

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

Decision that undertakings might be accepted

ME/6987-22

Introduction

1. Bouygues S.A. (**Bouygues**) has agreed to acquire Equans S.A.S. (**Equans**) from ENGIE S.A. (**ENGIE**) (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**).
3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act.
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. Accordingly, on 26 July 2022, the Parties offered undertakings to the CMA for the purposes of section 73(2) of the Act.
5. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to the Parties 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 offer.

The undertakings offered

6. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
7. The SLC Decision found that the Merger gives rise to 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 (**HS2 Tender**) and that there would be sufficient competition for any future high-speed OCS tenders in the UK.
8. In relation to the HS2 Tender the SLC decision found that:
 - a) Bouygues has submitted a bid through its subsidiary Colas Rail Limited (**Colas Rail**). Equans has submitted a bid through its participation in a consortium made up of (i) its subsidiaries SPL Powerlines UK Limited (**Powerlines UK**) and Ineo SCLE Ferroviaire SNC (**Ineo SCLE**); and (ii) Keltbray Rail Limited (**Keltbray**) (together the **Rapide JV**).
 - b) The tender is at a relatively advanced stage, with High Speed 2 (HS2) Limited (**HS2 Ltd**) considering final tenders submitted on 20 April 2022. While the final bids are comprehensive submissions that contain detailed technical and cost-related proposals, the available evidence indicates that late-stage negotiations are likely and could result in material changes to commercial conditions.
 - c) The Parties are two of only a very limited number of tenderers participating in the HS2 Tender. The Merger could result in the Merged Entity exercising control over two separate tenders for HS2 Ltd, which could soften competition between those tenders for the remainder of the HS2 Tender process.¹
 - d) Alternatively, in the event that the Parties were required to withdraw one of their bids following the Merger (under HS2 Ltd's tender rules, which place restrictions on multiple tenders from entities that are part of the same

¹ SLC Decision, paragraph 201.

corporate group), the Merger could result in the number of tenderers being reduced without a competitive process.²

9. Since the SLC decision, [§] 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), because HS2 Ltd's procurement rules do not allow multiple tenders from the same corporate group.³ The CMA believes that this removes the concern that the Merged Entity could exercise control over two separate tenders for HS2 Ltd, softening competition between those tenders for the remainder of the HS2 Tender process. The CMA's assessment of remedies has therefore focussed on the concern that the Merger could result in the number of tenderers being reduced without a competitive process.
10. To address the SLC found by the CMA, the Parties have offered to give the following undertakings in lieu of a reference to the CMA (the **Proposed Undertakings**):
 - a) The Parties would appoint an independent third-party expert 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.
 - b) The independent third-party expert proposed by the Parties would be subject to the approval of the CMA, in particular to ensure that it is sufficiently independent of the Parties and has the technical and other capabilities required to carry out the assessment.
 - c) The independent third-party expert's assessment of which of the bids is the most economically advantageous to HS2 Ltd would be based on pre-existing evaluation methodology developed by HS2 Ltd, which was provided to bidders,⁴ and used by bidders to prepare their final tender submissions.⁵
 - d) The independent third-party expert would carry out its assessment predominantly on the basis of the final tender documents submitted to HS2

² SLC Decision, paragraph 202.

³ [§].

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

⁵ 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.

Ltd on 20 April 2022, but would also be able to seek additional written and oral clarifications as the third-party expert considers necessary.

- e) The assessment of the independent third-party expert would be carried out within a timeframe to be agreed by the CMA.
- f) Once the independent third-party expert has determined which of the Colas Rail and Rapide JV tenders is more economically advantageous to HS2 Ltd, the Parties would propose to HS2 Ltd that the more economically advantageous tender should remain in the HS2 Tender, and would remove or procure the removal of the less economically advantageous tender.
- g) In the event that the independent third-party expert considered that the two tenders are equally economically advantageous to HS2 Ltd, the Parties would propose that the [X] tender remains in the HS2 Tender process.
- h) The Parties would not complete the Merger until (i) the CMA is satisfied that the independent third-party expert has completed its report and made a final decision on which of the two tenders is the more economically advantageous; and (ii) the Parties are in a position to notify HS2 Ltd of which tender will be withdrawn in line with its procurement rules.
- i) The Proposed Undertakings also provide that the CMA may appoint a monitoring trustee to supervise the independent third-party expert's assessment, including by facilitating any exchange of information between the assessor and the Parties, as well as monitoring the Parties' compliance with the Proposed Undertakings more generally.

The CMA's provisional views

- 11. The CMA has considered whether the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA.
- 12. When considering whether to accept undertakings in lieu of a reference, the CMA has an obligation under the Act to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any resulting adverse effects.⁶

⁶ Mergers remedies (CMA87), December 2018, paragraph 3.3.

