crew management services, which consist in the provision of pilots and cabin crew and of ancillary services (recruitment, planning and re-planning, crew control, wage payment, training and HR) to AOC holders.
- (15) They submit that the market for crew management services is a sub-market of the overall market for temporary employment services. According to the Parties, the relevant product market should not be defined wider than crew management services, notably because of the high regulatory demands affecting specifically the passenger air travel industry and, consequently, the market for crew management services, such as compulsory pilot licences.
- (16) Conversely, the Parties argue that the market for crew management services should not be further sub-segmented by type of personnel (pilot vs. cabin crew) or by type of service (provision of personnel vs. provision of ancillary services).
- (17) The Parties finally suggest that the use of in-house staff and the use of crew management services by AOC holders are interchangeable and substitutable.
- (18) In previous decisions concerning the employment services sector, the Commission has considered three product markets:

- a. temporary employment services ('TES'), i.e. posting of temporary workers to user firms for a temporary period of time;
  - b. permanent employment services ('PES'), i.e. posting of workers who are expected to remain permanently employed by the user firm; and
  - c. human resources consultancy services ('HRCS'), including a range of services comprising, inter alia, payrolling services, HR IT processes, outplacement services, re-integration services and assessments, training and development advice.
- (19) The Commission has in the past concluded that there is a separate product market for the provision of TES, which is distinct from the provision of PES and from direct employment<sup>5</sup>, due to the added-value services offered by temporary employment agencies to job-seekers, the long-lasting relationship that such agencies establish with workers seeking employment, as well as the differences in the legal and regulatory requirements covering TES and PES<sup>6</sup>.
- (20) With respect to possible segmentations of the TES market, the Commission has considered, but ultimately left open, whether it could be subdivided according to:
- a. the level of education of temporary workers. In particular, the Commission considered whether the TES market should be further segmented into a market for general staffing (provision of TES in the traditional, generalist sector of general staff) and a market for professional staffing, which would include higher educated and specialised staff<sup>7</sup>;
  - b. the type of specialisation of temporary workers. In particular, the Commission considered whether a sub-market for general staffing could be further segmented into specialised segments for office & administration, and industry. Likewise, the Commission left open whether the professional staffing sub-segment could be further divided by reference to the worker's specialisation<sup>8</sup>; and
  - c. the type of appointment. In particular, the Commission considered whether the overall TES market should include secondment and project-based TES, or whether separate markets should be distinguished for those activities, due to their tailor-made nature and the higher degree of coordination or management needed by the agency as opposed to "regular" temporary employment services<sup>9</sup>.

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<sup>5</sup> Norwegian, as most AOC holders in the EEA, also employs directly pilots and cabin crew members. As TES and direct employment are not part of one and the same market, the Parties' activities are not considered to overlap.

<sup>6</sup> See Case M.5699 – Adecco / MPS Group and Case M.5009 – Randstad / Vedior.

<sup>7</sup> See Case M.6908 – Randstad / USG Assets; Case M.5699 – Adecco / MPS Group and Case M.5626 – Adecco / Spring.

<sup>8</sup> See Case M.6908 – Randstad / USG Assets; Case M.5699 – Adecco / MPS Group; and Case M.5626 – Adecco / Spring.

<sup>9</sup> See Case M. 6908 – Randstad / USG Assets.

