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***Case No COMP/M.7056 - USS / BA / EASYJET /
MONARCH / CROWN SHAREHOLDER / NATS***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION

Date: 18/03/2014

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Brussels, 18.3.2014
C(2014) 1894 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 No COMP/M.7056 - USS / BA / easyJet / Monarch / Crown Shareholder/NATS
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004¹**

(1) On 11 February 2014, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004² by which the undertaking Universities Superannuation Scheme Limited ("USS") acquires within the meaning of Article 3(1)(b) of the Merger Regulation indirect joint control of the undertaking NATS, together with British Airways ("BA"), easyJet, Monarch and the Crown Shareholder, by way of purchase of shares.

(2) USS, BA, easyJet, Monarch and the Crown Shareholder are collectively referred to as the "**Parties**".

1. THE PARTIES

(3) **USS** is the sole corporate trustee of the Universities Superannuation Scheme, which is a UK private sector pension fund. USS invests in both transport and utilities infrastructure, including airports, with a focus on mature, operating assets in OECD countries.

(4) **BA, easyJet and Monarch** are UK-based airline companies.

¹ 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.

² OJ L 24, 29.1.2004, p. 1 (the "**Merger Regulation**").

- (5) **The Crown Shareholder** is the UK Secretary of State for the Department for Transport, which has responsibility for setting national aviation policy.
- (6) **NATS** is active in the provision of air navigation services in the UK. It provides "en route" air traffic services in UK airspace and airspace managed by the UK in accordance with the terms of a license issued by the UK Secretary of State of Transport. NATS also provides airport air traffic services and to a limited extent a range of other services such as consultancy and training.
- (7) **The Airline Group ("TAG")** is a special purpose vehicle formed in 2001 by seven airline companies in order to acquire – and to hold – their respective equity interest in NATS. The acquisition by TAG of joint control, together with the Crown Shareholder, over NATS was reviewed and cleared by the Commission in 2001 in its case COMP/M.2315 *The Airline Group / NATS* (the "**2001 Decision**").

2. THE OPERATION AND THE CONCENTRATION

2.1. Acquisition of joint control over TAG

- (8) TAG is currently jointly controlled by the following seven airlines: (i) BA, (ii) easyJet, (iii) Monarch, (iv) Thomas Cook Airlines Limited, (v) Thomson Airways Limited, (vi) Virgin Atlantic Airways and (vii) Deutsche Lufthansa AG³.
- (9) Pursuant to a sale and purchase agreement entered into on 18 November 2013 by Thomas Cook, Thomson, Virgin Atlantic, Lufthansa and USS⁴, USS will acquire a 49.9% shareholding in TAG (the "**Transaction**"). The SPA broadly involves Thomas Cook, Thomson, Virgin Atlantic and Lufthansa each selling the overwhelming majority of their respective shares in TAG. BA, easyJet and Monarch will see no change in their respective equity shareholdings in TAG as a result of the Transaction. Following the Transaction, USS will be the one new shareholder with a direct interest in TAG and an indirect interest in NATS.
- (10) The post-Transaction distribution of voting rights in TAG will be as follows:

SHAREHOLDER	% HOLDING
USS	[...]
BA	[...]
easyJet	[...]
Monarch	[...]
Lufthansa	[...]
Virgin Atlantic	[...]
Thomson	[...]
Thomas Cook	[...]

Source: Form CO, paragraph 96

- (11) Under the Shareholders' Agreement, a number of issues are listed as "Reserved Matters" in relation to the governance of TAG and require the written approval of a "Super Majority" (i.e. a majority representing 75% or more of the shares in issue in TAG at any one time). The Reserved Matters include [...]⁵.

³ See also the 2001 Decision.

⁴ Including USS Sherwood Limited, a wholly owned subsidiary of USS.

⁵ [...]

