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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

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Subject: **Case M.10970 - FORTRESS INVESTMENT GROUP / AIR INVESTMENT VALENCIA / JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 25 January 2023, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Fortress Investment Group LLC ('Fortress', USA), controlled by SoftBank Group Corp. (Japan), and Air Investment Valencia S.L. ('AIV', Spain), controlled by Mr Carlos

[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 1, 3.1.1994, p. 3 (the 'EEA Agreement').

Bertomeu, will acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control of a newly formed joint venture (the 'JV'), which will incorporate (i) the businesses of CityJet Designated Activity Company ('CityJet', Ireland) which will be contributed by Fortress, and (ii) the businesses of Air Nostrum Líneas Aéreas Del Mediterráno, S.A. and its subsidiaries,[3] and certain other companies[4] ('Air Nostrum', Spain) which will be contributed by AIV (the 'Transaction')[5]. (Fortress and AIV are designated hereinafter as the 'Notifying Parties' and, together with the JV, the 'Parties' or the 'Parties to the Transaction').

1. THE PARTIES

(2) Fortress is a global investment management firm based in New York, USA. Fortress manages assets on behalf of over 1,900 institutional clients and private investors worldwide across a range of credit and real estate, private equity and permanent capital investment strategies. Fortress Investment Group is a subsidiary of SoftBank Group Corp., a listed Japanese holding company. SoftBank Group Corp. is headquartered in Tokyo, Japan, and is the parent company of a global portfolio of subsidiaries and affiliates involved in advanced telecommunications, internet services, Internet of Things, robotics and clean energy technology providers.

(3) **AIV** is a holding company based in Valencia, Spain, controlled by Mr. Carlos Bertomeu. Apart from Air Nostrum, AIV controls Inversiones Líneas Aéreas Internacionales (a holding/consulting company dedicated to the design, management and control of projects and investments). AIV also jointly controls, through Maltair Holding, S.L., Mediterranean Aviation Operations Company, Ltd ('Melair'), an airline active in the operation of air routes between Europe and Africa, focusing on providing air transportation services to gas and oil companies, corporate customers and humanitarian organizations, mainly through charter flight and wet-lease services.

(4) The **JV** will incorporate the business of CityJet and Air Nostrum. CityJet is a European regional airline based in Dublin, Ireland, operating a fleet of 22 aircraft providing wet-lease services to other airlines across Europe.[6] Pre-Transaction, CityJet is indirectly controlled by two individuals, namely […] and […]. Air Nostrum is a regional airline based in Valencia, Spain, operating a fleet of 41 aircraft providing scheduled flight services under a franchise agreement with Iberia, charter services, and wet-lease and maintenance services to other airlines. Air Nostrum is currently solely controlled by AIV.

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3 The subsidiaries of Air Nostrum that, similarly to Air Nostrum, are pre-Transaction wholly-owned and controlled by AIV and will be contributed to the JV are the Spanish companies Air Nostrum Global Services, Air Nostrum Engineering and Maintenance ('ANEM'), and Air Nostrum Training Operations ('ATO'). For their part, ANEM controls 100% of the Spanish company Aviatech Consulting and ATO controls 100% of the Spanish company Trabajos Aéreos de Córdoba. All of the above-mentioned companies will also be contributed to the JV (Form CO, paragraph 5).

4 The other companies that are pre-Transaction wholly-owned and controlled by AIV and, similarly to Air Nostrum, will be transferred to the JV are the Irish companies Hibernian Airlines Limited, Ard Aer Commercial Services and Aer Resources Services Agency ('ARA'). For its part, ARA controls the Spanish company ARA Gestión de Tripulaciones y Vuelo, which will also be contributed to the JV (Form CO, paragraph 5).

5 Publication in the Official Journal of the European Union No C 39, 1.2.2023, p. 27.

6 CityJet's current fleet consists of 21 active aircraft, with one in long-term storage (Form CO, footnote 1).

2. THE PROCEDURE

(5) This Transaction has been previously notified and unconditionally cleared by the Commission on 27 July 2019 ('Clearance Decision'),[7] but it has never been implemented. The concentration was notified anew in light of the considerable time that has passed and the fact that market circumstances might have changed, in particular due to the significant effects of the Covid-19 pandemic on the European aviation markets.

3. THE OPERATION AND THE CONCENTRATION

(6) The Transaction is a concentration within the meaning of Article 3(1) EUMR and 3(4) EUMR. It will be effected through an indirect acquisition of shares and rights in the newly created JV by AIV and investment funds advised and managed by Fortress and its affiliates.