- (21) As indicated above, the Commission has in the past concluded that the market for PES constitutes a market separate from TES. Similarly to TES, the Commission has left open whether PES should be further sub-divided according to the specialisation of workers, by distinguishing between (i) a market for executive search (recruitment of employees for the top end of the market) and (ii) a market for regular permanent placement (recruitment of employees for the middle and lower end of the market)<sup>10</sup>.
- (22) The Commission has in the past considered that the provision of HR consultancy services is part of the larger market for the provision of management consultancy, which encompasses the provision of IT services, strategic planning and human resources<sup>11</sup>. The Commission has also considered sub-segments for HR consultancy services but has ultimately left open, whether it could be subdivided according to payroll services, HR IT processes, outplacement services, re-integration services and assessments, training and development advice<sup>12</sup>.
- (23) The results of the Commission's market investigation suggest that, as far as pilots are concerned, crew management services may be different from other employment services due to the complexities of the regulatory requirements regarding the employment of pilots. Moreover, the Commission's market investigation has shown that, unlike workers from other industries, pilots working on a temporary basis for AOC holders are in most cases permanently employed by a crew management company. Therefore, the provision of TES for pilots by crew management agencies usually implies that those agencies employ pilots on a permanent basis<sup>13</sup>.
- (24) The market investigation yielded more mixed results as to the difference between cabin crew services and other employment services, since employment of cabin crew members is not subject to the same regulatory constraints as employment of pilots and does not require the same level of specialisation, from the points of view of both the employees, who can be trained into cabin crew members within six weeks, and of the agencies, which do not have to possess a high level of expertise in the aviation sector to recruit and supply cabin crew services<sup>14</sup>. In this regard, the market investigation gave indications that employment services for pilots and for cabin crew may be distinct.
- (25) However, for the purposes of this decision, it is not necessary to reach a definitive conclusion on whether crew management services are a separate sub-segment of the TES, PES or HRCS markets, because the Transaction does not give rise to any serious doubts as to its compatibility with the internal market on any plausible product market. For the same reason, it can be left open whether crew management services should be further segmented by type of personnel, i.e. pilots and cabin crew, or by type of service, i.e. TES, PES or HRCS.

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<sup>10</sup> See Case No COMP/M.5009 – Randstad/Vedior.

<sup>11</sup> See Case M.1016 – Price Waterhouse/Coopers & Lybrand.

<sup>12</sup> See Case M.5009 – Randstad/Vedior.

<sup>13</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016.

<sup>14</sup> See agreed minutes of the call with one of OSM Aviation's competitors on 3 May 2016 and with two of OSM Aviation's customers on 28 April 2016 and 18 May 2016.

#### 4.1.2. *Relevant geographic market*

- (26) The Parties submit that, contrary to the overall employment services market, the market for crew management services (including ancillary administrative services) is at least EEA-wide and more probably world-wide. As the aircrafts are staffed at their home-base, i.e. airport, but AOC holders operate internationally, providers of crew management services have to organise their businesses accordingly. This means that service providers must be able to serve their international customers locally in several countries. In this respect, the Parties also highlight the existence of national regulatory or political barriers to the provision of crew management services in some Member States (Spain, Italy and France) or in Norway.
- (27) Concerning the TES market, the Commission has in the past considered that the market is not wider than national, due to factors such as language differences, personal preferences regarding relocation of workers, and differing legal and regulatory frameworks between Member States<sup>15</sup>. Concerning the PES market, the Commission has in the past considered that the market could be national for the same reasons as for the TES market, but left the precise scope open<sup>16</sup>. Concerning the HRCS market, the Commission has in the past considered that the market could be national but left the precise scope open<sup>17</sup>.
- (28) The results of the Commission's market investigation are not conclusive as to whether the scope of the geographic market is world-wide, EEA-wide or national<sup>18</sup>. On the one hand, at least as far as pilots are concerned, the provision of crew management services may be broader than national in scope. Agencies are specialised and operate usually at a multi-national level. Pilots for the EEA-wide bases of AOC holders are recruited at (at least) EEA-wide level. Apart from a good knowledge of English, there are no specific language requirements depending on the base for which a specific pilot is employed. On the other hand, there are diverging national requirements for the employment of temporary staff in general and of pilots in particular. Crew management companies need to have knowledge of the national regulatory requirements, in particular with regard to tax, social security and labour law, in order to offer their services in a specific EEA country.
- (29) In any event, for the purposes of this decision, it is not necessary to reach a definitive conclusion on whether the scope of the relevant market is national or broader in scope, because the Transaction does not give rise to any serious doubts as to its compatibility with the internal market on any plausible geographic market.

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<sup>15</sup> See Case M.6908 – Randstad / USG Assets.

<sup>16</sup> See Case M.5699 – Adecco / MPS Group.

<sup>17</sup> See Case M.5009 – Randstad/Vedior.

<sup>18</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016.

