

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

## Decision on relevant merger situation and substantial lessening of competition

ME/6987-22

Please note that [X] indicates figures or text which have been deleted or replaced in ranges for reasons of commercial confidentiality.

### SUMMARY

1. On 12 May 2022, Bouygues S.A. (**Bouygues**) agreed to acquire the entire issued share capital of 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. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Bouygues and Equans is an enterprise; that these enterprises will cease to be distinct as a result of the Merger; and that the turnover test in the Enterprise Act 2002 (the **Act**) is met. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. The Parties overlap in the UK, including in: a) the supply of high-speed overhead catenary systems (**OCS**), b) the supply of 'standard' (ie non-high-speed) OCS, and c) the provision of certain maintenance-focused (or 'hard') facilities management (**FM**) services, in particular to customers in the healthcare sector.
4. The CMA found that the competitive conditions for the supply of each of these services are distinct in the UK, compared to other regions, including because of the customer preference for suppliers with a national presence and other specific customer and regulatory requirements in the UK.

5. The CMA has considered whether the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) in relation to each of these services in the UK.
6. In the supply of **high-speed OCS in the UK**, the CMA found that the Parties are close competitors and are currently competing to supply High Speed 2 (**HS2**) – the only contract in the recent years for the supply of catenary to high-speed in the UK. The CMA's assessment takes into account the impact that the change in market structure brought about by the Merger would have on the ongoing HS2 tender (which is currently scheduled to complete around the end of 2022), and also on any high-speed OCS projects that might be tendered in the UK in future.
7. The Parties are two of only a very limited number of tenderers participating in the HS2 tender. The CMA considers that the Merger would result in the Merged Entity exercising control over two separate tenders for HS2, which could soften competition between those tenders for the remainder for the HS2 tender process. Alternatively, in the event that the Parties are required to withdraw one of their bids following the Merger (under HS2's tender rules, which place restrictions on multiple tenders from entities that are part of the same corporate group), the Merger could result in the number of tenderers being reduced without a competitive process. The CMA notes that it would be difficult, in practice, for HS2 to introduce a new (or previously eliminated) supplier into the tender process at such an advanced stage.<sup>i</sup> On this basis, the CMA considers that the Merger gives rise to significant competition concerns in relation to the ongoing HS2 tender.
8. The CMA also assessed competition for future high-speed OCS work. While the outcome of the ongoing HS2 tender is likely to be relevant to competition for future tenders in this market, the competitive choices available to customers are likely to be different to those that currently facing HS2, in particular because of the significant lead-time before the earliest future tender.
9. The CMA notes that it is common industry practice to enter into consortia arrangements to bid for high-speed OCS contracts and that there is limited evidence to suggest that having the capabilities to perform all aspects of the work required (as the Merged Entity will be able to do) will be a material competitive advantage. The CMA notes that a range of suppliers would be able to bid credibly (most likely in combination) for future high-speed OCS work, with several possessing either the design expertise or UK operational experience that would be necessary. On this basis, the CMA considers that the Merger does not give rise to competition concerns in relation to future high-speed OCS contracts.

10. The CMA, therefore, considers that the Merger gives rise to a realistic prospect of an SLC as result of horizontal unilateral effects in relation to the supply of high-speed OCS. The CMA found, however, that these concerns are limited to the current HS2 tender and that there would be sufficient competition for any future high-speed OCS tenders in the UK.
11. In the supply of **standard OCS**, the CMA found that Bouygues is a relatively recent entrant in the UK, albeit with ambitions to grow in the future. The Parties do not appear to be particularly close competitors, and there are several well-established players in the UK.
12. The CMA, therefore, considers that the Merger does not raise competition concerns as a result of horizontal unilateral effects in relation to the supply of standard OCS, as there will be sufficient competition to constrain the Parties post-Merger.
13. In the supply of **'hard' FM services to healthcare**, the CMA found that both of the Parties generate a significant portion of their FM revenues in the healthcare sector and have competed to a material extent in the relatively limited number of recent tenders for hard FM contracts. The CMA also found, however, that a number of credible alternative suppliers pose a significant competitive constraint onto the Parties, including suppliers active nationally (eg Mitie, CBRE, Serco, Sodexo, and ISS) and, to a lesser extent, competitors present in certain regions of the UK.
14. The CMA also found that the phase-out of the project finance initiative (**PFI**) framework will likely result in changes to public healthcare bodies' procurement strategies. This is likely to increase competition for the supply of hard FM services to healthcare customers (by increasing the incentives of existing suppliers to compete and encouraging additional entry by FM providers not currently active in the healthcare space).
15. The CMA, therefore, considers that the Merger does not raise competition concerns in the supply of hard FM services to healthcare customers because there will be sufficient competition to constrain the Parties post-Merger.
16. The CMA is now considering whether to accept undertakings under section 73 of the Act. The Parties have until 26 July 2022 to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

## ASSESSMENT

### Parties

#### *Bouygues*

17. Bouygues, a Euronext-listed French company,<sup>1</sup> is a diversified industrial group active across the globe in general construction, transport infrastructure construction and maintenance, real estate development, and the media and telecommunication sectors.<sup>2</sup> In the UK, Bouygues provides network infrastructure (to energy and digital networks), facility management, and electrical, mechanical and HVAC engineering through Bouygues Energies & Services S.A.S.<sup>3</sup> Bouygues also provides engineering services for railway infrastructure — including the installation and maintenance of OCS — and railway signalling through its subsidiary Colas Rail S.A. (**Colas Rail**).<sup>4</sup>
18. Bouygues' global turnover in the financial year 2021 was approximately £32.3 billion, of which approximately [X] was generated in the UK.<sup>5</sup>

#### *Equans*

19. Equans is a French company solely controlled by ENGIE.<sup>6</sup> Equans was recently created by consolidating ENGIE's global multi-technical service offerings, with the business focusing on the supply of electrical services; mechanical services; heating, ventilation and air conditioning engineering; refrigeration solutions, FM; digitization and information and communications technology services; and construction services. Equans also provides engineering services for railway infrastructure (including, like Bouygues, the installation and maintenance of OCS) through Powerlines Group GmbH (**Powerlines**),<sup>7</sup> Ineo SCLE Ferroviaire SNC, and Fabricom SA.<sup>8</sup>

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<sup>1</sup> Final Merger Notice submitted by the Parties on 19 May 2022 (**FMN**), paragraph 2.20.

<sup>2</sup> FMN, paragraph 3.1.

<sup>3</sup> FMN, paragraph 3.2.

<sup>4</sup> FMN, paragraph 3.4.

<sup>5</sup> Parties' response to the CMA's request for information dated 19 June 2022. Bouygues revenues have been converted from EUR to GBP at the ECB average exchange rate for 2021 of 0.85906.

<sup>6</sup> FMN, paragraph 2.21. Equans was established on 1 July 2022 following the announcement of ENGIE's new strategic plan (see FMN, paragraphs 3.9-3.11).

<sup>7</sup> ENGIE acquired Powerlines on 7 October 2019 by way of share purchase. The business comprising Powerlines is incorporated within Equans. See FMN, paragraph 4.2.

<sup>8</sup> FMN, paragraph 3.8. Powerlines also owns SPL Powerlines UK Limited (**SPL Powerlines**).

20. Equans' global turnover in the financial year 2021 was approximately [REDACTED], of which approximately [REDACTED] was generated in the UK.<sup>9ii</sup>

## Transaction

21. The Merger will result in Bouygues acquiring the entirety of Equans' issued share capital and voting rights from ENGIE,<sup>10</sup> pursuant to a Sale and Purchase Agreement entered into between Bouygues, ENGIE, and ENGIE Energy Services International S.A. on 12 May 2022. The consideration for the Merger provides for an enterprise valuation of approximately [REDACTED] for Equans.<sup>11</sup>
22. The Merger is conditional on merger control approvals from the CMA and the European Commission (EC).<sup>12</sup> The Merger has otherwise received merger control approvals or seen the expiration of applicable waiting periods in Canada, Chile, Morocco, Russia, Saudi Arabia, Switzerland, and the United States of America.<sup>13</sup>

## *Rationale for the Merger*

23. Bouygues submitted that its rationale for the Merger is:<sup>14</sup>
- (a) to broaden its portfolio of offerings in the field of multi-technical services, and to source new opportunities through a broader global footprint;
  - (b) to benefit from a wide range of complementary activities and technical expertise and from Equans' expertise in specialised areas such as public transportation, process industries, defence and marine; and
  - (c) in line with Bouygues' overall strategy, to increase its capabilities to better address its customers' needs in the performance of large and complex projects.

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<sup>9</sup> Parties' response to the CMA's request for information dated 19 June 2022. Equans submitted that its UK revenues includes [REDACTED], in the UK in 2020. [REDACTED]. Equans' revenues have been converted from EUR to GBP at the ECB average exchange rate for 2021 of 0.85906.

<sup>10</sup> FMN, paragraph 2.3.

<sup>11</sup> FMN, paragraph 2.5. The final consideration may be subject to adjustments.

<sup>12</sup> FMN, paragraph 2.6

<sup>13</sup> FMN, paragraph 2.6.

<sup>14</sup> FMN, paragraph 2.16.

24. Bouygues' internal documents are broadly consistent with this rationale. One internal document states that [REDACTED].<sup>15</sup> The same document also notes that [REDACTED].<sup>16</sup>
25. When Bouygues (through Colas Rail) considered acquiring Powerlines in 2019, it stated in an internal document that such an acquisition would have allowed Powerlines and Colas Rail to [REDACTED] and [REDACTED].<sup>17</sup> It also considered that the acquisition of Powerlines would give Colas Rail an [REDACTED], which would allow it [REDACTED].<sup>18</sup> The CMA considers that the rationale set out in these documents assessing a potential acquisition of Powerlines by Colas Rail is relevant for the assessment of this Merger, because Powerlines was subsequently acquired by ENGIE and the Merger will bring Colas Rail and Powerlines under the same ownership.

## Procedure

26. The CMA provided the Parties with an Issues Letter setting out its concerns around the Merger. After hearing the Parties at an Issues Meeting and reviewing their additional written submissions, the Merger was considered at a Case Review Meeting.<sup>19</sup>

## Jurisdiction

27. Each of Bouygues and Equans is an enterprise under section 129 of the Act. As a result of the Merger, these enterprises would cease to be distinct for the purposes of sections 23(2)(a) and 26 of the Act.
28. The turnover test in section 23(1)(b) of the Act is satisfied, as Equans' 2021 UK turnover exceeded £70 million.
29. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
30. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 23 May 2022 and the statutory 40 working day deadline for a decision is therefore 19 July 2022.

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<sup>15</sup> Bouygues Annex S109.4.002 to the CMA's s109 notice dated 3 May 2022, page 4.

<sup>16</sup> Ibid, page 16.

<sup>17</sup> Bouygues Annex S109.3.044 to the CMA's s109 notice dated 8 April 2022, page 9.

<sup>18</sup> Bouygues Annex S109.3.045 to the CMA's s109 notice dated 8 April 2022, slide 11.