13. As noted in paragraph 9 above, the CMA's assessment of the Proposed Undertakings has focussed on the concern that the Merger could result in the number of tenderers being reduced without a competitive process.
14. For the reasons set out in more detail below, the CMA considers that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA. In particular, 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.
15. As set out in the CMA's remedies guidance, UILs are appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear-cut.⁷ This means that there should not be material doubts about the overall effectiveness of the remedies, and that their complexity should be such that their implementation is feasible within the constraints of the Phase 1 timetable.⁸ The CMA's guidance also notes that UILs should be capable of ready implementation.⁹
16. In its initial assessment of the effectiveness of the remedy for this decision, the CMA has considered, in particular, the scope of the assessment to be carried out by the independent third-party expert and the ability of that third party to make that assessment. The CMA has also considered whether the behavioural nature of the remedy could undermine its effectiveness or give rise to material difficulties in implementation.

The nature of the assessment to be carried out by the independent third party

17. The Proposed Undertakings would not fully replicate the process that HS2 Ltd intends to undertake to complete the tender process. In particular, the CMA notes that: (a) the assessment to be carried out by the independent third-party expert would take place within a shorter timeframe than HS2 Ltd's assessment; and (b) HS2 Ltd's assessment would take into account certain behavioural factors that the independent third-party expert would not be able to replicate.¹⁰
18. The CMA notes, in this regard, that the purpose of the Proposed Undertakings is not to fully replicate HS2 Ltd's assessment. HS2 Ltd has its own criteria to select

⁷ Mergers remedies (CMA87), December 2018, paragraph 3.27

⁸ Mergers remedies (CMA87), December 2018, paragraph 3.28

⁹ Mergers remedies (CMA87), December 2018, paragraph 3.27

¹⁰ This methodology [§] 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

a single preferred bidder at the end of its tender process. The purpose of the Proposed Undertakings, which are intended to address the competition concern identified by the CMA in the SLC decision, is to ensure that any reduction in bidders brought about by the Merger should be as the result of a competitive process.

19. The CMA currently considers that the elimination of one of the two bids in which the Parties are involved by way of a competitive process does not require a mechanism to be put in place that would fully replicate the process by which HS2 Ltd will choose the final bidder. The CMA currently believes that the process that would be put in place by the Proposed Undertakings would be sufficiently robust to achieve the intended purpose (ie the competitive elimination of one of the bids). In particular, the CMA notes that there are detailed commercial and technical criteria (which account for the [REDACTED] of the weighted criteria to be taken into account by HS2 Ltd) that provide considerable guidance to qualitatively and objectively assess which of the two bids is the most economically advantageous to HS2 Ltd.
20. As the Proposed Undertakings are not intended to fully replicate HS2 Ltd's assessment, the CMA notes that there is no reason, in principle, why the assessment to be carried out by the independent third-party expert could not take place within a shorter timeframe. The CMA also notes that there is some benefit (in keeping with the purpose of the Proposed Undertakings) in seeking to ensure that the competitive elimination of one of the bids takes place as soon as is practically possible in order to minimise any disruption to the ongoing HS2 Tender process. The CMA will consider the period of time likely to be required for the independent third-party expert to be able to complete a sufficiently robust assessment as part of its more detailed assessment of whether to accept the Proposed Undertakings.¹¹

The ability of an independent third party to carry out the required assessment

21. The Proposed Undertakings are based on an assessment carried out by an independent third-party expert rather than by HS2 Ltd. While, as noted above, the independent third-party expert should have the technical and other capabilities required to carry out the assessment, it is unlikely that a third party with those

overall weighting (see the Evaluation Methodology). The Parties have proposed that the independent 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.

¹¹ [REDACTED] the initial qualification envelope and compliance stage. The CMA understands that this stage of the assessment involves a fail or pass assessment, but that it would result from a subjective assessment by HS2 Ltd that an independent third party expert would be unlikely to be able to replicate (Parties' submission dated 26 July, paragraph 2.11a.) For instance, if a tender initially fails HS2 Ltd would [REDACTED]. The CMA currently considers it appropriate for the independent third-party expert to deem the tenders to have passed this part of the assessment, in so far as it relates to HS2 Ltd's subjective assessment.

capabilities will possess the same level of knowledge as an expert purchaser in the position of HS2 Ltd.