## 4.2. Air transport of passengers

- (30) In its decisional practice, the Commission has traditionally defined the relevant market for scheduled air transport of passenger services on the basis of the 'point of origin/point of destination' ('O&D') city-pair approach<sup>19</sup>.
- (31) The Parties note that the O&D approach has primarily been used by the Commission in cases where the parties have been active on horizontally overlapping markets. They submit that, for the purposes of the Transaction, an approach per base of the AOC holders (home airport for their aircrafts) would be more appropriate to assess the vertical relationships between crew management services and air transport of passengers, considering that AOC holders staff their aircrafts according to the laws and regulations of the country of their bases.
- (32) The market investigation has confirmed that the staffing of aircrafts providing air transport of passengers is legally and practically structured around the different bases of the AOC holders<sup>20</sup>. AOC holders take their staffing decisions on the basis of the national regulatory framework of the country in which they have their base.
- (33) However, for the purposes of this decision, it is not necessary to reach a definitive conclusion on whether the approach per country or per base is more appropriate. The Transaction does not give rise to any serious doubts as to its compatibility with the internal market under either approach.

## 5. COMPETITIVE ASSESSMENT

- (34) The Transaction results in the vertical integration of a supplier of crew management services (OSM Aviation) into its customer providing air transport of passengers (Norwegian), without any horizontal overlap. OSM Aviation will become [...] provider of crew management services to Norwegian [...] <sup>21</sup>, while, according to the Parties, remaining active on the market and competing to gain new customers.
- (35) Considering that OSM Aviation's activities are already pre-Transaction generated almost entirely through Norwegian<sup>22</sup>, the latter's entry in OSM Aviation as a co-controlling shareholder does not *a priori* bring about any significant structural change on the market for crew management services.
- (36) Nevertheless, the Transaction gives rise to vertically affected markets considering that:

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<sup>19</sup> See Case M.6663 – Ryanair/Aer Lingus III; Case M.6447 – IAG/bmi; Case M.6607 – US Airways/American Airlines; Case M.5889 – United Air Lines/Continental Airlines; Case M.5440 – Lufthansa/Austrian Airlines; Case M.5335 – Lufthansa/SN Airholding.

<sup>20</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016 and of the calls with two OSM Aviation's customers on 28 April 2016 and 2 May 2016.

<sup>21</sup> [...].

<sup>22</sup> In 2016, the share of OSM Aviation's business attributable to Norwegian is expected to represent [more than 50]% in terms of number of employees (OSM Aviation's employees are assigned on a temporary basis to OSM Aviation's customers) and [more than 50]% in terms of turnover (in 2015, it represented [more than 50]% and [more than 50]% respectively).



- a. OSM Aviation's share would exceed 30% on the upstream market for temporary employment services for pilots and cabin crew (taken together), as well as for pilots and for cabin crew (taken separately) in bases in Norway<sup>23</sup>, Sweden<sup>24</sup>, Finland<sup>25</sup> and Denmark<sup>26</sup>, from which Norwegian operates;
  - b. Norwegian's share would exceed 30% on the downstream market for air transport of passengers on the Oslo airport ([30-40]%) or in Norway<sup>27</sup>, where OSM Aviation operates.
- (37) According to the Parties, OSM Aviation's market share would not exceed 30% on the upstream market under any other plausible market definition:
- a. Concerning the plausible markets other than TES (PES and HRCS), the Parties claim that OSM Aviation's share would be close to zero on a separate PES market, under all market definitions, while it would be minimal on the HRCS market, irrespective of the possible segmentations (including by type of personnel, i.e. pilots and cabin crew) and geographic scopes of that market. In the light of the marginal activities of OSM Aviation on the plausible PES and HRCS markets, the latter will not be further considered in this decision, including a potential product market combining TES, PES and HRCS<sup>28</sup>;
  - b. Concerning the other plausible market definitions for the TES market, the Parties indicate that on the overall TES market, OSM Aviation would have an insignificant market share in all countries where it operates. If the TES market for pilots and cabin crew is defined as EEA-wide or world-wide, the Parties indicate that OSM Aviation's market share would reach a maximum of [20-30]%<sup>29</sup>.