<sup>19</sup> See [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2Revised\)](#), as amended 4 January 2022, from paragraphs 9.32-9.33 and 9.39.

## Counterfactual

31. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual).<sup>20</sup> For anticipated mergers, the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of those conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.<sup>21</sup> In determining the appropriate counterfactual, the CMA will generally focus only on potential changes to the prevailing conditions of competition where there are reasons to believe that those changes would make a material difference to its competitive assessment.<sup>22</sup>
32. The Parties submitted that the competitive effects of the Merger should be assessed against the 'pre-existing' competitive situation.<sup>23</sup>
33. As regards high-speed OCS and standard OCS, the evidence considered by the CMA broadly supports that the appropriate counterfactual is the prevailing conditions of competition. The CMA nonetheless notes that the prevailing conditions of competition take into account Colas Rail's current plans to [X],<sup>24</sup> as well as some uncertainty about whether future opportunities for high-speed OCS work will arise. The CMA has taken account of these considerations in its competitive assessment.
34. As regards FM services for healthcare customers, the CMA considers the prevailing conditions of competition to be the relevant counterfactual for these services, but has assessed the impact future changes in this sector may have on competition in its competitive assessment. As explained below the CMA's investigation indicates that the future structure of competition for such services will likely change materially as a result of the phase-out of Private Finance Initiatives (**PFI**s).

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<sup>20</sup> [Merger Assessment Guidelines](#) (CMA 129), March 2021 (**Merger Assessment Guidelines**), paragraph 3.1.

<sup>21</sup> **Merger Assessment Guidelines**, from paragraph 3.12.

<sup>22</sup> **Merger Assessment Guidelines**, paragraph 3.9.

<sup>23</sup> FMN, paragraph 11.1.

<sup>24</sup> See eg Annex 017 to the FMN, slides 8, 9, and 10.

## Background

35. The CMA's investigation focused on two areas where there are material overlaps between the Parties: the supply of high-speed and standard OCS; and the supply of FM services.<sup>25</sup>
36. This background section sets out a brief overview of: a) the supply of OCS, including of the current demand of high-speed OCS in the UK; and b) the supply of FM services, focusing on the healthcare sector, including an explanation of the PFI framework and its anticipated phase-out.<sup>26</sup>

## OCS

37. OCS, also referred to as catenaries or overhead contact lines, are electric cables that transmit electricity to electric trains or trams.<sup>27</sup> When discussing OCS in this decision, the CMA refers to both the installation and maintenance of overhead catenary systems, either on existing lines that are being upgraded/electrified, or on new track.
38. OCS are required on any rail track that makes use of electric trains, including the UK mainline, where approximately 38% of all routes have been electrified, as well as local and metropolitan train lines and tramways.
39. The UK mainline is owned and operated by Network Rail, a public-sector body operating under the Department of Transport. Local and metropolitan train lines and tramways are managed by local transportation authorities (eg Transport for London).<sup>28</sup>
40. According to the Parties, Network Rail typically awards the bulk of OCS work through regional tenders to a shortlist of suppliers that successfully bid for inclusion in Network Rail's Electrification Framework Agreement,<sup>29</sup> in line with its decarbonization strategy, which calls for the eventual electrification of the

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<sup>25</sup> The Parties also overlap in the supply of other services in the UK, namely construction and electrical engineering services, as well as limited merchant-market sales of catenary equipment upstream of installation and maintenance of OCS. The CMA carefully examined the Parties' submissions regarding these services, and also solicited views from a range of relevant third parties. The CMA has not found concerns related to these overlaps and they are therefore not discussed further in this decision.

<sup>26</sup> The phase-out of PFI may also have an impact on procurement of other facilities management and other services by public bodies. As explained in the frame of reference section below, however, the CMA does not consider it necessary to separately assess competitive conditions for other types of facilities management customers.

<sup>27</sup> OCS are similar in purpose to 'third rails' where power is transmitted to electric trains through an electrified rail underneath the vehicle. The Parties have submitted that third rail is a 'marginal' sector in the UK, and its installation is limited to London and parts of Southern England; FMN, paragraph 13.115. The extent to which third rail is relevant to the CMA's assessment is considered in the frame of reference section below.

<sup>28</sup> FMN, paragraph 13.100.

<sup>29</sup> FMN, paragraph 13.101. This framework agreement and resulting regional tenders are designed to implement Network Rail's formal delivery plans, which are currently in Control Period 6, which starts in 2019 and runs until 2024.



vast majority of the UK's main line.<sup>30</sup> Network Rail may tender for additional electrification work outside of these planned projects, as may local transportation authorities.<sup>31</sup>

41. In relation to high-speed railway,<sup>32</sup> the only UK customer for OCS services, at present, is High Speed 2 (HS2) Limited (**HS2 Ltd**). HS2 Ltd is a non-departmental public body sponsored by the Department of Transport, and is responsible for developing the HS2 high-speed railway line.
42. Phase 1 and 2a of HS2, which will run from London to Birmingham and from Birmingham to Crewe, have received government authorisation to proceed, and construction work is already under way with opening of the line anticipated between 2029 and 2033.<sup>33</sup>
43. Phase 2b of HS2 currently consists of an Eastern leg (from the West Midlands to East Midlands Parkway) and a Western leg (from Crewe to Manchester). A hybrid bill for the Western leg, the High-Speed Rail (Crewe to Manchester) Bill, was re-introduced to Parliament on 11 May 2022.<sup>34</sup>
44. The HS2 routes will use only high-speed electric-only trains, and therefore have substantial OCS requirements. HS2 Ltd has licensed a new high-speed OCS system design developed by France's SNCF, the SNCF V360 design, which allows trains to operate at speeds of up to 360 kmph, and is a new design that builds upon SNCF's V350 design which is used in France and other countries in Europe.<sup>35</sup>

### *The HS2 Tender*

45. Opportunities for significant volumes of OCS work in the UK appear to arise relatively infrequently.<sup>36</sup> The Parties consider Network Rail to be the 'dominant' customer for OCS,<sup>37</sup> where work is for progressive electrification of existing lines.<sup>38</sup> HS2 Ltd's OCS tender (**HS2 Tender**) therefore represents a

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<sup>30</sup> FMN, paragraph 13.98.

<sup>31</sup> Eg the Edinburgh Glasgow Improvement Programme, which was outside Network Rail's Electrification Framework Agreement. FMN, paragraph 13.105.

<sup>32</sup> High-speed railway systems are purpose built to allow for greater train speeds. By way of comparison, the maximum speed on standard railways in the UK is around 125 mph, whereas HS2 trains are capable of travelling at up to 225 mph

<sup>33</sup> See [Phase One: London to West Midlands - HS2](#), HS2 website.

<sup>34</sup> See [Phase 2b: Crewe to Manchester - HS2](#) and [Phase 2a: West Midlands to Crewe - HS2](#), HS2 website.

<sup>35</sup> See [Certification of Overhead Catenary is latest step towards delivering Europe's fastest railway \(hs2.org.uk\)](#).

<sup>36</sup> Equans, for instance, won [£] tenders in the period 2018-2021 in the UK, with a total value of around [£] million. The HS2 OCS opportunity is worth at least [£] million according to the Parties, or [£] as the totality of Equans' tender wins from 2018-2021.

<sup>37</sup> FMN, paragraph 13.100.

<sup>38</sup> Outside of Network Rail's Electrification Framework Agreement, the most significant rail projects requiring extensive OCS work in the past decade appear to be the Transpennine Route Upgrade (awarded in 2017) and Crossrail (awarded in 2013).

large and important source of demand for OCS, is the only opportunity for high-speed OCS in the UK,<sup>39</sup> and is [REDACTED] million.<sup>40</sup>

46. The HS2 Tender process formally commenced on 2 July 2020 with an open tender process.<sup>iii</sup> After registering interest, companies submitted pre-qualification bids in late 2020.
47. Around March 2021, HS2 Ltd decided which suppliers were pre-qualified to tender for the project and subsequently notified four short-listed bidders: (1) Bouygues, through Colas Rail supported by subcontractors such as AECOM and Egis Rail;<sup>41</sup> (2) Equans, through SPL Powerlines and Ineo SCLE, is tendering in a partnership with Keltbray,<sup>42,iv</sup> which is expected to be structured as a joint venture (**JV**) in the near future (the **Rapide JV**);<sup>43</sup> (3) Balfour Beatty through a JV with ETF and TSO (the **Balfour Beatty JV**); and (4) China Railway Engineering Equipment Group (**CREG**).<sup>44</sup>
48. HS2 Ltd issued tender documents on 28 July 2021 outlining the tender process and requirements.<sup>45,v</sup>
49. [REDACTED], the Parties submitted their final bids on 20 April 2022. The evaluation process is ongoing, with HS2 Ltd reserving the right to continue negotiating with each bidder, [REDACTED] until it makes its final decision and awards the tender, which is expected to occur by January 2023.

### ***Facilities management***

50. FM is the provision by the same operator of a single or several services on behalf of a customer, which are necessary for the operation and maintenance of a building, property, or an overall business or public body.
51. FM can cover a broad range of discrete services. These can include ‘**soft FM**’ services that broadly relate to the *operation* of a facility (eg cleaning, catering, and postal services, etc.) as well as ‘**hard FM**’ services that relate to the *maintenance* of a facility (eg maintenance of mechanical equipment and electrical system, gardening and landscaping, plumbing, fire protection and

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<sup>39</sup> The current project covers both Phase 1 and Phase 2a as a single contract. Phase 1 of the HS2 project will connect London with Birmingham and the West Midlands, whereas Phase 2a will extend the route to Crewe.

<sup>40</sup> FMN, paragraph 15.115. By comparison, between 2018 to 2021, Equans participated in around [REDACTED] tenders.

<sup>41</sup> Colas Rail document sent to HS2 Ltd titled [REDACTED].

<sup>42</sup> Rapide JV document sent to HS2 Ltd titled [REDACTED].

<sup>43</sup> The CMA notes that the Rapide JV has [REDACTED]. For the sake of simplicity, the CMA refers to the grouping of SPL Powerline, Ineo SCLE, and Keltbray when working towards the HS2 Tender as the **Rapide JV**.

<sup>44</sup> CREG’s participation in the HS2 Tender is on a stand-alone basis.

<sup>45</sup> The scope of the contract includes in relation to OCS: a) scheme and detailed design; b) materials supply; c) logistics and manufacture; c) installation; d) material spares and training, e) dynamic testing support; and f) Testing and validation. Maintenance is not included in the contract and will be done in-house by HS2 Ltd. See HS2 Ltd’s email.

alarm maintenance and overall maintenance of the physical components attached to the building).<sup>46</sup>

52. Customers can take a variety of approaches in how they procure FM services. Customers may choose to procure individual FM services from different suppliers, elect for several varying bundles of FM services from a smaller number of suppliers, or contract with a single supplier to cover all their operational and/or maintenance needs (this is referred to as 'Total FM' or **TFM**). In the case of bundled delivery and TFM, the supplier may subcontract parts of the work to other FM providers.<sup>47</sup>
53. The types of work performed by FM service providers can also be carried out in-house, with the ability and incentive to do so varying based on the customer's in-house capabilities and the economics of maintaining dedicated staff for these functions. According to third-party estimates provided by the Parties, even though 60% of FM services in the UK are already outsourced to FM providers, industry reports suggest that there may be further scope for additional growth as customers focus on their core activities and outsource FM work.<sup>48</sup>

#### *FM in the healthcare sector*

54. While the majority of FM services reflect facility-related work that are required or at least desirable by most businesses and public bodies, different types of customers can have differing services requirements, and can have materially different expectations and requirements based on their core activity. The healthcare sector has particular requirements as regards supplier assurances and service commitments, which are considered in the frame of reference analysis further below.