(7) Post-Transaction, the JV will be jointly controlled by Fortress and AIV. AIV will be the majority shareholder of the JV (holding shares representing […]% of the JV's voting rights), but Fortress will have negative joint control together with AIV through certain veto rights conferred to Fortress regarding key business decisions (for at least […] years until its preference shares are redeemed).[8] [INFORMATION ON THE JV'S GOVERNANCE ARRANGEMENTS].

(8) As a result, Fortress and Air Investment Valencia would acquire joint control over the JV on a lasting basis.

(9) The JV will be full-function within the meaning of Article 3(4) EUMR since it will have sufficient resources to operate, including its own employees and management dedicated to its day-to-day operations to enable it to operate independently on the market.[9] Furthermore, the JV's activities will go beyond one specific function of those of the Notifying Parties, as the former will have the ability to conduct its own commercial policy.[10] Moreover, the JV will have access to the market, as it will be responsible for the sourcing of its own input requirements and will offer its services to third party customers on an independent basis. In particular, there will be no sales to the Notifying Parties, as the latter do not own airlines in the EEA that could make use of the wet-leasing services of the JV.[11] Finally, the JV will operate on a lasting basis, since no limitation of its duration is agreed or envisaged by the Notifying Parties.[12]

4. UNION DIMENSION

(10) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Fortress EUR […]; AIV EUR […] in 2021).[13] Each

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7 Case M.9062 – Fortress Investment Group/Air Investment Valencia/JV.

8 Form CO, paragraph 46.

9 Form CO, paragraph 35.

10 Form CO, paragraph 35.

11 However, the Notifying Parties submit that there will be some purchasing links between the JV and AIV, through Melair (former Medavia), in respect of wet-leasing services. In this regard, Melair will continue to provide wet-lease services to the JV as it currently does with Air Nostrum for an overall of […] aircraft (Form CO, paragraph 35).

12 Form CO, paragraph 35.

13 Turnover calculated in accordance with Article 5 of the Merger Regulation.

of them has a Union-wide turnover in excess of EUR 250 million (Fortress EUR […]; AIV EUR […] in 2021), but each of them does not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension.

5. RELEVANT MARKETS

5.1. Product Market Definition

(11) The activities of the Parties overlap in relation to the provision of wet-leasing services. Wet-leasing involves the leasing of an aircraft to an airline with crew. Under a wet-leasing agreement, the lessor operates the flights using its own air operator certificate (AOC) and resources, for which it receives an income from the lessee, which is usually a fixed price per block hour, unrelated to ticket prices.

(12) Damp-leasing is very similar to wet-leasing. The only difference is that with damp-lease services, the cabin crew is provided by the lessee, and not the lessor, whereas the lessor still provides the cockpit crew.

(13) Where wet- or damp-lease services also include maintenance and insurance, one speaks of ACMI services (*i.e.* aircraft, crew, maintenance and insurance services). ACMI services can be considered synonymous with wet- and damp-lease services.

5.1.1. The Commission's findings in the Clearance Decision

(14) In the Clearance Decision, the Commission found that dry-leasing, wet-leasing and franchise services[14] each belong to separate product markets.[15] This finding is in line with the Commission's past and more recent decisional practice.[16]

(15) Furthermore, in the Clearance Decision, the Commission considered, but, in the absence of competition concerns, left open, whether damp- and wet-leasing of aircraft belong to the same product market.[17]

(16) Finally, in the Clearance Decision, the Commission considered, but ultimately left open, whether the market for wet-leasing services should be further segmented to wet-leasing services of regional aircraft (i.e. aircraft with a capacity of 30-90+ seats), and whether it should be further segmented by seat capacity of the regional aircraft between: (i) under 50 seats; and, above 50 seats; (ii) 50-70 seats; and, 70-100 seats; and (iii) 30-70 seats; and, 70-100+ seats.[18]

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[14] In the Clearance Decision, the Commission explains that dry-leasing, wet-leasing, and franchise services are all services used by airlines to increase capacity. However, these services have different characteristics. Dry-leasing involves the leasing of an aircraft to an airline, without cabin crew, maintenance services and insurance. Franchise services are those where, the franchisor airline puts its brand and livery at the disposal of the franchisee for use under a franchise agreement (M.9062 – Fortress Investment Group / Air Investment Valencia / JV, dated 23 July 2019, paragraph 15).