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<sup>23</sup> In Norway, OSM Aviation holds a market share of [90-100]% for pilots and cabin crew together, [90-100]% for pilots only, and [90-100]% for cabin crew only, if the market share is calculated on the basis of the number of employees.

<sup>24</sup> In Sweden, OSM Aviation holds a market share of [70-80]% for pilots and cabin crew together, [90-100]% for pilots only, and [70-80]% for cabin crew only, if the market share is calculated on the basis of the number of employees.

<sup>25</sup> In Finland, OSM Aviation holds a market share of [50-60]% for pilots and cabin crew together, [90-100]% for pilots only, and [50-60]% for cabin crew only, if the market share is calculated on the basis of the number of employees.

<sup>26</sup> In Denmark, OSM Aviation holds a market share of [90-100]% for pilots and cabin crew together, [90-100]% for pilots only, and [90-100]% for cabin crew only, if the market share is calculated on the basis of the number of employees.

<sup>27</sup> Norwegian holds a market share of [30-40]% on the Oslo airport, if the market share is calculated on the basis of the number of passengers. The Parties argue that Norwegian's market share in Norway would not be significantly different.

<sup>28</sup> OSM Aviation's position would be even weaker if the three types of services were parts of one single product market. As a consequence, the competitive assessment will focus on TES.

<sup>29</sup> The maximum market share of [20-30]% would be attained on the possible TES market for cabin crew in the EEA, if the market share is calculated on the basis of the number of employees assigned by TES providers to customers. On the possible TES market for pilots, OSM Aviation's market share would fall to [10-20]% in the EEA. In order to calculate that market share, the Parties have estimated that the total size of the TES market for pilots in the EEA amounts to 3 575 pilots, which would be a

- (38) Likewise, according to the Parties, Norwegian's share on the downstream market for air transport of passengers would be below 30% on all other EEA bases or countries<sup>30</sup>.
- (39) Competition concerns arising from vertically affected markets are typically either input or customer foreclosure issues.

### **5.1. Input foreclosure of temporary employment services for pilot and cabin crew**

- (40) According to the Non-Horizontal Merger Guidelines, input foreclosure occurs when actual or potential rivals' access to supplies or markets is hampered, thereby reducing those companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit<sup>31</sup>.
- (41) In order for input foreclosure to be a concern, three conditions need to be met post-merger: (i) the merged entity needs to have the ability to foreclose access to inputs; (ii) the merged entity needs to have the incentive to do so; and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the downstream market. In practice, these factors are often examined together since they are closely intertwined.

#### *5.1.1. The Parties' views*

- (42) First, the Parties claim that OSM Aviation would reach a very high market share on the upstream market if it is defined as national, a definition which does not correctly reflect the market structure.
- (43) Second, the Parties underline that the market size in the four concerned EEA countries (Norway, Sweden, Finland, Denmark) is very limited since OSM Aviation holds [90-100]% of the TES market for pilots<sup>32</sup> while supplying respectively [0-50], [0-50], [0-50] and [0-50] pilots (out of a total number of pilots employed by AOC holders in those countries estimated at, respectively, [1 000-1 100], [800-900], [900-1 000] and [400-500]). The Parties express the same reservation on the TES market for cabin crew, since OSM Aviation holds market shares of [90-100]% in Norway, [70-80]% in Sweden, [50-60]% in Finland and [90-100]% in Denmark, while supplying, respectively, [50-100], [200-300], [100-200] and [0-50] cabin crew members (out of a total number of cabin crew members employed by AOC holders in those countries estimated at, respectively, [1 900-2 000], [1 400-1 500], [2 200-2 300], and [900-1 000]). For Norway and Denmark, the Parties explain that this situation results from national regulatory

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conservative estimation according to the market leader in the providers of TES services for pilots (see paragraph 47 of this decision below). For pilots and cabin crew taken together, it would be [10-20]% in the EEA. Those market shares would be diluted at world-wide level, since OSM Aviation is mainly active in the EEA (about 77% of its employees are assigned to EEA bases) and some of its main competitors (CAE Parc Aviation, Rishworth) are stronger outside of the EEA.

<sup>30</sup> Norwegian's highest market share outside of bases in Norway would be obtained in Stockholm ([10-20]% based on the number of passengers).