#### *PFI in healthcare*

55. PFI was a scheme launched in 1992 by the UK Government. It aimed to create public-private partnerships where private firms contract to complete and manage public projects. while managing the debt of public institutions and delivering more effective outcomes for public works. There was a significant uptake of PFI projects following the change of government in 1997 and, according to the Parties, the initial success of public healthcare related PFI

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<sup>46</sup> FMN, paragraph 13.2.

<sup>47</sup> FMN, paragraph 13.6.

<sup>48</sup> FMN, paragraph 13.5

can be attributed to the complete transfer of risk associated with the design, build and operation of buildings under the model.<sup>49</sup>

### *Structure of PFI contracts*

56. In the Parties' experience, public healthcare PFI FM contracts are generally long-term contracts typically ranging between 20 and 40 years, with an average duration of 27 years.<sup>50</sup> Their operation can be broadly summarised as follows:
- (a) A group of investors (often including a construction firm) create a PFI Special Purpose Vehicle company (**SPV**) to negotiate with a contracting public authority (eg a hospital or NHS Trust). One of the key functions of the SPVs, which typically do not have their own commercial operations and instead subcontract out management to a service company, is to raise the capital to fund a public project.
  - (b) The contracting authority and the SPV agree on the scope of the PFI, which can include some or all of the design, construction, refurbishment and maintenance of new and existing facilities, as well as anything else the contracting authority intends to put in-scope of the project.
  - (c) The SPV will contract out the various work required to complete the project, either to a single provider on a 'design, build, and maintain' basis, or to a range of different service providers. These providers may themselves sub-contract out work to other providers. Competition to win business at the outset of a PFI project is characterised as participation in the **Primary PFI market**.
  - (d) The SPV is repaid by its investment plus interest over the course of the project from public funds, though the contracting authority will set a range of service standards, and any failure by the SPV to meet these standards (including through work done by its subcontractors) will result in a reduction of the fee.
  - (e) After a PFI project's work has been contracted out, the SPV and its investors may replace a service provider under certain conditions. According to the Parties, in the context of FM services this can occur when either: (1) the incumbent supplier becomes insolvent,

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<sup>49</sup> FMN, paragraph 13.18. The CMA notes that PFI has an extremely broad scope, and includes multiple projects and services outside FM, and was used by many public bodies outside of healthcare. As these applications of PFI are not relevant to the CMA's assessment of competition for the supply of FM services in the healthcare sector, they are not discussed further in this decision.

<sup>50</sup> FMN, paragraph 13.10

(2) exceptionally, as a result of poor performance by the incumbent supplier, and (3) principally in the case of soft FM services (including the soft FM component of a TFM agreement), as a result of a periodic benchmarking exercise, if the SPV and incumbent supplier are unable to agree on a price adjustment process. Competition to replace an incumbent supplier partway through a PFI project is characterised as participation in the **Secondary PFI market**.

### *Decline of PFI*

57. While PFI was successful in its early years, its popularity and use for new projects has declined. As set out in more detail below, evidence from third parties indicates that the service standards imposed by contracting authorities have made competing for PFI work unattractive for a number of FM providers. Uptake by public bodies has also become limited in recent years: according to HM Treasury, 86% of PFI contracts (including PF2, an overhaul of PFI that was introduced by the Government in 2012) were signed before 2010.<sup>51</sup>
58. In 2018, the Government announced that it would no longer support the PFI (including PF2) framework for new public works, but would allow existing PFI contracts to remain in place. As a result, the majority of PFI contracts are anticipated to start expiring from 2025,<sup>52</sup> with the Infrastructure and Projects Authority (**IPA**) producing extensive guidance on transitioning from PFI contracts.<sup>53</sup> Multiple third-party stakeholders (SPVs/investors and NHS Trusts) have confirmed to the CMA that they do not expect the PFI model to continue beyond current contracts,<sup>54</sup> and two SPVs explicitly mentioned that they are already planning for their end.<sup>55</sup>
59. As PFI contracts by public health bodies expire, the Parties expect public authorities to choose on a project-by-project basis whether to (a) stay with their existing SPV providers; (b) in-source the services; or (c) tender the services through direct contracts between the NHS Trust and an FM

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<sup>51</sup> See HM Treasury, “[Private Finance Initiative \(PFI\) and Private Finance 2 \(PF2\): Budget 2018 brief](#)”.

<sup>52</sup> See [Managing the expiry of PFI contracts - Committees - UK Parliament](#).

<sup>53</sup> Preparing for PFI contract expiry, Practical guidance for contracting authorities on managing expiry and service transition, Infrastructure and Projects Authority, 28 February 2022; (**PFI contract expiry guidance**) available here: [IPA\\_Guidance\\_-\\_Preparing\\_for\\_PFI\\_Contract\\_Expiry.pdf \(publishing.service.gov.uk\)](#).

<sup>54</sup> Note of call with third-party; Note of call with third-party; Note of call with third-party; Third-party responses to the CMA’s questionnaire; Third-party responses to the CMA’s questionnaire.

<sup>55</sup> PFI contract expiry guidance.

provider.<sup>56</sup> This is broadly consistent with the IPA's<sup>57</sup> and other third-parties' expectations.<sup>58</sup>

60. In light of the significant coming changes to PFI, and the potential impact on competition for FM in the healthcare sector, the CMA's competitive assessment examines the differences between the Primary PFI market, Secondary PFI market, and post-PFI FM markets, including whether competition may be expected to increase or decrease.

## Frame of reference

61. The assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of a merger and should not be viewed as a separate exercise.<sup>59</sup> It involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger.<sup>60</sup>
62. The CMA's assessment of competitive effects of the merger does not need to be based on a highly specific description of any particular market definition (including, for example, descriptions of the precise boundaries of the relevant markets and bright-line determinations of whether particular products or services fall within it).<sup>61</sup> In this context, the CMA sets out its analysis on the appropriate frame of reference necessary for it to carry out a competitive assessment of the Merger.
63. The CMA's assessment focuses on two sets of services that the Parties supply in the UK:<sup>62</sup>
- (a) OCS services; and
  - (b) FM services.

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<sup>56</sup> Parties updated submission in relation to public healthcare facilities management services (hard) dated 10 June 2022, paragraph 4.15

<sup>57</sup> PFI contract expiry guidance, section 4.6.3.3.

<sup>58</sup> Note of call with third-party; Third-party responses to the CMA's questionnaire; Third-party responses to the CMA's questionnaire.

<sup>59</sup> [Merger Assessment Guidelines](#), paragraph 9.1.

<sup>60</sup> [Merger Assessment Guidelines](#), paragraph 9.2.

<sup>61</sup> [Merger Assessment Guidelines](#), paragraph 9.5.

<sup>62</sup> As mentioned at footnote 25 above, the CMA has not further assessed the Parties' activities in construction services, electrical engineering services, or upstream supply of catenary equipment.

## OCS

### *Product scope*

64. The Parties are both active in the supply of installation and maintenance of OCS on UK rail lines. Further, the Parties are active in the supply of standard OCS and are both competing to supply high-speed OCS to HS2 Ltd.
65. The CMA has considered whether it would be appropriate to segment between the supply of installation and maintenance of standard OCS, on the one hand, and the supply of installation and maintenance of high-speed OCS, on the other, on the basis that customer demand and supplier capabilities for high-speed OCS is distinct from standard OCS.<sup>63</sup>

### *Parties' submissions*

66. The Parties submitted that the frame of reference should be for the overall installation and maintenance of OCS,<sup>64</sup> noting that segmentation between high-speed OCS and standard OCS works would not be appropriate due to significant supply-side substitutability across segments.<sup>65</sup> In response to the Issues Letter, the Parties emphasized that the EC's *Engie/Powerlines* and *Vinci/Gegelec* decisions<sup>66</sup> did not consider segmenting regular and high-speed OCS and submitted that the EC 'had explicitly rejected any segmentation of the market based on speed' at a State of Play meeting with the Parties in the context of its review of the present Merger.<sup>67</sup>
67. The Parties told the CMA that there are no specific requirements in providing the installation and maintenance of high-speed OCS, other than appropriate references for high-speed lines. The Parties further noted that HS2 Ltd had confirmed that 'SNCF V350' experience is not a mandatory requirement in the HS2 Tender, and that Equans considered that Keltbray's doubts as to its

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<sup>63</sup> The CMA notes that the Parties have made additional submissions to the effect that it is unnecessary to segment between: a) overhead OCS versus third rail systems, and b) OCS for long-distance railways versus metropolitan railways and tramways. In doing so, the Parties have pointed to the EC's *Engie/Powerlines* decision, which considered each segmentation based on inferences from past decisional practice, but found at paragraphs 11 and 12 that the market investigation did not support these segmentations, while ultimately leaving market definition on both points open. The CMA did not consider it necessary to assess the meaningfulness of these segmentations—which would only affect standard OCS—to reach a conclusion in this case. As regards third rails, Equans has no presence in the UK [X], and the EC's decision suggests that the only meaningful differentiation raised (by a minority of respondents) was that OCS suppliers are more easily able to enter third rail than vice-versa. As regards metropolitan versus main line OCS, the CMA has seen no evidence to suggest that a segmentation would be warranted. Overall, the CMA has not received or heard any evidence from the Parties or third parties suggesting either distinction is meaningful, and the CMA does not consider such a segmentation would affect its assessment of competition between the Parties in this case.

<sup>64</sup> FMN, paragraph 13.124.

<sup>65</sup> Parties' submission in relation to the market for the installation and maintenance of overhead lines and catenaries dated 1 June 2022 (**Parties' Submission on UK catenaries market**), paragraph 4.7.

<sup>66</sup> M.9483 - *Engie/Powerlines* (20.09.2019); M.5701- *Vinci/CEGELEC* (26.03.2010).

<sup>67</sup> Parties' annotated response to the Issues Letter.

ability to compete without Equans was due to a lack of high-speed line references rather than a specific lack of V350 experience.<sup>68</sup>

68. The Parties submitted that, while the EC left the market definition open in its decisions on *Engie/Powerline* and earlier *Vinci/Gegelec*, these decisions do not explicitly consider a possible segmentation of the supply of OCS by speed.<sup>69</sup>

#### *CMA's assessment*

69. The CMA considered whether a segmentation between standard OCS and high-speed OCS would be appropriate, including whether experience and specific technical capability with high-speed OCS is considered necessary to win business in the supply of high-speed OCS.