- (12) The effect of the requirement of a Super Majority on the Reserved Matters will be such that:
- USS, by virtue of its 49.9% shareholding, is able to exercise its veto in respect of the Reserved Matters;
 - No other single shareholder in TAG alone has the power to exercise a veto in respect of the Reserved Matters (or any other matter), but any two of BA, easyJet and Monarch, if voting together, have the ability to exercise a veto.
 - None of Lufthansa, Virgin Atlantic, Thomson or Thomas Cook will have the power alone or together to exercise any veto⁶.
- (13) The Commission found in its 2001 Decision that the individual shareholders of TAG will have strong commonality of interest in TAG (and through it in NATS) and that each of the seven airline shareholders in TAG had the right to appoint one director to the board of TAG⁷. The Parties submit that up to now, matters at TAG level have been agreed consensually by the airlines in board meetings of TAG and there has rarely been recourse to a vote. The present transaction brings about a substantial change in TAG's shareholding. USS acquires interests from four airline companies, making it the largest shareholder in TAG and the only one able to block decisions requiring a super majority individually. Jointly with any two of the three airline companies keeping their pre-transaction shareholding, it could reach the 75% Super Majority and actively adopt motions of strategic importance to TAG. However, the airline shareholders share a common knowledge of the sector and have shown in practice a strong commonality of interest. The findings of the Commission in its 2001 Decision have in practice been confirmed. In addition, post-Transaction, only BA, easyJet and Monarch will have the right to each appoint one voting director to the board of TAG. All these elements show that airline companies are likely to continue to act together within TAG.
- (14) As a consequence, in view of the criteria set out in paragraphs 65 *et seq.* of the Commission's Jurisdictional Notice⁸, the Commission concludes that post-Transaction USS, BA, easyJet and Monarch will exercise joint control over TAG.
- (15) In the 2001 Decision, the Commission found that the Crown Shareholder and TAG would exert joint control over NATS primarily because of the veto right on the budget of NATS⁹. The provisions of the Strategic Partnership Agreement that the Commission relied on in its 2001 Decision to establish joint control of NATS by TAG and the Crown Shareholder have remained the same¹⁰ and therefore, it can be

⁶ Pursuant to the provisions of the Shareholders Agreement, they will no longer be able to nominate a director to the board of TAG, either alone or together. Therefore, the mechanism through which commonality of interest could previously have been achieved between the seven airlines no longer exists.

⁷ The 2001 Decision, recital 7.

⁸ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16 April 2008, p.1.

⁹ 2001 Decision, recital 10.

¹⁰ The Strategic Partnership Agreement provides that the adoption of any new business plan of NATS or any departure or change in the current business plan (or strategy set out in it) requires the approval of the directors appointed by each of the Crown Shareholder and TAG. The business plan covers the following matters: safety and risk management, the service and investment plan, strategy for non-operational and corporate divisions, long-term air traffic provision with the UK Ministry of Defence, performance management and business development. In addition, if the adoption of any part of any new business plan or any amendment to any current business plan involves a requirement for the provision of funding to NATS or any third party by the shareholders of NATS, the approval of each of the Crown Shareholder and TAG must be obtained. Lastly, the making of any

concluded that USS, BA, easyJet, and Monarch, all via TAG, together with the Crown Shareholder will exercise joint control over NATS.¹¹

2.2. Full functionality of NATS

- (16) In its 2001 Decision, the Commission found that NATS would perform on a lasting basis all the functions normally carried out by air traffic control undertakings. NATS would also have a management dedicated to its day-to-day operations, and would have access to sufficient resources including finance, staff and assets in order to conduct its business activities. NATS would be an autonomous economic entity in commercial, financial and operational terms. Therefore, the Commission concluded that NATS would be fully-functional. There is no contemporaneous element putting this conclusion into question.
- (17) The notified operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

- (18) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million¹² (USS: EUR [...]; BA (IAG): EUR 18 117 million; easyJet: EUR 4 680 million; Monarch: EUR 799 million; NATS: EUR 1 096 million). Each of them has a EU-wide turnover in excess of EUR 250 million (USS: EUR [...], BA (IAG): EUR [...]; easyJet: EUR [...]; Monarch: EUR [...]; NATS: EUR [...]) and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension¹³.