<sup>31</sup> See Non-Horizontal Merger Guidelines, paragraphs 29-30.

<sup>32</sup> The Parties note that the market shares provided at national level may be overestimated as they lack an adequate insight into how airlines other than Norwegian handle their needs for TES. They may thus have failed to identify other TES providers.

constraints applying to temporary employment and from the pressure of unions, which together restrict the use of TES to either pilots under training or cabin crew providing temporary coverage during summer vacation of permanently employed staff.

- (44) Third, the Parties claim that they will not have the ability nor the incentive to engage into an input foreclosure strategy post-Transaction, since the vast majority of personnel working in the passenger air transport sector is employed directly by the AOC holders. The Parties estimate that, at EEA level, there are 8 200 pilots and cabin crew members employed through external agencies and 181 188 pilots and cabin crew members employed directly by airlines. OSM Aviation, which accounts for [10-20]% of the pilots and cabin crew members employed by external agencies in the EEA, would account for less than [0-5]% of the total number of pilots and cabin crew members assigned to EEA bases.
- (45) The Parties submit that, on the contrary, the Transaction might have a pro-competitive effect on the two vertically related markets. Post-Transaction, OSM Aviation's activities will be stabilised as an exclusive provider of services to Norwegian. This might facilitate investments in OSM Aviation's service offering to various AOC holders, allowing them to minimise the risks associated with in-house staffing and facilitating entry into the downstream market of air transport of passengers.

#### 5.1.2. *The Commission's assessment*

- (46) The Commission consulted two of OSM Aviation's competitors<sup>33</sup> and two of OSM Aviation's very few non-Norwegian customers of TES in order to support data provided by the Parties as to the overall upstream market for crew management services and OSM Aviation's limited position on that market.
- (47) The market investigation confirmed that the size of the TES market for pilots is currently limited to 5 000 - 6 000 pilots in the EEA, at least half of which being assigned to Ryanair and 500 - 600 pilots being assigned to Norwegian (the second largest user of external employment services)<sup>34</sup>. It also confirmed that outsourcing the supply of pilot services remains unusual in the aviation sector<sup>35</sup>. It may nevertheless become increasingly relevant as AOC holders, especially those with small needs and infrastructure in certain countries, may face more difficulty in

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<sup>33</sup> In view of the very small number of competitors active in the EEA, the market investigation targeted two significant players with a diversified customer base.

<sup>34</sup> See agreed minutes of a call with one of OSM Aviation's competitors on 3 May 2016. The size of the TES market for pilots seems to have been underestimated by the Parties and, consequently, OSM Aviation's market share overestimated. For example, the Parties estimate that CAE Parc Aviation provides TES for 200 pilots in the EEA, while the latter actually provides over 300 pilots in the EEA. Conversely, the number of pilots assigned to Norwegian and employed by external agencies according to the results of the market investigation seems relatively accurate. Indeed, the Parties specify that 414 pilots flying for Norwegian from EEA bases are currently employed through external agencies (266 for short-haul flights through OSM Aviation and 148 through Rishworth), to which would be added pilots hired from external agencies by NARH European subsidiaries.

<sup>35</sup> See agreed minutes of a call with one of OSM Aviation's competitors on 3 May 2016.

complying with increasingly demanding national taxation and social security requirements in the aviation sector<sup>36</sup>.