[15] and Case M.9062 – Fortress Investment Group / Air Investment Valencia / JV, dated 23 July 2019, paragraphs 16-17.

[16] Case M.9287 – Connect Airways / Flybe, dated 5 July 2019, paragraph 213. The decision to treat dry and wet-leasing as separate markets was confirmed in M.10231 - AerCap / GECAS / SES, dated 26 July 2021, paragraph 17.

[17] Case M.9062 – Fortress Investment Group / Air Investment Valencia / JV, dated 23 July 2019, paragraph 21.

[18] Case M.9062 – Fortress Investment Group / Air Investment Valencia / JV, dated 27 July 2019, paragraphs 25-27.

5.1.2. The Notifying Parties' view

(17) The Notifying Parties do not contest the Commission's findings in the Clearance Decision.[19]

(18) Furthermore, the Notifying Parties consider that wet- and damp- lease services belong to the same product market but that this distinction should not be of great importance in commercial reality for the following reasons. From a demand-side perspective, damp-lease services are mostly requested in incidental situations by customers, in order to protect their cabin crew from the risk of job losses due to outsourcing, or if they have specific language requirements for their cabin crew that would otherwise be difficult for the wet-lease provider to comply with.[20] In this context, the Notifying Parties explain that they have not had any requests for mere damp-leasing in any ACMI quotation request received within the last […] years. The last request Air Nostrum received for damp-leasing services […] was from […] in […], relating to just […] aircraft.[21] Furthermore, from a supply-side perspective, the Notifying Parties are not aware of ACMI providers that purely focus on damp-leasing, whereas all wet-lease providers are able to provide damp-leasing services if so requested by customers.[22]

5.1.3. The Commission's assessment

(19) The results of the market investigation have not provided the Commission with grounds allowing it to conclude that the market definition retained in the Clearance Decision would no be longer applicable. Consequently and for the purposes of the present case, it is still valid.

(20) In this context, the vast majority of both the competitors and customers that responded to the Commission's market investigation, agreed that dry-leasing, wet-leasing and franchise services constitute distinct product markets,[23] because they refer to services that '*cater to different airline needs*',[24] and, that each service results in '*different levels of control, risk, and responsibilities for the parties involved'*.[25]

(21) Similarly, the market investigation provided no indication suggesting that a deviation from the Commission's previous findings on the distinction between wet- and damp-leasing would be justified.

(22) Finally, the responses to the Commission's market investigation were mixed and inconclusive on whether the wet-leasing market should be further segmented by

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19 Form CO, paragraphs 103 *et seq*., 109 *et seq*. and 117.

20 Form CO, paragraph 87 *et seq.* In this context, the Notifying Parties have not had any requests for mere damp-leasing in any ACMI quotation request received within the last […] years, whereas Air Nostrum received only […] request for damp-leasing services within an ACMI quotation in […], relating to just […] aircraft. (Form CO, paragraph 89).

21 Form CO, paragraph 89. [INFORMATION ON THE CONTENT AND OUTCOMES OF PREVIOUS REQUESTS FOR QUOTATION] (Response of the Notifying Party to a Commission's Request for Information ('RFI 1'), dated 23 February 2023, question 1(a)).

22 Form CO, paragraph 90.

23 Response to question B.1. of the Commission's market investigation questionnaire 01 to customers; and, response to question B.1. of the Commission's market investigation questionnaire 02 to competitors.

24 Response to question B.2. of the Commission's market investigation questionnaire 02 to competitors.

25 Response to question B.2. of the Commission's market investigation questionnaire 02 to competitors.

aircraft seat capacity.[26] Some respondents thought the suggested splits were too narrow, some thought that they were too wide, while others questioned the segmentation by size altogether, pointing to the fact that lessees take many other factors into account when selecting a wet-leasing provider/aircraft.[27]

5.1.4. Conclusion

(23) In light of the above, the Commission concludes that, for the purposes of this decision, wet-leasing, dry-leasing and franchise services constitute distinct product markets. Furthermore, it could be left open whether (i) wet and damp-lease services should belong to the same product market; and, (ii) the market for the provision of wet-lease services should be further segmented based on the size of aircraft, as the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement, under any of the plausible product market definitions.

