

# Anticipated acquisition by Bouygues S.A. of Equans S.A.S.

## NOTICE UNDER PARAGRAPH 2(1) OF SCHEDULE 10 TO THE ENTERPRISE ACT 2002 (THE ACT) – CONSULTATION ON PROPOSED UNDERTAKINGS IN LIEU OF REFERENCE PURSUANT TO SECTION 73 OF THE ACT

ME/6987-22

### INTRODUCTION

1. Bouygues S.A. (**Bouygues**) has agreed to acquire Equans S.A.S. (**Equans**) (the **Merger**). Bouygues and Equans are together referred to as the **Parties** and for statements referring to the future (if the Merger were to proceed), as the **Merged Entity**.
2. On 19 July 2022, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom as a result of horizontal unilateral effects in relation to the supply of high-speed overhead catenary systems (**OCS**) (the **SLC Decision**). The text of the SLC Decision is available on the CMA webpages.<sup>1</sup>
3. On 26 July 2022, the Parties offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 2 August 2022, the CMA gave notice to the Parties, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the Parties' offer (the **UIL Provisional Acceptance Decision**).

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<sup>1</sup> See [Bouygues S.A. / Equans S.A.S. merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/bouygues-s-a-equans-s-a-s-merger-inquiry)

## THE UNDERTAKINGS OFFERED

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to the supply of high-speed OCS but noted that competition concerns are limited to the current OCS tender for High Speed 2 (the **HS2 Tender**) and that there would be sufficient competition for any future high-speed OCS tenders in the UK.
6. As noted in the UIL Provisional Acceptance Decision and as subsequently reiterated to the CMA, HS2 Ltd confirmed that, in line with its procurement rules, the Merged Entity would be required, in the event that the Merger were to complete, to withdraw one of the tenders submitted by Bouygues (through Colas Rail UK) or Equans (through its participation in the Rapide JV).<sup>2</sup> The CMA considers that this removes concerns that the Merged Entity could exercise control over two separate tenders for HS2 Ltd and that the Merger could soften competition between the parties for the remaining HS2 Tender.<sup>3</sup> Therefore, the CMA's assessment of remedies has focussed on the concern that the Merger could result in the number of tenders being reduced without a competitive process.
7. As set out in the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, the Parties have offered undertakings to appoint an independent third-party expert (the **Objective Third Party Assessor**) to assess the bids submitted in the HS2 Tender by Colas Rail and the Rapide JV to determine which of the bids is the most economically advantageous to HS2 Ltd. The Objective Third Party Assessor would be sufficiently independent of the Parties and have the technical and other capabilities required to carry out the assessment. The Objective Third Party Assessor's assessment would be based on pre-existing evaluation methodology developed by HS2 Ltd, which was provided to the bidders<sup>4</sup> and used by them to prepare their final tender submissions.<sup>5</sup>
8. The assessment of the Objective Third Party Assessor would be carried out within a timeframe to be agreed by the CMA, and the Parties would not complete the Transaction or withdraw either of their bids until the Objective Third Party Assessor has notified the results of its assessment. Once the Objective Third Party Assessor has determined which of the two bids mentioned above is the more economically advantageous to HS2 Ltd, the Parties would propose to HS2 Ltd that the more

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<sup>2</sup> [REDACTED], paragraph 10.1.

<sup>3</sup> See UIL Provisional Acceptance Decision, paragraph 9.

<sup>4</sup> High Speed Two (HS2) Limited Route Wide Railway Systems Overhead Catenary System (OCS) Volume 0: Invitation to Tender (ITT) Evaluation Methodology (the "Evaluation Methodology").

<sup>5</sup> The Parties have proposed that a preliminary qualification envelope and compliance stage of HS2 Ltd's assessment, which is done on a pass or fail basis ahead of the subsequent weighted assessment, be deemed passed by both tenders, in so far as neither of the Parties have been notified that their tenders have failed this threshold stage of the evaluation. The methodology followed by HS2 Ltd affords a 30% weighting to the commercial evaluation and a 70% weighting to the technical evaluation. The technical evaluation includes a behavioural assessment that accounts for 15% of the overall weighting (see the Evaluation Methodology). The Parties have also proposed that the Objective Third Party Assessor awards both tenders a full score for the behavioural assessment, so as to eliminate subjectivity involved with this part of the tender process.

economically advantageous tender should remain in the HS2 Tender, and would remove or procure the removal of the less economically advantageous tender. The text of the undertakings is available on the CMA webpages (the **Proposed Undertakings**).<sup>6</sup>

9. The Parties have proposed to appoint Ingerop,<sup>7</sup> a French independent engineering company, as the Objective Third Party Assessor. Ingerop had 2021 revenues of approximately EUR 272 million, employs over 2,300 employees, and has extensive experience with high-speed rail projects, including the design of overhead catenary systems.