- (48) With regard to cabin crew, the market investigation also confirmed that the vast majority of cabin crew members is directly employed by airlines. Leasing of cabin crew is still a rather marginal *modus operandi* and outsourcing cabin services is a novelty in the aviation sector<sup>37</sup>. Taking account of cabin crew members directly employed by airlines, OSM Aviation's cabin crew members would therefore represent less than 5% of the total number of cabin crew members assigned to bases in most EEA countries (less than 15% in Sweden). Moreover, given that cabin crew undergoes a training of only six weeks, there is also competition from non-specialised employment service providers like Adecco and Randstad<sup>38</sup>.
- (49) The market investigation gave a more nuanced picture of the level of fragmentation of the TES market for pilots and of the barriers to entry than the picture provided by the Parties, which consider that the market is highly fragmented and has a very low entry cost.
- (50) In particular, with regard to the barriers to entry, OSM Aviation's competitors pointed to significant obstacles, linked to the obligation of a national or regional labour leasing licence to provide temporary employment services in certain EEA countries and to the level of complexity of compliance with diverging national requirements<sup>39</sup>. Those elements would discourage the entry into small countries, which would not be profitable for specialised TES agencies<sup>40</sup>.
- (51) The market investigation confirmed that there are several agencies active in the provision of TES for pilots and cabin crew in the EEA, in particular CAE Parc Aviation, Rishworth Aviation, Aeroprofessional, Sigma Aviation Services or Resource Group. Some of these competitors are active world-wide and of similar or even larger size than OSM Aviation. It also confirmed that it is customary for airlines to multi-source TES.
- (52) In addition, neither of the two OSM Aviation's competitors consulted during the market investigation considered that OSM Aviation is a significant competitive force on the upstream market for employment services<sup>41</sup>. They indicated that OSM Aviation is a relative newcomer to the aviation sector which almost exclusively works for Norwegian<sup>42</sup>. The two OSM Aviation's customers of TES that replied to

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<sup>36</sup> See agreed minutes of a call with one of OSM Aviation's customers on 2 May 2016.

<sup>37</sup> See agreed minutes of a call with one of OSM Aviation's customers on 18 May 2016.

<sup>38</sup> See agreed minutes of two calls with two of OSM Aviation's customers on 28 April 2016 and 18 May 2016.

<sup>39</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016.

<sup>40</sup> The Parties argue that there is no obligation to be granted a labour leasing licence to provide TES in Scandinavia. The absence of other players than OSM Aviation in the Scandinavian bases would result from their limited size, which make them unattractive.

<sup>41</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016.

<sup>42</sup> One of OSM Aviation's competitors notes that OSM Aviation also has entered into contracts with Turkish Airlines, Transavia and ASL but has actually not delivered pilots. See agreed minutes of the call on 3 May 2016.

the market investigation also confirmed that OSM Aviation has no specific expertise which would create a problem if OSM Aviation stopped supplying TES to other AOC holders than Norwegian<sup>43</sup>.

- (53) Finally, the market investigation confirmed that external agencies providing TES for pilots and cabin crew are in direct competition with in-house staffing by AOC holders, which remains the dominant type of working arrangements in the aviation sector<sup>44</sup>. The group of airlines that replied to the market investigation (one of OSM Aviation's customers of TES) even submitted that, for its airlines, the two types of working arrangements are completely interchangeable. Therefore, its airlines gave the choice to pilots to be either directly employed by them on a permanent basis or to work with them through temporary contracts with an external agency<sup>45</sup>.
- (54) On that basis, the Commission considers it unlikely that OSM Aviation would gain the ability post-Transaction to restrict access of airlines competing with Norwegian to TES for pilots and cabin crew in an anti-competitive way.

## **5.2. Customer foreclosure for TES providers**

- (55) According to the Non-Horizontal Merger Guidelines, customer foreclosure may occur when a supplier integrates with an important customer in the downstream market. Because of this downstream presence, the merged entity may foreclose access to a sufficient customer base to its actual or potential rivals in the upstream market and reduce their ability or incentive to compete. In turn, this may raise downstream rivals' costs by making it harder for them to obtain supplies of the input under similar prices and conditions as absent the merger<sup>46</sup>.
- (56) In order for customer foreclosure to be a concern, three conditions need to be met post-merger: (i) the merged entity needs to have the ability to foreclose access to the downstream market by reducing its purchases from its upstream rivals; (ii) the merged entity needs to have the incentive to reduce its purchases upstream; and (iii) the foreclosure strategy needs to have a significant detrimental effect on consumers in the downstream market.

### *5.2.1. The Parties' views*

- (57) The Parties underline that, pursuant to the Shareholders' agreement, Norwegian will keep using the same other providers of crew management services as pre-Transaction, notably Adecco, Rishworth, Aeroprofessional or CAE Parc Aviation ([...]), thus excluding the risk that OSM Aviation's competitors are foreclosed access to a sufficient customer base.