(24) Nevertheless, since CityJet and Air Nostrum only provided wet-leasing services in the past four years, the Commission will only assess this market segment further in this decision. Moreover, considering that the Parties both use regional aircraft of a seat capacity between 88 and 100, the Commission will assess the effects of the Transaction on (i) the broader market for wet-leasing services; (ii) the segment for wet-leasing services of regional aircraft (with a capacity of 30-90+ seats); and, (iii) the sub-segment large regional aircraft (with a capacity of 70-90+ seats), in line with the findings of the Clearance Decision.

5.2. Geographic Market Definition

5.2.1. The Commission's findings in the Clearance Decision

(25) In the Clearance Decision the Commission considered that the geographic market for wet-leasing services is at least EEA-wide.[28] This is in line with its past decisional practice, where the Commission left open whether the market for wet-leasing services is EEA-wide or worldwide in scope.[29]

5.2.2. The Notifying Parties' view

(26) The Notifying Parties do not contest the Commission's geographic market definition in the Clearance Decision.[30]

5.2.3. The Commission's assessment

(27) The results of the Commission's market investigation do not suggest a departure from the Clearance Decision would be justified, as virtually all competitors and customers agree that the geographic scope of the market is at least EEA-wide.[31]

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26 Response to question B.5. of the Commission's market investigation questionnaire 01 to customers; and, response to question B.5. of the Commission's market investigation questionnaire 02 to competitors.

27 Response to question B.6. of the Commission's market investigation questionnaire 01 to customers; and, response to question B.6. of the Commission's market investigation questionnaire 02 to competitors.

28 Case M.9062 – Fortress Investment Group / Air Investment Valencia / JV, dated 27 July 2019, paragraph 31.

29 Case M.9287 – Connect Airways/Flybe, dated 5 July 2019, paragraph 232.

30 Form CO, paragraph 120.

5.2.4. Conclusion

(28) In light of the above, the Commission concludes that, for the purposes of this decision, the question whether the scope of the market for the provision of wet-leasing services is EEA-wide or larger than EEA-wide can be left open, as the Transaction does not raise serious doubts as to its compatibility with the internal market or the functioning of the EEA Agreement, under any of the plausible geographic market definitions. Nevertheless, the Commission will assess the effects of the Transaction on the narrowest possible geographic market definition, namely the EEA.[32]

6. COMPETITIVE ASSESSMENT

6.1. Introduction

(29) In the Clearance Decision, the Commission's main findings in respect of the wet-leasing market were that although the Transaction would give rise to affected markets: (i) the combined entity's market share post-Transaction would remain moderate; (ii) the Parties would continue to face competition from significant number of other wet-leasing suppliers that are established in the EEA; (iii) that barriers to entry are relatively low; and, (iv) that there are no significant barriers to switching between wet-lessors.[33] Consequently, the Commission concluded, in line with the indications from respondents to the market investigation,[34] that it would be unlikely for the Transaction to have a negative impact on the competitive situation of the market for wet-leasing services in the EEA.[35]

6.1.1. The Notifying Parties' views

(30) The Notifying Parties consider that the competitive landscape and market conditions in terms of the number of competing operators and total aircraft within the wet-leasing market remained broadly the same as when the Commission examined the Transaction back in 2019 and that the Parties' combined market shares (as well as the increments to these shares that will be brought about by the Transaction) have actually fallen across all possible segments in the market since

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31 Response to question B.9. of the Commission's market investigation questionnaire 01 to customers; and, response to question B.9. of the Commission's market investigation questionnaire 02 to competitors.

32 The Commission will not assess the effects of the Transaction in a wider geographic market (i.e. world-wide in scope), because the Notifying Parties confirm that both CityJet and Air Nostrum are only active in the provision of ACMI services within the EEA, and therefore, their combined market share would be significantly lower if the scope of the wet-leasing market were to be considered as world-wide, especially in light of the fact that ACMI services are used on a much greater scale in the USA than in the EEA. (Form CO, paragraph 158).