4. COMPETITIVE ASSESSMENT

4.1. Relevant markets: *en route* and airport air traffic services

- (19) NATS provides "*en route*" air traffic services in UK airspace in accordance with the terms of a licence issued by the Secretary of State for Transport. NATS also provides airport air traffic services.

investment or the liquidation of any investment made by NATS in any other person or business requires the approval of the directors appointed by each of the Crown Shareholder and TAG.

¹¹ The Crown Shareholder considers that he does not possess such rights as to confer control over the commercial operations of NATS. While the Crown Shareholder does have the right to appoint Partnership Directors to the board of NATS, the Crown Shareholder considers that these directors are required to act independently and is forbidden from representing the Crown's wider interests and as such are concerned only with the Crown's shareholding in NATS. Furthermore, according to the Crown Shareholder, the consent of the Partnership Directors is required in very narrow circumstances i.e. where either the business plan involves a requirement for the provision of funding to NATS or any third party by the Shareholders. However, as described in footnote 10, the veto rights of the Crown Shareholder are not limited to pure minority protection rights but are rights which relate to the strategic business behaviour of NATS and furthermore, the Crown Shareholder has the right to nominate the Partnership Directors; these are elements that sustain the finding of joint control over NATS. In any event, the question of whether the Crown Shareholder actually jointly controls NATS or not is not relevant for the purpose of determining jurisdiction of the European Commission over the assessment of the Transaction under the Merger Regulation.

¹² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

¹³ A waiver was granted to the Crown Shareholder as to the provision of the turnover figures as in any event the thresholds of Article 1(2) of the Merger Regulation are met.

- (20) None of the Parties is active in the provision of such services. However, BA, easyJet, and Monarch buy both "*en route*" and airport air traffic services from NATS. There is, therefore, a vertical relationship between the activities of NATS and those airlines having a stake in NATS.

4.1.1. *Product markets*

- (21) "*En route*" services consist of air traffic controllers giving instructions to aircraft "*en route*" over national airspace (as opposed to those in the vicinity of airports), so that those aircraft are safely separated to agreed international standards.
- (22) Airport air traffic services relate to control of air traffic within a defined radius¹⁴ of an airport, and comprise airport approach, landing and take-off. These services are alternatively designated as "*terminal air navigation services*".
- (23) In its previous decision practice, the Commission left open whether "*en route*" and airport air traffic services constituted separate product markets.¹⁵
- (24) For the purposes of this decision, it can be left open whether "*en route*" and airport air traffic services belong to the same market.

4.1.2. *Geographic markets*

- (25) The Commission has previously considered that the market for "*en route*" traffic services were not larger than national¹⁶.
- (26) As regards the airport air traffic services, it envisaged the possibility that each individual airport would constitute a separate relevant market¹⁷ while it also left open whether a wider EEA-market could be envisaged.¹⁸
- (27) Ultimately, in both cases, the Commission can leave the question open as the Transaction would not lead to serious doubts irrespective of the precise market definition.

4.2. **Competitive assessment**

- (28) The Transaction will not lead to any horizontal overlaps between the activities of the Parties and NATS.
- (29) NATS provides on an exclusive basis "*en route*" services in the UK airspace and airspace managed by the UK and therefore has a 100% share of supply. As regards airport air traffic control services, NATS holds a share of [50-60]% of supply at UK airports (on the basis of aircraft traffic movements) as at November 2013.

¹⁴ In the UK, the scope of the control stretches up to 15 miles (about 24.1 km).

¹⁵ Case COMP/M.2315, *The Airline Group / NATS*, recital 15, Case COMP/M.7008 *Aena Internacional/AXA PE/LLAGL*, recitals 15 and 20.