- *Previous decisions*

70. The CMA has not assessed OCS in its decisional practice. However, the EC has in previous decisions assessed an overall market for the installation and maintenance of catenaries and overhead contact lines, while leaving open the precise scope of this relevant product market (including possible segmentations).<sup>70</sup>
71. The CMA notes that its own merger decisions and those of other authorities do not constitute precedents, and that each case turns on its own facts. The EC's analysis is based on its own investigation and the product and geographic markets it is investigating, which may well reflect different views on the extent customers are willing to accept tenders from suppliers without high-speed design capabilities, and the corresponding ability and willingness of those competitors to compete.

- *Tender documents and Parties' internal documents*

72. In relation to high-speed OCS, the CMA understands that there is only one high-speed OCS project that is currently being tendered for in the UK, the HS2 Tender. The CMA's assessment of HS2 Tender [REDACTED] documents confirms the importance of high-speed OCS experience and technical expertise. Indeed, [REDACTED] providers did not demonstrate experience in delivering projects

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<sup>68</sup> Parties' annotated response to the Issues Letter.

<sup>69</sup> Parties' annotated response to the Issues Letter.

<sup>70</sup> See the decisions of the EC in relation to the following mergers: M.9483 - Engie/Powerlines (20.09.2019), paragraph 8-14; M.5701- Vinci/CEGELEC (26.03.2010), paragraph 36 – 39.



with maximum operational line speed requirements and therefore did not pre-qualify for the HS2 Tender.<sup>71</sup>

73. The documents submitted by the Parties as part of the HS2 Tender process (pre-qualification and final offer) also illustrate the importance of previous design experience for SNCF technology.<sup>72</sup> Such experience increases the attractiveness of the bid once a provider has pre-qualified, where such technology has been used extensively in Europe and in particular France.<sup>73</sup>

- *Third-party views*

74. Evidence from HS2 Ltd indicates that previous high-speed OCS experience is one of the key factors considered in assessing whether a supplier will pre-qualify or not for the HS2 Tender, alongside the wider pre-qualification requirements.<sup>74</sup>

75. Evidence from the response of OCS providers to the CMA's questionnaire is also consistent with the HS2Tender's [REDACTED] documents, indicating that previous high-speed experience and technical capability is a requirement to participate in the HS2 Tender. In particular, while HS2 Ltd submitted that SNCF V350 catenary system design experience is not a mandatory requirement when assessing a tenderers' ability to deliver high-speed OCS,<sup>75,vi</sup> the majority of OCS providers that responded indicated that experience and technical capability in delivering high speed OCS is important in general and that, in the case of the HS2 Tender, experience in delivering a catenary system with SNCF design, in particular experience with the SNCF V350 design, was an effective requirement.<sup>76</sup> For example:

- (a) One competitor, which is in a JV with Equans, confirmed that they would be unable to participate or be a credible competitor in the HS2 Tender process without the SNCF design capability of Equans.<sup>77</sup>
- (b) Another competitor noted that the pre-qualification criteria set out by the customer require specific past high-speed OCS experience, in addition to

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<sup>71</sup> Third-party document titled '[REDACTED]' page 7 and 8; and Third-party response to the CMA's questionnaire.

<sup>72</sup> There are two types of SNCF technology used for high-speed OCS projects: 1) SNCF V350 which is a catenary design licensed from French infrastructure manager SNCF Réseau, which has been installed on recent extensions of the French high-speed network, including LGV Sud Europe Atlantique between Tours and Bordeaux; and 2) SNCF V360 which is a catenary design licensed by HS2 Ltd from French infrastructure manager SNCF Réseau, in relation to the current HS2 Tender.

<sup>73</sup> Rapide JV document sent to HS2 Ltd titled '[REDACTED]', page 3; Bouygues' response to Q7 of the CMA's s109 notice dated 16 March 2022; and Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 17, 20, and 22.

<sup>74</sup> HS2 Ltd response to the CMA's questionnaire.

<sup>75</sup> HS2 Ltd response to the CMA's questionnaire.

<sup>76</sup> Third-party responses to the CMA's questionnaire; Note of a call with third-party Keltbray.

<sup>77</sup> Note of a call with a third-party Keltbray.

capacity, capability to deliver the specific design requirements and financial standing. In general, contractors or JVs bid for the high-speed opportunities which specify the use of the high-speed OCS design that they have experience using on past projects. In the case of the HS2 Tender, SNCF high-speed OCS V350/V360 design is a material requirement.<sup>78</sup>

- (c) One competitor noted that, while high-speed OCS is, if anything, less technically demanding than typical UK OCS projects during the construction phase, the approvals, testing, design and commissioning of high-speed OCS are likely to be more complex, as these are new systems, and in the case of the HS2 OCS project, not in operational use anywhere at the required design speed. The scale of the HS2 OCS project is such that it may not be accessible for smaller organisations with less resource and smaller balance sheets. This competitor also noted that a supplier is stronger if it has, or if it partners with someone that has, specific French high-speed OCS experience, as the system to be used in the tender is the French system.<sup>79</sup>
- (d) Another competitor stated that there are aspects of the system design and ITC delivery safety for high-speed OCS which must be clearly understood. A key aspect will be managing the delivery quality and compliance to HS2 OCS project's requirements. HS2 Ltd was looking for providers with specific experience in high-speed OCS, severely limiting the set of available suppliers compared to standard OCS more generally.<sup>80</sup>
- (e) Another competitor submitted that previous experiences in being able to deliver high-speed OCS design & installation is a pre-requisite. A high-speed OCS contractor should demonstrate an ability to meet the installation quality requirements and have knowledge/ experience of commissioning high-speed OCS that includes speed runs and collection of contact and power data. The competitor further noted that it did not proceed to submitting a pre-qualification response to the current high-speed tender for OCS as it considered that other suppliers would be stronger in this competition, particularly as HS2 Ltd had specified a unique SNCF V360 OCS design range rather than allowing suppliers to offer their own in-house design range.<sup>81</sup>

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<sup>78</sup> Third-party response to the CMA's questionnaire.

<sup>79</sup> Third-party response to the CMA's questionnaire.

<sup>80</sup> Third-party response to the CMA's questionnaire.

<sup>81</sup> Third-party response to the CMA's questionnaire.

76. As regards the Parties' submission that HS2 Ltd confirmed that SNCF design capabilities are not a requirement to participate in the HS2 Tender, the CMA notes that there is a meaningful distinction between a contracting authority setting an absolute minimum threshold to participate in a tender and the ability for suppliers to credibly participate. The CMA's understanding of HS2 Ltd's comment is only that an absence of V350 experience would not result in a tenderer's automatic disqualification from the HS2 Tender process. This is consistent with the views expressed in the Parties' internal documents highlighting the importance of V350 experience. This also consistent with evidence provided by multiple competitors, which have affirmed that V350 experience is, in their view, a de facto requirement to meaningfully participate in the tender, including where, as was the case with Keltbray, the absence of V350 experience alone was enough to rule out making a stand-alone tender.
77. The CMA therefore considers that there is a different competitor set in the supply of standard OCS and high-speed OCS, given that standard OCS providers in the UK can only partner with a limited number of high-speed OCS providers to meet the necessary high-speed experience and technical capability requirements. For instance, one third-party competitor in standard OCS in the UK indicated that it would need to enter into a JV arrangement with another provider to service the HS2 Tender, given it has no experience with the SNCF design.<sup>82</sup>
78. The CMA will therefore separately examine:
- (a) the supply of high-speed OCS; and
  - (b) the supply of standard OCS.

### *Geographic scope*

#### *Parties' submissions*

79. The Parties submitted that the geographic frame of reference for the supply of OCS should be at least national in scope, and provided qualitative and quantitative data on a national basis.
80. The Parties submitted, however, that the references to past experience required in the HS2 Tender do not need to be UK-specific and that local presence is not a requirement in the HS2 Tender specifications.<sup>83</sup> In addition, the Parties submitted that there is an ability for high-speed OCS suppliers

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<sup>82</sup> Third-party response to the CMA's questionnaire.

<sup>83</sup> Parties' annotated response to the Issues Letter, page 12.

without UK presence to either subcontract work or partner with firms with UK presence, which would allow non-UK suppliers to develop necessary UK-specific experience (eg as regards health and safety regulations and working standards).<sup>84</sup>

81. The Parties further submitted that the ability for suppliers outside the UK to participate can be illustrated in CREG's (a Chinese firm with no prior experience in the UK, but significant experience in China) participation, including as one of the four suppliers that have pre-qualified for the final bid in the HS2 Tender.<sup>85</sup>

#### *CMA's assessment*

82. The assessment below focuses on the geographic scope of supply of high-speed OCS. In relation to standard OCS, Network Rail's regional tenders are ultimately carried out under a national Electrification Framework Agreement, and the competitor set for different regional tenders does not vary significantly.<sup>86</sup> The Parties' internal documents concerning standard OCS assess opportunities and competitor sets on a national basis, which supports assessment on an at least national basis.<sup>87</sup> This in line with the Parties' own submissions. Moreover, the CMA did not ultimately consider it necessary to determine whether a broader geographic frame of reference was necessary, because competitive concerns can be ruled out even on the basis of a narrower national assessment.

- *Previous decisions*

83. The CMA has not assessed OCS in its decisional practice, but in previous decisions the EC found that the installation and maintenance of catenaries was national in scope, mainly because the regulations regarding the safety and technical requirements for the supply of these services vary between different Member States.<sup>88</sup> However, in its most recent decision about the installation and maintenance of catenaries, the EC left open the precise geographic scope of this market, noting that the harmonisation of standards and regulations within the EEA are blurring and dissolving the borders of previously national geographic markets.<sup>89</sup>

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<sup>84</sup> Parties' annotated response to the Issues Letter, page 15.

<sup>85</sup> Bouygues' response to Q7(b) of the CMA's s109 notice dated 16 March 2022, paragraph 7.3.

<sup>86</sup> Third-party response to the CMA's questionnaire.

<sup>87</sup> Bouygues Annex S109.3.011 to the CMA's s109 notice dated 8 April 2022; Equans Annex 021 to the FMN.

<sup>88</sup> M.5701- Vinci/CEGELEC (26.03.2010), paragraphs 43 – 45.

<sup>89</sup> M.9483 - Engie / Powerline (20.09.2019), paragraphs 15-19.