## CMA ASSESSMENT

10. The CMA currently considers that, subject to its on-going assessment and responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie the CMA currently does not have material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.<sup>8</sup> This is because:
  - (a) the purpose of the Proposed Undertakings, which are intended to address the competition concerns identified by the CMA in the SLC decision, is to ensure that any reduction in bidders brought about by the Merger should be as a result of a competitive process;
  - (b) there is a readily available pre-existing evaluation methodology that can be followed by the Objective Third Party Assessor to determine which of the Parties' tenders is more economically advantageous; and
  - (c) as noted in detail below, Ingerop is sufficiently independent and has the size and resources to carry out the assessment envisaged by the Proposed Undertakings.
11. Therefore, the CMA considers that the Proposed Undertakings would put in place a competitive process (which the CMA currently considers is sufficiently robust to achieve its intended purpose) to determine which of the bids submitted by the Parties should be withdrawn,
12. The CMA also considers that the Proposed Undertakings would be capable of ready implementation, in particular, because of:

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<sup>6</sup> See [Bouygues S.A. / Equans S.A.S. merger inquiry - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>7</sup> See [INGEROP | Technical engineering group: research department, innovation, MOE, MOA](#)

<sup>8</sup> Mergers remedies (CMA87), December 2018, paragraph 3.28.

- (a) The discrete and time-limited nature of the assessment of the Parties' tenders that would be carried out by the Objective Third Party Assessor;
  - (b) The ready availability of objective qualitative criteria and pre-existing tender submissions to inform the assessment that would be carried out by the Objective Third Party Assessor; and
  - (c) The Parties' ability to remove or procure the removal of the less economically advantageous tender following the assessment of the Objective Third Party Assessor, where Bouygues and the Rapide JV will be able to withdraw the respective bids, as required, following the determination of the Objective Third Party Assessor.
13. Ingerop has been involved in design works for high-speed rail projects in the UK, France, Spain, and South Korea; and has extensive experience in conventional rail and mass transit rail in a number of other countries. The group was responsible for the functional and detailed design works of the Madrid-Seville and Madrid-Extremadura high-speed OCS lines in Spain, and has been involved in over five UK-based public procurement processes, including work for four HS2 tender lots.
14. Subject to the responses to this consultation, and based on the information available to the CMA at present, the CMA currently considers that:
- (a) Ingerop is sufficiently independent and does not appear to have any significant connection to the Parties and/or Keltbray that may compromise its incentive to independently assess the bids submitted in the HS2 Tender by Colas Rail and the Rapide JV to determine which of the bids is the most economically advantageous to HS2 Ltd.
  - (b) Ingerop has strong technical and commercial high-speed expertise in relation to the OCS sector. It has experience of providing services such as design of all phases of a project, assistance with procurement specifications and project management. It has worked on projects in France, Spain, UK etc. It is, therefore, capable of carrying out an informed assessment of the Parties' tenders by reference to HS2 Ltd's evaluation methodology.
  - (c) Ingerop has the appropriate resources to be able to carry out its role as the Objective Third Party Assessor within the timeframe agreed by the CMA.
15. Therefore, subject to responses to this consultation, the CMA currently considers Ingerop to be a suitable Objective Third Party Assessor.

## Proposed decision and next steps

16. For the reasons set out above, the CMA currently considers that the Proposed Undertakings are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.
17. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation. The text of the Proposed Undertakings is available on the CMA web pages.<sup>9</sup>
18. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.<sup>10</sup>
19. Representations should be made in writing to the CMA, preferably by email, and be addressed to:

Josh Dawson

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**Deadline for comments: 14 September 2022**

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<sup>9</sup> See [Bouygues S.A. / Equans S.A.S. merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/bouygues-s-a-equans-s-a-s-merger-inquiry)

<sup>10</sup> Under paragraph 2(4) of Schedule 10 to the Act.