¹⁶ Case COMP/M.2315 *The Airline Group / NATS*, recital 16, Case COMP/M.7008 *Aena Internacional/AXA PE/LLAGL*, recitals 15 and 20.

¹⁷ Case COMP/M.2315 *The Airline Group / NATS*, recital 16.

¹⁸ Case COMP/M.7008 – *Aena Internacional/AXA PE/LLAGL*, recital 19.

- (30) The Transaction therefore leads to vertically affected markets because of NATS' activities upstream on the market for "*en route*" and airport air traffic services and its airline shareholders as end-users of these services in their capacity as providers of air transport services to and from the UK. USS has no controlling interest in any upstream or downstream business.
- (31) The Commission assessed in its 2001 Decision whether the airline shareholders could favour NATS as the selected supplier at those airports where they are active and consolidate or strengthen NATS' leading position as an airport air control service provider. Second, the Commission assessed whether the vertical integration between NATS and its airline shareholders could lead to any anti-competitive effects in particular by way of price and non-price discrimination against other airlines. The Commission analysed whether the vertical integration would have created incentives for the airline shareholders to use NATS as a tool to reduce the competitiveness of competing airlines and to strengthen their position on the downstream air transport markets between the UK and other destinations. The Commission concluded in its 2001 Decision that none of these negative effects would materialise post-Transaction.
- (32) The Parties claim that there has been no relaxation of the rules and regulatory constraints since the Commission's 2001 Decision and that the conclusions of the 2001 Decision would remain valid in all aspects.
- (33) The Commission sought to ascertain whether the relevant factors relied on by the Commission in its 2001 Decision are still prevalent today and whether the current Transaction would bring about any elements which would justify a change of the Commission's conclusions in the 2001 Decision as regards these elements.
- (34) None of the respondents to the Commission's current market investigation considered that the Transaction brings about any elements which would justify a change of the conclusion in the 2001 Decision. Furthermore, the outcome of the Commission's current market investigation was that the majority of the relevant features which make unlikely any discrimination in favour of the airline shareholders are equally prevalent today. In particular, "*en route*" charges are subject to *ex ante* regulations, established by national authorities in line with the principles and formula set up by the Commission Implementing Regulation 391/2013 (the "charging Regulation") . Furthermore, as regards airport air traffic services, NATS currently charges airport operators and not airlines. Lastly, any systematic discrimination as regards flight plans of carriers or any manoeuvres to cause delays at landing would be impossible to maintain because of the role played by Eurocontrol and the transparency of the system.
- (35) The Commission further considers that the Transaction is likely to reduce the risks of foreclosure by reducing the number of airlines exerting indirect joint control over NATS, and thus the number of beneficiaries of a potential foreclosure strategy: Thomas Cook, Thomson, Virgin Atlantic and Lufthansa would be replaced by USS. As USS is a non-strategic investor with purely financial interests, any foreclosing of airlines which are not shareholders of NATS would run counter to its interests. Moreover, the fact that these four airlines give up their control rights over NATS can also be interpreted as a sign that these airlines do not fear any discriminating by NATS in favour of the remaining airline shareholders.

- (36) Lastly, USS recently acquired a non-controlling stake of 8.65% in Heathrow Airport Holdings (HAH), which operates Heathrow, Aberdeen, Glasgow and South Hampton. The Commission considered whether USS could use its control over NATS to make NATS discriminating in favour of USS' other airport shareholdings. However, USS has only negative control over NATS and can therefore not positively impose any strategy on NATS. In addition, it would be the only beneficiary of a strategy in favour of HAH, which would not only be against the commercial interests of the other shareholders but also in breach of the non-discrimination provisions contained in the NATS licence to operate. Finally, respondents to the market investigation discarded any such risk.
- (37) The Commission therefore considers that the present Transaction does not raise any serious doubts as to its compatibility with the internal market.

5. CONCLUSION

- (38) 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.

For the Commission

(signed)
Joaquín ALMUNIA
Vice-President