- *Tender documents and Parties' internal documents*

84. The CMA's assessment of both HS2 Tender documents and the documents submitted by the Parties as part of their bid indicate that all providers that pre-qualified for the HS2 Tender have previous experience in the supply of OCS in the UK and, if they do not, intend to put in place sub-contracting arrangements with providers that do have UK experience.<sup>90</sup>
85. One internal document prepared by ENGIE for its Commitment Pre-Assessment Committee, seeking approval for its bid to the HS2 Tender,<sup>91</sup> also states that:
  - (a) the strategic approach of Powerlines/ENGIE's bid will be to emphasise that the JV [REDACTED];
  - (b) [REDACTED]; and
  - (c) [REDACTED].
86. The same document also notes that the JV has [REDACTED] and that [REDACTED].
87. Equans submitted that the document reflects its views at an earlier stage of the HS2 Tender, before HS2 Ltd confirmed that it would not include a local presence requirement.<sup>92</sup> The CMA considers that Equans' recognition that it previously considered national presence to be important is consistent with the importance that other competitors attach to this factor in their more recent responses to the CMA's questionnaires, as set out below.
88. One internal document prepared by Colas Rail, seeking approval to invest in the preparation of the HS2 Tender, also makes clear the importance of having a national presence to compete effectively for this project. It states that [REDACTED].<sup>93</sup>
89. Bouygues submitted that the references to UK presence in this document refer to non-OCS capabilities, namely Colas Rail's more general rail experience, and the desirability of having UK designers.<sup>94</sup> The CMA does not consider this explanation materially supports the view that the frame of reference should be wider than national, in so far as it still suggests that a competitor must have a national presence in adjacent rail services.

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<sup>90</sup> Third-party document titled '[REDACTED]'; Colas Rail document sent to HS2 Ltd titled '[REDACTED]'; and Rapide JV document sent to HS2 Ltd titled '[REDACTED]', pages 4 and 8.

<sup>91</sup> Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN).

<sup>92</sup> Parties' annotated response to the Issues Letter, page 12.

<sup>93</sup> Annex 020 to the FMN.

<sup>94</sup> Parties' annotated response to the Issues Letter, page 13.

- *Third-party views*

90. HS2 Ltd submitted that a local presence in the UK or national content in the bid is not an element of the evaluation criteria when assessing final bids for the HS2 Tender.<sup>95</sup>
91. However, supplier responses to the CMA's questionnaire are consistent with the documents set out above, indicating that a local UK presence and therefore UK experience in a bid for high-speed OCS is important in order to win contracts. For example:
- (a) One competitor noted that the HS2 project requires interfaces with the UK conventional rail network. Therefore, UK specific knowledge is required to manage such interfaces between the existing and high-speed OCS connections. Contractors who have both high-speed OCS and local knowledge will be better positioned to manage these interface risks. This third-party also noted that high-speed OCS designs are specified by each local customer or transport authority. The suppliers competing for the high-speed OCS contracts generally compete on the projects which specify the OCS design which they have expertise and knowledge of.<sup>96</sup>
  - (b) Another competitor stated that local presence is fundamental to most if not all UK construction contracts needing to have a UK footprint and capability.<sup>97</sup>
  - (c) Another competitor stated that providers would be required to have a detailed understanding of UK legislation, codes and standards.<sup>98</sup>
  - (d) Another competitor stated that it is important to be used to the rules of art that are currently used in the UK.<sup>99</sup>
  - (e) Another competitor stated that a local UK presence is of benefit but not critical. For example, the HS2 Tender has requirements around use of local labour but this could be provided through local sub-contracts.<sup>100</sup>
  - (f) Another competitor stated that, although CREG pre-qualified for the HS2 Tender for high-speed OCS in the UK, it would expect that CREG would

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<sup>95</sup> HS2 Ltd response to the CMA's questionnaire.

<sup>96</sup> Third-party response to the CMA's questionnaire.

<sup>97</sup> Third-party response to the CMA's questionnaire.

<sup>98</sup> Third-party response to the CMA's questionnaire.

<sup>99</sup> Third-party response to the CMA's questionnaire.

<sup>100</sup> Third-party response to the CMA's questionnaire.

need to have specific UK-based expertise and resources in high-speed electrification to win the HS2 Tender.<sup>101</sup>

92. Some competitors also submitted that there are some difficulties for high-speed suppliers to enter the UK market on their own. For example:
- (a) One competitor identified the ability to have competent qualified staff and an understanding of UK technical and safety regulations, as a barrier to entry in the high-speed OCS market in the UK.<sup>102</sup>
  - (b) One competitor submitted that, for serving UK high-speed OCS contracts, it may need to bring specific plant, machinery and resources from its wider group (in Europe or worldwide) and/or partner with a local UK OCS provider. It added that would be difficult for organisations external to Europe to form JVs with UK OCS providers to serve UK High-speed OCS contracts (as the main design criteria is of European design).<sup>103</sup>

#### *Conclusion on frame of reference*

93. The evidence set out above shows that there are specific UK regulations in relation to the supply of high-speed OCS and that the Parties' competitors consider national presence to be an important consideration in participating in OCS tenders. The CMA considers that a lack of national presence would result in a supplier either declining to participate at all, or would result in a tender where a lack of national presence and knowledge would significantly undermine any credibility of the tender.<sup>104</sup>
94. The CMA will therefore examine OCS using the following product and geographic frames of reference.
- (a) the supply of high-speed OCS at the UK level; and
  - (b) the supply of standard OCS at the UK level.

#### ***Facilities management***

95. The Parties also overlap in the supply of FM services in the UK which is described at paragraphs 50 to 53 above.
96. The CMA has recently assessed the market for FM in *Mitie/Interserve* in 2020. In that decision, the CMA considered a frame of reference encompassing all

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<sup>101</sup> Third-party to the CMA's questionnaire; Note of a call with a third-party.

<sup>102</sup> Third-party response to the CMA's questionnaire.

<sup>103</sup> Third-party response to the CMA's questionnaire.

<sup>104</sup> As discussed in more detail below, the CMA notes these considerations are also applicable to CREG [X].

FM services, but out of an abundance of caution also examined a number of narrower segmentations and excluded the in-house supply of services.

97. The Parties submitted share data in line with those considered in *Mitie/Interserve*.<sup>105</sup> This data shows that the Parties have a combined share of less than [0-5]% under each of the segmentations considered in that case, with increments of less than [0-5]%.
98. The CMA considers that the low shares of the Parties within each of these segments would, in principle, also indicate that the Merger is unlikely to raise competition concerns within broader segments within the FM sector. To verify this position, the CMA reviewed the Parties' documents relating to FM, assessed revenue data for different customer types, and spoke with several FM customers and competitors. An assessment of both Bouygues and Equans' top 30 FM customers (by revenue) indicate that both Parties generate their highest revenues from healthcare customers, where [X]% and [X]% of revenues are accounted for by healthcare customers respectively.
99. In line with the approach taken in *Mitie/Interserve* (which examined TFM services for nuclear site customers), the CMA has therefore assessed whether to consider a narrower segmentation of FM services based on customer type and type of FM service.

## *Product scope*

### *Parties' submissions*

100. The Parties submitted that the appropriate product frame of reference is the provision of all FM services.<sup>106</sup>
  - (a) On the demand side, the Parties submitted that while customers do not typically consider different types of FM services substitutable, customers frequently chose one supplier to provide a group of services under a single contract and customers are able to switch between single service and bundled service FM contracts.<sup>107</sup>
  - (b) On the supply side, the Parties submitted that there is a high degree of substitutability between different types of FM services such that all types

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<sup>105</sup> The CMA assessed share data that combined national and regional coverage, because Bouygues derives the vast majority of its revenues from sub-national contracts, with less than 10% of its top 30 FM customers revenues generated from national work. In addition, the Parties did not provide share data for TFM for nuclear sites due to the lack of any overlap, as Bouygues does not provide FM services of any kind to nuclear customers in the UK or in Europe. Bouygues also confirmed that it does not consider [X].

<sup>106</sup> FMN, paragraph 13.76.

<sup>107</sup> FMN, paragraph 13.78.



of FM services as well as single services, bundled services and TFM/IFM form part of the same frame of reference.<sup>108</sup>

- (c) In terms of types of customer segments, the Parties submitted that the overall requirements of customers are expected to be similar between private sector and public sector customers.<sup>109</sup>

#### *CMA's assessment*

101. The CMA has previously considered all FM services (including TFM) within a single frame of reference, and also, on a cautious basis, considered narrower segments where it had received evidence that the competitive conditions in narrower segments may differ from those for FM services more generally.<sup>110</sup> Specifically in *Mitie/Interserve*, the CMA assessed all FM within a single frame of reference except for defining separate product frames of reference for:

- (a) TFM services; and
- (b) TFM services to nuclear sites.

102. In line with that approach, the CMA considered whether the product market should be segmented according to:

- (a) customer type, focusing on healthcare customers for the reasons explained in paragraph 98 above;
- (b) type of FM services provided to healthcare customers (eg, soft or hard FM services)<sup>111</sup>; and/or
- (c) Contractual model (ie, PFI and non-PFI contracts).

- *Healthcare customer*

103. As explained above in paragraph 98, the Parties generate a large proportion of their FM revenue from servicing healthcare customers. The CMA considered whether the supply of FM services to healthcare customers should be treated as a separate frame of reference.<sup>112</sup>

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<sup>108</sup> FMN, paragraphs 13.79-13.86.

<sup>109</sup> FMN, paragraph 13.88.

<sup>110</sup> Interserve plc / Rentokil Initial plc (2014); and Mitie Group Plc / Interservefm (Holdings) Ltd (2020).

<sup>111</sup> As the Parties submitted that Bouygues does not have any presence in healthcare PFI TFM contracts. The CMA left open the question whether it is appropriate to distinguish the supply of TFM services to healthcare customers as a separate frame of reference. The CMA considered in its competition assessment whether providers of TFM services can compete for Hard FM contracts.

<sup>112</sup> The CMA has not considered FM services for healthcare customers in any previous decision.

104. Third-parties told the CMA that customers in healthcare have more complex requirements for FM services compared to customers in other sectors.<sup>113</sup> Healthcare customers require greater levels of supplier assurances and service commitments, due to the time critical nature of the customers' work.<sup>114</sup> The Parties have confirmed this, with Equans noting that it would expect 'hard' FM providers in healthcare to have regard to the NHS's Health Technical Memorandums, which provide advice and guidance on the design, installation, and operation of specialised building and engineering technology used in the delivery of healthcare.<sup>115</sup>
105. In addition, from a supply perspective, the market structure for the supply of FM services in healthcare is more concentrated than the supply of FM services to other sectors, due to the specific requirements for healthcare customers and the lack of experience or relevant references as barriers to entry for other FM providers.<sup>116</sup>
106. For the reasons set out above, and on a cautious basis, the CMA has assessed the supply of FM services to healthcare customers as a separate product frame of reference from all other FM customers.<sup>117</sup>

- *Hard healthcare FM and soft healthcare FM*

107. As explained above in paragraph 51, FM services are sometimes grouped into 'soft' FM and 'hard' FM services:<sup>118</sup>
- (a) Soft FM services are commonly described as services that support the operation of a facility, such as: security services, cleaning services, catering services, postal services and secretarial services.
  - (b) Hard FM services are commonly described as services that support the maintenance of a facility, such as: gardening and landscaping, mechanical and electrical ("M&E") services, heating, ventilation, and air conditioning ("HVAC"), plumbing, building services control and management systems, building fabric, appliance testing, fire protection systems and fire alarm and detection system services.

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<sup>113</sup> Third-party responses to the CMA's questionnaire.

<sup>114</sup> Third-party responses to the CMA's questionnaire.

<sup>115</sup> FMN, paragraph 13.14.