22. As noted above, the Proposed Undertakings are not intended to fully replicate HS2 Ltd's assessment. Moreover, there are detailed commercial and technical criteria that provide considerable guidance to qualitatively and objectively assess which of the two bids is the most economically advantageous to HS2 Ltd. In such circumstances, the CMA currently believes that the independent third-party expert should be able to establish which of the two bids is the most economically advantageous to HS2 Ltd.
23. Based on the information available to the CMA at present, the CMA currently considers that there are a number of firms with sufficient expertise in relation to the OCS sector that are capable of carrying out an informed assessment of the Parties' tenders by reference HS2 Ltd's evaluation methodology.¹²
24. The appointment of the independent third-party expert would be subject to the approval of the CMA. In considering whether to approve the appointment of the independent third party, the CMA will ensure that it is sufficiently independent of the Parties and has the technical and other capabilities required to carry out the assessment.¹³
25. The CMA will consider the identity of the independent third-party expert as part of its more detailed assessment of whether to accept the Proposed Undertakings.

The behavioural nature of Proposed Undertakings

26. The Proposed Undertakings are behavioural in nature and therefore the CMA has considered whether the behavioural nature of the remedy could undermine its effectiveness or give rise to material difficulties in implementation.
27. The CMA will generally only use behavioural remedies as the primary source of remedial action where structural remedies are not feasible, the SLC is expected to have a short duration, or at Phase 2 behavioural measures will preserve substantial RCBs that would be largely removed by structural measures.¹⁴
28. As noted above, the SLC decision finds that the Merger gives rise to a realistic prospect of an SLC in relation to the supply of high-speed OCS but that competition concerns are limited to the current OCS tender for HS2, and that

¹² The Parties have submitted a shortlist of potential experts, which the CMA is evaluating and will consult on.

¹³ The CMA notes to the extent a proposed independent third-party expert has an existing relationship with either of the Parties, the CMA intends to carry out a case-by-case assessment of whether that relationship may compromise its ability to carry out an impartial assessment.

¹⁴ [Mergers remedies \(CMA87\), December 2018. Paragraph 7.2.](#)

there would be sufficient competition for any future high-speed OCS tenders in the UK. The HS2 Tender is well advanced and is expected to be fully completed by January 2023.¹⁵ The loss of competition brought about by the Merger is therefore expected to be limited in time (because it relates to a process that will last only a matter of months longer). As explained above, the Proposed Undertakings are intended to address this time limited competition concern by ensuring that any reduction in bidders brought by the Merger should be as the result of a competitive process.

29. The CMA notes that a structural remedy would not, by its nature, be suited to addressing the competition concern outlined in the SLC decision, because of the likelihood that any change in ownership over the Parties' OCS business would result in the exclusion of that bid from the ongoing HS2 Tender process (or result in a significant weakening of the constraint provided by that bid). The CMA therefore currently considers that a divestment remedy is not available in this case.¹⁶
30. The Proposed Undertakings would set up a short-term mechanism that would commit the Parties to engaging in an evaluation process that would ultimately result in a definitive outcome: the withdrawal of the less economically advantageous of the tenders proposed by Colas Rail and the Rapide JV. As noted above, this process would be based on pre-existing technical and commercial criteria that enable an appropriately robust qualitatively and objectively assessment to be made.
31. The CMA therefore notes that the Proposed Undertakings would not involve a long-term behavioural commitment that would require significant monitoring and supervision. As the CMA's remedies guidance notes, one of the limited circumstances in which the CMA might select a behavioural remedy as the primary source of remedial action in a merger investigation is where an SLC is expected to have a relatively short duration.¹⁷

The implementation of the Proposed Undertakings

32. For the reasons set out above, the CMA currently has reasonable grounds to believe that the Proposed Undertakings, or a modified version of them, may be capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also believes at this stage that the

¹⁵ SLC Decision, paragraph 49

¹⁶ [Mergers remedies \(CMA87\)](#), December 2018. Paragraph 3.32.

¹⁷ [Mergers remedies \(CMA87\)](#), December 2018. Paragraph 3.48(b).

Proposed Undertakings may be capable of ready implementation, in particular in light of:

- a) The discrete and time-limited nature of the assessment of the Parties' tenders that would be carried out by the independent third-party expert;
- b) The ready availability of objective qualitative criteria and pre-existing tender submissions to inform the assessment that would be carried out by the independent third-party expert; and
- c) The Parties' ability to remove or procure the removal of the less economically advantageous tender following the assessment of the independent third-party expert.

33. The CMA notes that Equans is participating in the HS2 Tender as part of a joint venture (the Rapide JV) with a third party (Keltbray). While [REDACTED], the CMA notes that this will be subject to further consideration in the CMA's more detailed assessment of whether to accept the Proposed Undertakings.

Conclusion

34. For all of the reasons set out above, the CMA currently believes that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.

35. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, further assessment and third-party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA.

Consultation process

36. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.¹⁸

Decision

37. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by the Parties, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has

¹⁸ [CMA2](#), paragraph 8.29.

until 28 September 2022 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 23 November 2022 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

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