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<sup>43</sup> See agreed minutes of the calls with two of OSM Aviation's customers on 2 May 2016 and 18 May 2016.

<sup>44</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016 and paragraph 43 of this decision above for the comparison between, on the one hand, the total number of pilots and of cabin crew members working under contracts with TES agencies in Nordic countries and, on the other hand, the total number of pilots and cabin crew members directly employed by AOC holders in Nordic countries.

<sup>45</sup> See agreed minutes of a call with one of OSM Aviation's customers on 2 May 2016.

<sup>46</sup> See Non-Horizontal Merger Guidelines, paragraph 58.

### 5.2.2. *The Commission's assessment*

- (58) The argument presented by the Parties does not appear sufficient to rule out any customer foreclosure effect, as it is based on a private agreement which can be changed any time and only grants Norwegian the contractual freedom to employ competitors of OSM Aviation, but no obligation.
- (59) The Commission nevertheless notes that the two OSM Aviation's competitors that replied to the market investigation confirmed Norwegian's intention to continue purchasing TES for pilots and cabin crew from other providers than OSM Aviation. They indicated that such a multi-sourcing policy aims at minimising the operational risks linked to a shortage in staff, at maintaining competition between TES providers or at coping with the limited supply capacities of OSM Aviation<sup>47</sup>.
- (60) In any case, other elements tend to demonstrate that a customer foreclosure strategy is unlikely. First, already pre-Transaction, Norwegian sources almost two thirds of it needs for EEA bases from OSM Aviation<sup>48</sup>. The contestable customer base at Norwegian was therefore already limited prior to the Transaction.
- (61) Second, the market investigation confirmed that the information provided by the Parties, according to which providers of crew management services are only marginally active at the Oslo airport or in Norway, the only base or country in the EEA where Norwegian has a more significant market position in the downstream market for air transport of passengers<sup>49</sup>.
- (62) Norwegian's share on the downstream market of air transport of passengers in Norway is moderate, with around [30-40]%. Therefore, the loss of Norwegian as a customer would have a limited impact on OSM Aviation's competitors, as confirmed by the market investigation. Indeed, one of OSM Aviation's competitors indicated that, thanks to a diversified customer portfolio, the termination of its contractual relationship with Norwegian would not question its business, despite Norwegian representing its largest customer by volume<sup>50</sup>.
- (63) Third, the other OSM Aviation's competitor that replied to the market investigation even stated that the Transaction would facilitate the access of OSM Aviation's non-integrated competitors to airlines currently served by OSM Aviation (other than Norwegian). It argued that Norwegian's competitors are less likely to resort to OSM Aviation's services once it is controlled by Norwegian, for fear that the best pilots found by OSM Aviation would be reserved to Norwegian<sup>51</sup>.
- (64) Fourth, even if Norwegian were able to foreclose access to a sufficient customer base to OSM Aviation's rivals and increase costs of crew management services

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<sup>47</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016.

<sup>48</sup> Not taking account of pilots and cabin crew members hired from external agencies by NARH European subsidiaries, Norwegian sources for its EEA bases [400-500] pilots from external agencies, including [...].

<sup>49</sup> See agreed minutes of the calls with two of OSM Aviation's competitors on 3 May 2016.

<sup>50</sup> See agreed minutes of a call with one of OSM Aviation's competitors on 3 May 2016.

<sup>51</sup> See agreed minutes of a call with one of OSM Aviation's competitors on 3 May 2016.

post-Transaction in Norway (or anywhere else), the indirect effect on the customers in the downstream market of passenger air transport would be limited. Indeed, as indicated in paragraph 53 of this decision above, AOC holders could counter an increase in the price of crew management services by switching to in-house staffing at limited costs.

- (65) On that basis, the Commission considers it unlikely that Norwegian would gain the ability or incentive to successfully engage into an anti-competitive customer foreclosure strategy post-Transaction.

### **5.3. Conclusion on vertical effects**

- (66) In light of the above, the Commission considers that the Transaction does not raise serious doubts about its compatibility with the internal market due to vertical effects.

## **6. CONCLUSION**

- (67) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission  
(Signed)  
Margrethe VESTAGER  
Member of the Commission*