33 Case M.9062 – Fortress Investment Group / Air Investment Valencia / JV, paragraphs 49- 58.

34 Case M.9062 – Fortress Investment Group / Air Investment Valencia / JV, paragraph 59.

35 Case M.9062 – Fortress Investment Group / Air Investment Valencia / JV, paragraph 60. The Commission notes that in the M.9062 – Fortress Investment Group / Air Investment Valencia / JV decision, it conducted an assessment of horizontal overlaps between the Parties' activities on the charter flight services market. The Transaction no longer gives rise to affected markets in charter flight services because CityJet exited that market in October 2021 (Form CO, paragraph 11(iii)). Furthermore, in the Clearance Decision, the Commission conducted an assessment of a number vertical relationships between the Parties' activities. The Parties confirm that there are no longer any vertical or conglomerate links between the activities of CityJet and Air Nostrum in the EEA (Form CO, paragraph 194). Fortress divested its interest in Falko Regional Aircraft Limited in 2022 and is therefore no longer active in the dry leasing of regional aircraft (Form CO, paragraph 11(ii)).

the Clearance Decision. Furthermore, they consider that there continues to be strong and close competition from established ACMI operators such as NoRRA Nordic and Xfly.[36]

(31) In addition, the Parties continue to consider that the proposed Transaction does not result in a significant impediment to effective competition, in particular due to the complementary nature of the Parties' activities. On the one hand, the Notifying Parties submit that CityJet's entire fleet is used for its wet-leasing activities. On the other hand, Air Nostrum's business is primarily related to its franchise agreement with Iberia, the terms of which require it to use a dedicated fleet with Iberia livery.[37] As such, Air Nostrum cannot use these aircraft for wet-leasing operations.[38] In addition, Air Nostrum only has a limited presence in wet- (and damp-) lease services.[39] On the contrary, CityJet does not operate on a franchise basis.[40]

(32) Furthermore, and in particular with regard to CityJet and Air Nostrum's wet-leasing activities, the Notifying Parties argue that the two are not close competitors, because they do not operate the same type of aircraft. In particular, CityJet's fleet consists of 22 Bombardier CRJ900 aircraft, which it intends to continue operating in the future, whereas, Air Nostrum ceased to operate Bombardier CRJ900 aircraft and has no plans to operate this type of aircraft in the foreseeable future.[41]

6.1.2. Commission's assessment

(33) Similar to the Clearance Decision, the Transaction gives rise to horizontal overlaps in the wet-leasing market in the EEA and its possible segment for wet-leasing of regional aircraft (*i.e.* regional aircraft with 30-90+ seat capacity) or its sub-segment for wet-leasing of large regional aircraft (*i.e.* aircraft with 70-90+ seat capacity).

(34) Both CityJet and Air Nostrum are only active in the wet-leasing of regional aircraft of a seat capacity between 88 and 100. Thus, the Commission's assessment will focus on the narrowest possible segment of wet-leasing of large regional aircraft (*i.e*. aircraft with 70-90+ seat capacity) in the EEA.

(35) **Table 1** below, provides an overview of the Parties and their competitors' shares in the market for wet-leasing of large regional aircraft between 2020-2022, per number of aircraft available for wet-leasing (*i.e.* in terms of the number of aircraft identified by the Notifying Parties as flying on behalf of one airline while being operated by a different airline). The market shares consist of Notifying Parties estimates, calculated using data from the *ch-aviation* database, and are calculated as an annual average based on four different points in time at the end of each quarter of the year.[42]

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36 Form CO, paragraph 13.

37 Response of the Notifying Parties to a Commission's Request for Information ('QP4'), question 3(b)(iv).

38 Response of the Notifying Parties to a Commission's Request for Information ('QP4'), question 3(b)(iv).

39 Form CO, paragraph 14.

40 Form CO, paragraph 14.

41 Response of the Notifying Parties to a Commission's Request for Information ('QP4'), question 3(c).

42 Table 1 only includes market data that relate to the provision of wet-leasing services of large regional aircraft to third party airlines, and does not include services provided intra-group (captive sales).

(36) The Notifying Parties also provided annual market shares based on a single point in time for each of the quarters between 2020-2022,[43] but no significant seasonal variation in market shares has been detected. These estimates were also made on the basis of the same data available in the *ch-aviation* database.[44] As such, all of the estimates only include aircraft flying on behalf of one airline while being operated by a different airline at the point in time of measurement, and therefore, they likely do not take into account all aircraft that could be available for wet-leasing.[45] The Commission notes the limitations of this way of calculating of the market shares, but, for the purposes of this decision, it accepts the Notifying Parties' methodology, given the limited data that is publically available on wet-leasing activities within the EEA, and, especially in light of some aircraft being used for wet-leasing only occasionally. The inclusion of various pre-determined points in time, not randomly selected by the Parties, acts to counteract those limitations.