<sup>116</sup> Third-party responses to CMA's questionnaire; An internal document from Engie also indicates that Equans has a higher share of supply in supply of FM in the healthcare sector than in the supply to FM in other sectors (see Equans Annex 126 (as set out in Annex 061 to the FMN) to the CMA's s109 notice dated 8 April 2022, slide 4.

<sup>117</sup> Due to the Parties low shares of supply in relation to the supply of FM services to other (non-healthcare) customers, the CMA does not consider these customers further in this note.

<sup>118</sup> FMN, paragraph 13.2.

108. The Parties' internal documents note that both Bouygues and Equans are planning to [REDACTED] soft FM services to healthcare customers:
- (a) A Bouygues internal document notes that it plans to [REDACTED].<sup>119</sup>
  - (b) An Equans internal document notes that [REDACTED].<sup>120</sup>
109. This is further supported by the Parties' submissions that:
- (a) Bouygues' policy is to [REDACTED], standalone soft FM work.<sup>121</sup>
  - (b) Equans' strategy is to [REDACTED].<sup>122</sup>
110. Bouygues also submitted that healthcare customers [REDACTED].<sup>123</sup>
111. The CMA has received evidence that the supply of hard FM services to healthcare customers is significantly different to the supply of soft FM. More specifically:
- (a) Several customer responses note that the skill set needed to provide hard and soft FM services for healthcare customers is different,<sup>124</sup> while customers typically ranked competitors differently depending on whether the supply of soft or hard FM services was being considered.
  - (b) Competitors consistently noted that hard and soft FM services require different skill sets and present different types of risks as hard FM contracts are more technically complex.<sup>125</sup> Several FM providers also noted that they only provide either hard or soft FM services to healthcare customers.<sup>126</sup>
112. For the reasons set out above, the CMA has, on a cautious basis, assessed the supply of hard FM services to healthcare customers as a separate product frame of reference from all other FM services.<sup>127</sup>

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<sup>119</sup> Bouygues' Annex S109.3.027 to the FMN, page 19.

<sup>120</sup> Equans Annex 123 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 20, page 13.

<sup>121</sup> Parties' response to Q7 of the CMA's request for information dated 6 May 2022 and Parties' response to Q7(a) of the CMA's request for information dated 11 May 2022.

<sup>122</sup> Parties' response to Q10 of the CMA's request for information dated 11 May 2022.

<sup>123</sup> Parties' response to Q7(b) of the CMA's request for information dated 11 May 2022.

<sup>124</sup> Third-party response to the CMA's questionnaire; Third-party response to the CMA's questionnaire; Third-party response to the CMA's questionnaire.

<sup>125</sup> Third-party responses to CMA's questionnaire.

<sup>126</sup> Third-party responses to the CMA's questionnaire.

<sup>127</sup> As the Parties activities in healthcare predominately focus on the provision of hard FM services, the CMA does not consider soft FM services further in this decision.

- *PFI and non-PFI contracts*

113. As described in paragraphs 54 to 60 above, FM services are provided to public healthcare customers into two broad categories, either via (a) PFI contracts or (b) non-PFI contracts.
114. Therefore, CMA also considered whether it is appropriate to distinguish between the supply of hard FM services to the healthcare sector, depending on whether or not these services are supplied under a PFI contract.
115. The Parties submitted that the supply of hard FM services is similar for PFI and non-PFI public healthcare customers. The end customers are the same in both – the NHS Trusts. The core services provided and the skills needed to deliver the services are largely identical and any differences are minor and will not impact the make-up of the service delivery team. The main differences are that the PFI sector involves an intermediary (the SPV investor) and that the PFI contractual risk profile means that the PFI FM supplier will need more legal and commercial resources.<sup>128</sup>
116. As explained below, however, the set of competitors that supply hard FM services to public healthcare customers under a PFI contract is more limited than the set of competitors that provide these services in a non-PFI context.
117. Third-party evidence indicates that there are differences in the level of risk and obligations (such as strict payment mechanisms and performance monitoring) that suppliers must be willing to accept in a PFI contract compared to a non-PFI healthcare customer.<sup>129</sup>
118. On the other hand, the evidence indicates that experience of previous NHS contracts is desirable in all new contracts whether PFI or non-PFI and there are no significant or material differences as between the non-PFI and the Secondary PFI market in relation to the selection process, as a standard procurement process can be adopted in both cases.
119. The CMA has considered PFI or non-PFI in the same frame of reference but has taken into account the differences between these contracts in its competitive assessment.

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<sup>128</sup> Parties updated submission in relation to public healthcare facilities management services (hard) dated 10 June 2022.

<sup>129</sup> Note of a call with a third-party; Third-party responses to the CMA's questionnaire; Third-party response to the CMA's questionnaire.

### *Conclusion on product scope*

120. For the reasons set out above, the CMA has, on a cautious basis, considered the impact of the Merger in the supply of hard FM services to healthcare customers (both under PFI and non-PFI contracts).
121. However, it was not necessary for the CMA to reach a conclusion on the product frame of reference, since, as set out below, no competition concerns arise on any plausible basis.

### *Geographic scope*

122. In *Mitie/Interserve*, the CMA considered the provision of TFM and FM with national coverage as a separate frame of reference to regional or local TFM and FM contracts.<sup>130</sup>
123. The Parties submitted that the appropriate geographic frame of reference for FM services is UK-wide.<sup>131</sup>
124. The evidence received by the CMA shows that contracts for the supply of FM services to healthcare customers may cover multiple sites grouped by NHS Trust. Some customers procuring these services told the CMA that they considered regional or local FM services suppliers could meet their requirements, but competitors noted that, due to the size and nature of the healthcare FM contracts, typically only large UK-wide FM providers could compete for these customers.<sup>132</sup>
125. The CMA has also found that most suppliers able to supply hard FM services to healthcare customers are able to bid for these services throughout the UK, although there are some (eg [X]) that compete only at a regional level.
126. Therefore, the CMA has considered the supply of hard FM contracts at a UK-wide level, taking into account regional or local FM providers in the competitive assessment.

### *Conclusion on geographic scope*

127. For the reasons set out above, the CMA has considered that the appropriate geographic frame of reference for the supply of hard FM services to healthcare customers is the UK.

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<sup>130</sup> Interserve plc / Rentokil Initial plc (2014); and Mitie Group Plc / Interservefm (Holdings) Ltd (2020).

<sup>131</sup> FMN, paragraph 13.96.

<sup>132</sup> Third-party response to the CMA questionnaire; Note of a call with a third-party; Third-party responses to the CMA questionnaire.

## ***Conclusion on frame of reference***

128. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:

- (a) the supply of high-speed OCS in the UK;
- (b) the supply of standard OCS in the UK; and
- (c) the supply of hard FM services to healthcare customers in the UK.

## **Competitive assessment**

129. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.<sup>133</sup> Horizontal unilateral effects are more likely when the merging parties are close competitors.

130. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects in:

- (a) the supply of high-speed OCS in the UK;
- (b) the supply of standard OCS in the UK; and
- (c) the supply of hard FM services to healthcare customers in the UK.

## ***Horizontal unilateral effects in the supply of high-speed OCS in the UK***

131. The concern under this theory of harm is that the removal of one party as a competitor may reduce competition between suppliers bidding for high-speed OCS in the UK, resulting in worsened contractual terms for customers.

132. The CMA has assessed the Merger's effect on the supply of high-speed OCS, taking into account the available evidence in relation to current and future market developments. The high-speed OCS market today is centred on a single customer, HS2 Ltd, and its ongoing tender process.<sup>134</sup>

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<sup>133</sup> [Merger Assessment Guidelines](#), paragraph 4.1.

<sup>134</sup> The only other high-speed line in the UK, for which OCS works would have been contracted, is HS1 where it has been operating, in part, from 2003 and along its entire route length since 2007 (see <https://highspeed1.co.uk/about-us>).

133. As described in paragraph 49, the HS2 Tender is currently at the evaluation stage, where HS2 Ltd is assessing the tender submissions made on 20 April 2022. There are still a range of steps HS2 Ltd needs to go through before awarding the contract by January 2023.<sup>135</sup>
134. One of the main characteristics of the high-speed OCS market in the UK is that tenders occur rarely and are issued by a single customer at a time.<sup>136</sup> Competition between suppliers within the UK market is therefore centred, at present, of a single high-value tender issued by a single customer.<sup>137</sup>
135. The Parties submitted that a theory of harm based on a single tender would be ‘highly unusual’ and ‘unprecedented’.<sup>138</sup>
136. For the avoidance of doubt, the CMA is considering whether competition concerns arise within the supply of high-speed OCS in the UK. That assessment takes into account the impact that the change in market structure brought about by the Merger would have on the ongoing HS2 Tender, but also on any high-speed OCS projects that might be tendered in the UK in future.
137. The CMA’s guidance sets out that the CMA will consider how the process of rivalry will be harmed as a result of a merger.<sup>139</sup> This assessment will take into account the nature of competition (within the context of the market at issue) and how firms are able to win business from each other.<sup>140</sup> To this end, in order to assess whether competition concerns arise within the supply of high-speed OCS in the UK, the CMA has considered the evidence available in relation to: the only current high-speed OCS project in the UK, the HS2 Tender; and any future high-speed OCS projects in the UK.

### *Competition for the current HS2 Tender*

138. As explained in paragraph 47, four bidders pre-qualified for the HS2 Tender: Bouygues, the Rapide JV, the Balfour Beatty JV, and CREG.
139. [REDACTED].
140. In assessing the potential impact of the Merger on competition for the ongoing HS2 Tender, the CMA has examined the available evidence in relation to:

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<sup>135</sup> HS2 Ltd response to the CMA’s questionnaire.

<sup>136</sup> The previous high-speed OCS tender, for High Speed 1, was awarded before 2003.

<sup>137</sup> Third-party response to the CMA questionnaire, indicated that the value of the tender is [REDACTED] million.

<sup>138</sup> Parties’ Submission on UK catenaries market, paragraph 3.5; See too Parties’ annotated response to the Issues Letter, page 37.

<sup>139</sup> [Merger Assessment Guidelines](#), paragraph 2.11.

<sup>140</sup> [Merger Assessment Guidelines](#), paragraph 2.12.

- (a) closeness of competition between the Parties;
- (b) the competitive constraints from alternative suppliers;
- (c) the extent to which harm could occur given the timings of the Merger and the HS2 Tender; and
- (d) third-party views about the effects of the Merger on the HS2 Tender.

*Closeness of competition between the Parties*

141. In assessing the closeness of competition between the Parties, the CMA considered:

- (a) the Parties' submissions;
- (b) Tender data in relation to high-speed OCS opportunities in Europe;
- (c) HS2 Tender documents;
- (d) internal documents; and
- (e) third-party views.