Table 1: Market Shares on wet-leasing of large regional aircraft in the EEA

Operator	**2020**	**2021**	**2022**
	Market Share	*Market Share*	*Market Share*
CityJet	[10-20]%	[10-20]%	[20-30]%
Air Nostrum	[0-5]%	[0-5]%	[0-5]%
Total JV	*[20-30]%*	*[10-20]%*	*[20-30]%*
Melair (former Medavia)[46]	[0-5]%	[0-5]%	[0-5]%
Total Parties	*[20-30]%*	*[10-20]%*[47]	*[20-30]%*
NoRRA Nordic Regional Airlines	[40-50]%	[40-50]%	[*30*-40]%
Xfly (former Regional Jet)	[5-10]%	[20-30]%	[20-30]%
Swiftair	[5-10]%	[0-5]%	[0-5]%
Others	*[10-20]%*	*[10-20]%*	*[10-20]%*
Total	*100.0%*	*100.0%*	*100.0%*

Source: Notifying Parties' estimates based on an annual average.

43 Form CO, Annex 13, Annex 14, and Response of the Notifying Parties to a Commission's Request for Information ('QP5').

44 Form CO, paragraph 15.

45 Form CO, paragraph 136.

46 Melair (formerly known as Medavia) is not contributed into the JV by Air Investment Valencia. It will continue to provide wet-lease services to the JV (Form CO, paragraph 35).

47 According to the data provided by the Notifying Parties, which was based on the *ch*-aviation database, Air Nostrum […] wet-leasing services in 2021. However, the Notifying Parties note that Air Nostrum did operate […] flights on behalf of […] in 2021. The relevant wet-lease agreement took effect on […] and was terminated on […]. Although this activity is not reflected in the market share data, contracts for the wet-lease of aircraft that are used for a few days duration are irrelevant to the competitive structure of the market, and do not have a material impact on competition in the market (Form CO, paragraph 136 and 179). The limited presence of Air Nostrum in the wet-leasing market in the EEA in 2021 was linked to the effect of the Covid-19 pandemic in the wet-leasing market throughout 2021 (i.e. with airlines offering fewer flights, demand for ACMI services reduced (Response of the Notifying Parties to a Commission's Request For Information ('RFI 2'), dated 24 February 2023, question 1).

(37) Both CityJet and Air Nostrum decreased the number of aircraft they have at their disposal for wet-leasing since the Clearance Decision, respectively from […] to […] and from […] to […].[48] Still, due to parallel changes on the market, the market shares of the JV would be similar to those back in 2019, when the Commission initially cleared the Transaction (*i.e.* they were at [20-30]% with an increment of [5-10]%).[49] The size of the market for wet-leasing of large regional aircraft (with a capacity of 70-90+ seats) remains rather small (below […] aircraft) and the Parties' combined market share post-Transaction would remain moderate and would not exceed [30-40]%, even on this narrowest plausible market segmentation. Furthermore, the increment brought by the Transaction will be limited, due to the fact that only […] aircraft out of Air Nostrum's fleet is made available for wet-leasing. This translates to a small market share of only [0-5]% in 2022; while it would not exceed [5-10]% at any of the individual points in time that the Notifying Parties used as reference for the calculation of the annual market shares.[50] It also appears unlikely that post-Transaction, Air Nostrum would increase the number of aircraft dedicated to wet-leasing using aircraft from its current fleet, due to its ongoing […] franchise agreement with Iberia, which requires the former to use a dedicated fleet with Iberia livery.[51]

(38) Furthermore, the combined entity will continue to face competition not only from other established competitors present on the market, such as Xfly or Norra Nordic, but also from airlines that are active on the wet-leasing market occasionally, when spare capacity is available.[52]

(39) The Commission has invited market participants to submit their views on the changes in market circumstances and on the current concentration, but none identified significant changes in any relevant market since the Clearance Decision. In general, it appears that the pandemic has not significantly altered the competitive landscape on the market for wet-leasing of large regional aircraft and that the market is recovering after the period when aircraft was grounded.

(40) One market participant pointed out that some providers received Covid-19 related state aid, but without providing details as to how this might have affected the competitive circumstances on the wet-leasing market.[53] State aid aspects of the case are addressed in Section 6.1.3 below.

(41) As regards the impact of the Transaction, the vast majority of customers that responded to the Commission's market investigation did not foresee a negative impact of the Transaction in the ACMI market, the ACMI market for large regional

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48 Form CO, paragraph 157. The Commission notes that Air Nostrum's 2022 market share is indicative of the future, because: (i) it is estimated on the assumption that […] planes are wet-leased, which […]; and (ii) this is confirmed by Air Nostrum's business plan, [INFORMATION ON FUTURE STRATEGY AND FORECASTS]. (Annex 3 to the Form CO, 'Indicative headline Terms', pages 11-12).

49 M.9062 – Fortress Investment Group / Air Investment Valencia / JV, Table 1.

50 The increment was the highest at the end of Q3 of 2022 and amounted to [0-5]% on an EEA market excluding UK and Switzerland (which the Notifying Parties do not consider to be the correct geographic market delineation) (Form CO, footnote 8).

51 Response of the Notifying Parties to a Commission's request for information ('QP4'), question 3(b)(iv); and, Form CO paragraph 114.

52 Form CO, Annex 13 and 14; and, Non-confidential minutes of a pre-notification conference call with a competitor, dated 18 January 2023, paragraph 16

53 Response to questions C.6. of the Commission's market investigation questionnaire 02 to competitors.

aircraft, or their companies.[54] On the contrary, a customer explained that '*the Transaction is unlikely to have a negative impact on the competitive situation of the markets for wet-leasing services, as it might create synergies and potentially allow the merged entity to charge lower prices due to cost efficiencies'*.[55]

(42) The results were similar for the competitor respondents,[56] with the exception of one, who expressed concerns about the fact that post-Transaction, the combined entity will control the vast majority (approximately […] aircraft)[57] of Bombardier CRJ900/1000 aircraft (i.e. two types of aircraft, one of 88-seat capacity and the other one of 100-seat capacity),[58] which are attractive aircraft options for ACMI customers, due to their low operating costs.[59] In that regard, the Commission notes the following.

(43) *First*, Air Nostrum does not wet-lease and ceased operating Bombardier CRJ900 aircraft in December 2021 and […].[60] *Second*, out of the 65 Bombardier CRJ900 aircraft that the Notifying Parties estimate are operated in the EEA, only 22 will be held by the combined entity.[61] *Third*, and as noted in the Clearance Decision, Air Nostrum's main focus is the implementation of its franchise agreement with Iberia, whose terms require the former to use a dedicated fleet with Iberia livery. As such, Air Nostrum cannot rely on […] to provide wet-leasing or bid for future tenders for wet-leasing services, as this would be in breach of its contractual obligations under its franchise agreement with Iberia.[62] *Fourth*, the results of the Commission's market investigation, neither support a finding that Air Nostrum and CityJet are close competitors in the ACMI market for large regional aircraft in the EEA,[63] nor that the Bombardier CRJ900/1000 aircraft are considered by operators the preferred large regional aircraft (with Embraer 190 and Embraer 195 scoring higher than both CRJ900 and CRJ1000 in terms of customer preference).[64]

(44) In the light of all of these considerations, it can be concluded that the reasoning of the Clearance Decision remains valid.

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54 Responses to questions E.1.-E.6. of the Commission's market investigation questionnaire 01 to customers.

55 Response to question E.6. of the Commission's market investigation questionnaire 01 to customers.

56 Responses to questions E.1.-E.6. of the Commission's market investigation questionnaire 02 to competitors.

57 Responses to question E.4. of the Commission's market investigation questionnaire 02 to competitors.

58 Responses to questions E.4., E.6. and E.7. of the Commission's market investigation questionnaire 02 to competitors.

59 Non-confidential minutes of a pre-notification conference call with a competitor, dated 18 January 2023, paragraph 25.

60 Response of the Notifying Party to the Commission's Request For Information ('QP4'), question 3(c).

61 These would be CityJet's Bombardier CRJ900 fleet, which consist of an overall of 22 aircraft, of which one is in long-term storage. (Form CO, footnote 1; and, Response of the Notifying Party to the Commission's Request For Information ('QP4'), questions 3(b)(i) and (ii)).

62 Response of the Notifying Party to the Commission's Request For Information ('QP4'), question 3(c).

63 Response to question C.4. of the Commission's market investigation questionnaire 01 to customers; and, Response to question C.4. of the Commission's market investigation questionnaire 02 to competitors.

64 Response to question D.3. of the Commission's market investigation questionnaire 01 to customers; and, Response to question D.3. of the Commission's market investigation questionnaire 02 to competitors.