- *Parties' submissions*

142. As a general position, the Parties submitted that they do not tend to compete against each other and are not close competitors for high-speed OCS.<sup>141</sup>

- *Tender data in relation to high-speed OCS opportunities in Europe*

143. The Parties submitted a list of high-speed OCS tenders where they competed in the last ten years in Europe.<sup>142</sup> The data shows that the Parties competed head-to-head on approximately [30-40]% of all opportunities. The CMA notes that it considers the relevant frame of reference for high-speed OCS is national, and that the extent of head-to-head competition across may be of limited relevance for the purposes of competitive assessment in the UK. Notwithstanding this position, the CMA notes that the fact the Parties overlapped in almost a third of the tenders in which they both participated over the last decade demonstrates some similarity in the type of high-speed OCS work they have the ability and incentive to compete for.

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<sup>141</sup> Parties' Submission on UK catenaries market, paragraph 4.12(ii).

<sup>142</sup> Annex 1 to the CMA's request for information dated 23 June 2022.



- *Documents related to the HS2 Tender*

144. HS2 Ltd's [REDACTED] tender documents at the first stage of the HS2 Tender notes that HS2 Ltd is providing the successful contractor with an OCS basic design range (V360), where the V360 has been procured by HS2 Ltd under licence from SNCF.<sup>143</sup>
145. The CMA considers that the documents submitted by the Parties in response to the HS2 Tender demonstrate that both Parties have specific expertise and technical capability in meeting the high-speed requirements of the HS2 Tender, including experience with the SNCF design system that HS2 Ltd will use. The documents indicate that both Parties have: (1) extensive experience of high-speed OCS projects in Europe, and in particular France, based on the SNCF V350 catenary system, which is reported to be the foundation of the SNCF V360 catenary system used on the HS2 OCS project, and (2) relevant UK experience.<sup>144</sup>
- (a) Colas Rail's (Bouygues) submissions to HS2 Ltd indicate that it has extensive experience in design and installation of the SNCF V350 system, citing high-speed OCS case studies [REDACTED], where it carried out the works [REDACTED],<sup>145</sup> [REDACTED], where it carried out the works on [REDACTED].<sup>146</sup> Furthermore, within such documents, Colas Rail also emphasises its own UK experience and the UK experience of its sub-contractors.<sup>147</sup>
- (b) SPL Powerlines/Ineo SCLE's (Equans) submissions to HS2 Ltd indicate that it has extensive experience in the design and installation of the SNCF V350 system, citing high-speed OCS case studies across [REDACTED]. [REDACTED],<sup>148</sup> SPL delivered the project [REDACTED], whilst in the other it carried out the works [REDACTED].<sup>149</sup> In relation to the latter case study, [REDACTED] Equans submitted that the design and adaptation of the SNCF catenary system was particularly led by Ineo SCLE.<sup>150</sup> Furthermore, within SPL Powerlines/Ineo SCLE's (Equans) submissions, SPL Powerlines also emphasises its own UK experience and the UK experience of its partners in the Rapide JV.<sup>151</sup>
146. In response to the CMA's Issues Letter, the Parties submitted that none of the bidders for the HS2 Tender have experience with the SNCF V360 platform,

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<sup>143</sup> HS2 Ltd document titled '[REDACTED]', page 2.

<sup>144</sup> Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 13; see too Third-party document titled '[REDACTED]', page 2.

<sup>145</sup> Colas Rail document sent to HS2 Ltd titled '[REDACTED]', pages 1 and 2.

<sup>146</sup> Colas Rail document sent to HS2 Ltd titled '[REDACTED]', page 4.

<sup>147</sup> Colas Rail document sent to HS2 Ltd titled '[REDACTED]'.  
<sup>148</sup> Rapide JV document sent to HS2 Ltd titled '[REDACTED]', page 3.

<sup>149</sup> Rapide JV document sent to HS2 Ltd titled '[REDACTED]'.  
<sup>150</sup> Rapide JV document sent to HS2 Ltd titled '[REDACTED]'.  
<sup>151</sup> Rapide JV document sent to HS2 Ltd titled '[REDACTED]', pages 4 and 8.

since it has been developed for HS2 Ltd for the specific purpose of this project. The Parties also reiterated that HS2 Ltd has confirmed that experience with the SNCF V350 is not a requirement for a successful tender, and that HS2 Ltd is unable to give weight to experience with the platform.

147. As already noted in paragraph 76 above, the CMA draws a distinction between HS2 Ltd setting threshold requirements for a tender to be valid, on the one hand, and experience that is considered highly desirable (or essential to credibly compete, according to several competitors), on the other. The CMA considers the Parties' tender submissions to HS2 Ltd demonstrate a clear understanding that V350 experience—which the V360 design is based on—is desirable to HS2 Ltd. Indeed, the CMA notes that Colas Rail explicitly called out in a document pitching its capabilities to HS2 Ltd that its [REDACTED].<sup>152</sup> The CMA considers that this implicitly assumes that Colas Rail thought it would be more competitive by elaborating its familiarity with the SNCF process obtained through its V350 work.<sup>153</sup>
148. This illustrates the importance of the Parties' experience in designing the SNCF V350 catenary system which is to be used on the HS2 OCS project.

- *Internal documents*

149. The CMA also considered the extent to which the Parties view each other as close competitors in their own internal documents.
150. The CMA notes that closeness of competition is a relative concept, and that closeness of competition between merging firms must be assessed in the context of the other constraints that would remain post-merger.<sup>154</sup> Where, as here, there are only a very small handful of firms, any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary.<sup>155</sup> In this regard, the Parties' internal documents evidence that the Parties consider each other to be credible competitors in the context of a small number of rivals. For example:

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<sup>152</sup> Colas Rail document sent to HS2 Ltd titled [REDACTED], page 4.

<sup>153</sup> Similarly, the CMA considers Equans' response to HS2 Ltd's request to clarify SCLE's role in the concept design on the Tours/Bordeaux high speed OCS line, that [REDACTED] [emphasis in original] was done with the intention of emphasizing SCLE's / Equans' credential with the SNCF platform. See Rapide JV document sent to HS2 Ltd titled [REDACTED].

<sup>154</sup> Merger Assessment Guidelines, paragraph 4.10.

<sup>155</sup> Merger Assessment Guidelines, paragraph 4.10

- (a) A Bouygues internal document, dated October 2021, prepared by Colas Rail for [REDACTED] ahead of the ITT submission to the HS2 Tender, indicates that Colas Rail monitor [REDACTED].<sup>156</sup>
- (b) Another Bouygues document – [REDACTED] –, notes that there is [REDACTED].<sup>157</sup>
- (c) Another internal document, prepared by Colas Rail to request authorisation to invest in the preparation of the HS2 Tender, states that [REDACTED]. In this document, [REDACTED].<sup>158</sup>
- (d) One presentation prepared by Colas Rail regarding the possible acquisition of Powerlines, dated May 2019, suggests that Colas Rail views [REDACTED] as [REDACTED].<sup>159</sup>
- (e) Furthermore, an Equans presentation, dated June 2020, prepared for the pre-assessment of the HS2 Tender opportunity, also indicates that SPL Powerlines/Ineo SCLE (Equans) [REDACTED] for the HS2 Tender [REDACTED], where it is noted that [REDACTED].<sup>160</sup>

151. Furthermore, the Parties' internal documents show that both Parties consider the current HS2 Tender as a [REDACTED]<sup>161</sup>, which suggests that, absent the Merger, they would compete aggressively to win this opportunity, including against each other.

- *Third-party views*

152. Competitors' submissions indicate that the Parties are competing particularly closely for the HS2 Tender, as both Colas Rail and the Rapide JV have strong high-speed OCS experience, particularly in relation to the French SNCF system to be used on the HS2 OCS project. For example:

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<sup>156</sup> Bouygues Annex S109.3.004 to the CMA's s109 notice dated 8 April 2022, page 9.

<sup>157</sup> Bouygues Annex S109.3.011 to the CMA's s109 notice dated 8 April 2022, slide 4. The Parties have explained that this document was produced after the transaction was announced, and reflects Colas Rail— [REDACTED] —speculating on the perception of the Parties' businesses by customers (Parties' Response to CMA's request for information dated 11 May 2020, paragraph 14.3). The CMA considers that this document confirms that Colas Rail considered the Equans OCS business a close enough competitor for the Merger to result in noteworthy uncertainty around the competitive process, and confirms that Colas Rail considers Equans' OCS business an important competitor.

<sup>158</sup> Annex 020 to the FMN. The other expected competitors were: i) Balfour Beatty Vinci TSO (with Systra); ii) Costain / Alstom; iii) Eiffage; iv) Spanish contractors; v) Amey; and vi) Elecnor.

<sup>159</sup> Bouygues Annex S109.3.044 to the CMA's s109 notice dated 8 April 2022, slide 21.

<sup>160</sup> Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 20.

<sup>161</sup> One internal document – [REDACTED], dated March 2021 –, shows that one of Colas Rail's strategic priorities is to [REDACTED], and one of the actions in implementing such a strategy is to [REDACTED] and [REDACTED] (see Annex 017 to the FMN, slide 8, 9 and 10. An internal presentation from Equans to the Pre-Assessment Committee, dated June 2020, about its possible participation in the HS2 Tender shows that the HS2 Tender is a [REDACTED]. The same presentation notes that winning the HS2 Tender would allow Equans to [REDACTED] (Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 15.

- (a) A competitor noted that Colas Rail (Bouygues) is a very strong SNCF type high-speed OCS provider with experience in high-speed OCS in France, Morocco and UK in relation to High Speed 1 (**HS1**).<sup>162</sup> It also considered that SPL Powerlines/Ineo (Equans) has SNCF high-speed OCS experience in France.<sup>163</sup>
- (b) Another competitor noted that Colas Rail (Bouygues) has good international high-speed OCS experience, but limited UK OCS experience. On the other hand, the Rapide JV has Keltbray, the UK market leader for standard OCS, and Equans, which has expert French high-speed delivery experience through its subsidiary, Ineo.<sup>164</sup>
- (c) Another competitor told the CMA that the Parties compete closely with one another, given that they have both pre-qualified for the current HS2 Tender.<sup>165</sup>
- (d) Two other competitors indicated that Colas Rail and SPL Powerlines compete closely with one another, although they considered SPL Powerlines a stronger alternative to Colas Rail than vice versa.<sup>166</sup>

153. The Parties submitted that applying the same logic would lead to the conclusion that CREG and Balfour Beatty are also close competitors with each of Bouygues and Equans.<sup>167</sup> The CMA notes that presence of other close competitors may not eliminate competition concerns. As noted above, the CMA's guidance notes that where the number of competitors is limited, each competitor may be seen as sufficiently close competitors with each other, such that elimination of competition between any two of them would raise competition concerns, subject to evidence to the contrary.<sup>168</sup> The CMA notes, in addition, that the constraint offered by different competitors within a limited competitive set can vary.[✂].

- *CMA's assessment*

154. Based on the evidence above, the CMA considers that the Parties are close competitors.

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<sup>162</sup> HS1 is a 109 km rail line between St Pancras International in London and the Channel Tunnel and connects the international high-speed routes between London and Paris, London and Brussels and London and Amsterdam, as well as the domestic route from London to Kent. HS1 Ltd has the 30-year concession to own, operate and maintain HS1.

<sup>163</sup> Third-party response to the CMA's questionnaire.