6.1.3. State aid aspects

(45) In the context of the proposed Transaction, a number of State measures that might benefit the Parties to the Transaction have been adopted. According to the case law of the General Court, the Commission has to consider the impact of these measures on the financial strength and future market position of the Parties to the notified concentration and their consequences for the maintenance of effective competition in the Common market post-Transaction.[65]

(46) Between […] and […] two entities within the CityJet group received total state aid of EUR […], through Irish and Danish Covid-19 relief schemes. According to the Parties, this state aid did not include any restrictions, did not require repayment, and did not require CityJet to prepare a viability plan. This relief was not specific to the airline sector and put in place to assist business with paying employees that were unable to work due to the Covid-19 pandemic.[66]

(47) Air Nostrum has had access to various forms of public financing since the Covid-19 outbreak. In particular, it:

a. received a direct grant of EUR 9 million, from the Autonomous Community of Valencia ('AN aid 1'). This measure was approved by the Commission under Article 107(2)(b) of the Treaty on the Functioning of the European Union on 22 July 2021;[67]

b. obtained 132 million of State-guaranteed loans under a Spanish aid scheme approved by the Commission ('AN aid 2');[68] and,

c. received an equity loan for a total amount of EUR 111 million in May 2022, from Sociedad Estatal de Participaciones Industriales (SEPI, through its fund for strategic companies – Fondo Estatal de Apoyo a la Solvencia de las Empresas Estratégicas) ('AN aid 3').[69]

(48) The Notifying Parties note that the state aid received by Air Nostrum addressed certain financial needs of Air Nostrum group in a specific volatile situation[70] and that none of the funds are or will be used to finance the Transaction.[71]

(49) It must in any case be recalled that under Regulation 139/2004, state aid is considered in the assessment merely in order to verify that the state measures in question are not such, in combination with other elements of the market situation, as to confer on the combined entity a market position which would result in a significant impediment to effective competition.

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65 Judgment of the CFI of 31 January 2001, T-156/98 RJB Mining/Commission, ECR p. II-337, points 114-125.

66 Form CO, paragraph 56.

67 State Aid SA.58343 (2021/N) – Spain- Air Nostrum – Compensation for the damage caused by the COVID-19 outbreak.

68 State Aid SA.56803 – Spain COVID-19- Guarantee scheme to companies and self-employed to support the economy in the current COVID-19 outbreak.

69 Under a scheme approved by the Commission: State Aid SA.57659 (2020/N) – Spain COVID 19 - Recapitalisation fund.

70 Form CO, para 58.

71 Form CO, para 60.

(50) Whilst under Article 2(1)(b) of the Merger Regulation, economic and financial power are important criteria for the appraisal of whether a concentration is compatible with the common market, in the absence of other indicators, financial strength as such will not be sufficient to lead to the creation or strengthening of a dominant position as a result of which competition will be significantly impeded. In the present case, as outlined above in Section 6.1.2., market share overlaps are not indicative of creation or strengthening of a dominant position. Moreover, the market investigation provided no indications that by means of their financial power, the Parties will be able to increase the JV's market position, for instance, by systematically undercutting competitors' prices in such a way that its existing or potential competitors are marginalised.

(51) Furthermore, the more significant aid granted to Air Nostrum by SEPI (AN aid 2 and 3) was given to it while it was experiencing serious financial difficulties in the context of the Covid-19 pandemic. The aid is part of a series of measures conceived at national level by the Spanish authorities to remedy a serious disturbance in their economy. It aims at remedying the liquidity shortage and ensuring that the disruptions caused by COVID-19 outbreak do not undermine the company's viability, and takes the form of a guarantee on a loan (AN aid 2) and a loan (AN aid 3). Both measures have been approved by the Commission and the use of the funds is subject to ongoing monitoring by Spain and by the Commission.

(52) Consequently, the Commission sees no circumstances specific to the merger whereby such aid would alter its competition analysis under the Merger Regulation as set out above. In any event, this decision is entirely without prejudice to the Commission's findings in carrying out state aid control.[72]

(53) In light of all above considerations, the Commission concludes that the Transaction is unlikely to raise serious doubts as to its compatibility with the internal market in relation to wet-leasing services, under any plausible market definition.

7. CONCLUSION

(54) 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
Executive Vice-President

[72] In the course of market investigation, the Commission received allegations from one of the market participants maintaining that the implementation of the Transaction would be in breach of a temporary ban on acquisitions imposed on Air Nostrum until it repays the aid it received from the Spanish Government under AN Scheme 3 (Non-confidential minutes of a pre-notification conference call with a market participant, dated 26 October 2022).