<sup>164</sup> Third-party response to the CMA's questionnaire.

<sup>165</sup> Note of a call with a third-party.

<sup>166</sup> Third-party responses to the CMA's questionnaire.

<sup>167</sup> Parties' annotated response to the Issues Letter, page 23.

<sup>168</sup> Merger Assessment Guidelines, paragraph 4.10.

155. The CMA considers that at this stage of the HS2 Tender process there are only a very limited number of players, including the Parties, that have submitted final bids. The CMA reiterates that where the number of competitors in a market is very small, the CMA would expect any two competitors to be close enough competitors so as to raise serious competitive concerns, absent evidence to the contrary. The CMA has not received any evidence that suggests the Parties are not close competitors (and, by contrast, the evidence summarised above is consistent with the position that the Parties are close competitors).

#### *Alternative suppliers*

156. The CMA considered whether there are alternative suppliers which would provide a competitive constraint to the Merged Entity in relation to the HS2 Tender and considered within the assessment:

- (a) the Parties' submissions;
- (b) evidence from internal documents; and
- (c) third-party views on alternatives.

- *Parties' submissions*

157. The Parties submitted that they compete against the other two providers that have pre-qualified for the HS2 Tender – the Balfour Beatty JV and CREG.<sup>169</sup>

158. The Parties further submitted that there are a wide number of European players that are able to compete for high-speed OCS, including through partnerships between continental European firms with high-speed OCS experience and UK firms with general experience delivering UK railway infrastructure projects.<sup>170</sup>

159. In assessing the impact of the Merger on ongoing competition for the HS2 Tender, the CMA notes that the competitive constraint by suppliers outside the pre-qualified bidders is not likely to be strong. Only [X] suppliers engaged in even the pre-qualification process and [X] of those were eliminated for failing HS2 Ltd's criteria. In addition, the evidence available to the CMA indicates that it would not be possible, in practice, for HS2 Ltd to introduce a new (or previously eliminated) supplier into the tender process.

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<sup>169</sup> FMN, paragraph 15.117.

<sup>170</sup> Parties' annotated response to the Issues Letter, pages 42-45; See too Parties' response to Q7 of the CMA's request for information dated 23 June 2022.

160. The CMA's assessment of the impact of the Merger on ongoing competition for the HS2 Tender therefore primarily takes into account the suppliers still competing for the HS2 Tender. Competitors beyond those competing for the HS2 Tender are considered further in the CMA's assessment of competition for future high-speed tenders.

- *Internal documents*

161. The Parties' internal documents with respect to the current HS2 Tender indicate that prior to the shortlisting of four providers by HS2 Ltd they only considered a limited set of alternative constraints, as several suppliers lacking high-speed OCS experience would have needed to enter into JVs or otherwise form partnerships with suppliers who do have such experience. For example:

(a) Equans' internal documents indicate that the expected 'main' competitors for the HS2 Tender were the following individual competitors and partnerships: [REDACTED].<sup>171</sup> These documents show that not all the companies that were considered likely to form part of possible partnerships had SNCF experience. One of these Equans internal documents (a presentation with a pre-assessment of the HS2 Tender opportunity) presents an analysis of these main competitors, and lists all providers that have detailed design accreditation by SNCF: [REDACTED].<sup>172</sup><sup>173</sup> [REDACTED] and Equans notes in this document that it anticipates HS2 Ltd would [REDACTED], which implies, in the context of the document, that [REDACTED] might be used to exert some constraint on pricing, but would otherwise not be considered a threat in terms of winning the HS2 Tender, given the other factors listed in the document such as [REDACTED]; [REDACTED], [REDACTED] and [REDACTED].<sup>174</sup> As mentioned above, [REDACTED] and [REDACTED] and [REDACTED] did not pre-qualify.

(b) A Bouygues internal document, prepared by Colas Rail for the [REDACTED] ahead of the ITT submission to the HS2 Tender, shows Colas Rail monitoring the [REDACTED].<sup>175</sup>

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<sup>171</sup> Equans Annex 19 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN); See also, Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 19.

<sup>172</sup> Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 16.

<sup>173</sup> Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 20.

<sup>174</sup> Equans Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 20.

<sup>175</sup> Bouygues Annex S109.3.004 to the CMA's s109 notice dated 8 April 2022, page 9.

- *Third-party views*

162. In relation to the two other shortlisted providers for the HS2 Tender, evidence from third parties indicates that:

- (a) The Balfour Beatty JV has significant high-speed experience within Europe. Balfour Beatty submitted a prequalification bid in a JV with Vinci, ETF and TSO. Evidence received from [REDACTED] indicates that the Balfour Beatty JV has high-speed experience within Europe, including SNCF design experience, as [REDACTED]. Furthermore, evidence provided by third parties emphasises Balfour Beatty's JV UK presence and experience.<sup>176</sup>
- (b) CREG's bid does not impose a credible constraint on the Parties.[REDACTED].<sup>177</sup> A further response by a competitor [REDACTED] is consistent with this position, [REDACTED].<sup>178</sup> In competitor responses, CREG was either ranked poorly as an alternative or not mentioned at all.<sup>179</sup> For example, one competitor told the CMA that CREG would need to have specific UK based expertise and resources in high-speed electrification to be an effective competitor.<sup>180</sup> The CMA also notes that third-party evidence is consistent with comments in the industry press, which state that CREG has '[no] UK presence or experience and I would imagine no experience of the SNCF OCS system'.<sup>181</sup>

163. HS2 Ltd submitted that only [REDACTED] additional providers submitted prequalification bids<sup>vii</sup>, but each failed to pre-qualify:

(a) [REDACTED].<sup>182</sup>

(b) [REDACTED].

(c) [REDACTED].

164. In general, this evidence shows that [REDACTED] third parties failed to pre-qualify for the current HS2 Tender. because they did not meet either the maximum operational line speed requirement; and/or failed to demonstrate their

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<sup>176</sup> Third-party document titled '[REDACTED]'.

<sup>177</sup> Third-party document titled '[REDACTED]', pages 10-11 and 16.

<sup>178</sup> Third-party response to the CMA's questionnaire.

<sup>179</sup> Third-party responses to the CMA's questionnaire.

<sup>180</sup> Third-party response to the CMA's questionnaire.

<sup>181</sup> See for example: [HS2 shortlists Chinese rail giant for £300m catenary works | Construction Enquirer News](#)

<sup>182</sup> HS2 Ltd's pre-qualification documents provides definitions of these terms and the criteria by which they are to be assessed. See eg HS2 Ltd document titled '[REDACTED]', page 3, where HS2 Ltd indicates that any 'successful OCS Delivery Contractor for the HS2 Tender will be responsible for the design, installation, testing and commissioning of the OCS in open route'.

involvement and technical capability; and/or failed to demonstrate capacity to deliver the OCS scope.

165. Some other providers submitted an expression of interest but not a pre-qualification bid.
166. Competitors' submissions, as set out directly above and in paragraphs 75222, and 91 indicate that previous experience of the SNCF catenary system and UK presence are material requirements to be able to compete credibly for the HS2 Tender. The evidence available to the CMA indicates that only the Parties and the Balfour Beatty JV are currently considered well-positioned to meet these criteria and should be considered effective competitors in the HS2 Tender.
167. The Parties submitted that the main European high-speed OCS providers are [X], [X], [X], [X], [X], [X], [X], and [X].<sup>183</sup> The CMA notes that none of these providers pre-qualified for the HS2 Tender. [X] submitted a pre-qualification bid but failed to progress, [X] submitted an expression of interest in the tender but did not submit a preliminary request to procure for the HS2 Tender, and the remaining competitors did not provide either an initial expression of interest or make a preliminary request to procure for the HS2 Tender.<sup>184</sup>
168. HS2 Ltd confirmed that [X] pre-qualification bid submissions from two companies, both of which were rejected due to their inability to meet maximum operational line speed requirements.<sup>185</sup>
169. The Parties submitted that the CMA had not critically assessed competitors' submissions when evaluating their credibility as alternative suppliers. The CMA notes, however, that the majority of the evidence summarised above relates to the factual question of whether a competitor participated in the HS2 tender, and which stage it reached. The CMA has no reason to doubt this evidence, including because it has been corroborated by HS2 Ltd.
- *CMA's assessment on alternative suppliers*
170. On the basis of the evidence summarised above, the CMA considers that the Parties are two out of the remaining three credible providers capable of winning the HS2 Tender.

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<sup>183</sup> Parties' response to Q2 of the CMA's request for information dated 11 May 2022.

<sup>184</sup> HS2 Ltd document titled [X].

<sup>185</sup> HS2 Ltd document titled [X].



171. [REDACTED].

172. Of the other European high-speed OCS providers mentioned by the Parties and considered above, none of them pre-qualified for the HS2 Tender, meaning that they provide at best a limited constraint for the HS2 Tender, if at all, given that competition for the HS2 Tender is now limited to the final bidders.

*Extent to which harm could occur given the timings of the Merger and the current tender for high-speed OCS in the UK*

173. The HS2 Tender evaluation process would continue after the Merger, based on the Parties' anticipated closing date. The CMA has therefore considered:

(a) whether both Parties could continue to compete in the ongoing HS2 Tender;

(b) whether Keltbray could continue to effectively compete in the HS2 Tender, without Equans as a partner in the Rapide JV; and

(c) whether, and the extent to which, harm to the competitive process could occur at this stage of the HS2 Tender.

- *Whether both Parties could continue to compete in the ongoing OCS HS2 Tender*

174. HS2 Ltd is subject to strict public procurement rules that are designed, among other things, to ensure a level playing field for all tender participants. One provision in HS2 Ltd's tender manual provides that HS2 Ltd does not accept multiple tenders from entities that are part of the same corporate group, and that where this occurs due to a change of circumstance (such as a merger), 'the affected Tenderers are required to jointly propose which of the Tenderers will continue in the procurement'.<sup>186</sup>

175. The Parties submitted that the Merged Entity will remain incentivised to progress each of the bids of Bouygues and Equans after the Merger, because: a) Colas Rail is operationally autonomous from Bouygues and, Bouygues has had [REDACTED] by Colas Rail; and b) after the Merger, the Merged Entity will have [REDACTED] made by the Rapide JV to which Equans is a party (including because this would also require approval from a third party, Keltbray, which will remain incentivised to compete strongly) and that the [REDACTED]

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<sup>186</sup> HS2 OCS Invitation to Tender Manual, paragraph 2.33.

of the Rapide JV supports the view that it should be considered a distinct corporate group and not part of Equans (or in future the Merged Entity).

176. The Parties therefore consider that, in light of this position, it would not be necessary for HS2 Ltd to require one of the Parties' bids to be withdrawn from the process, in spite of HS2 Ltd's tender rules. [REDACTED].<sup>187</sup>
177. [REDACTED], HS2 Ltd confirmed on [REDACTED] that the Parties will be required to withdraw one of their bids should the Merger go ahead.<sup>188</sup> [REDACTED].<sup>189</sup> The CMA notes that, in this scenario, the Merger will result in the withdrawal of one of the Parties' tenders, leading to a reduction in the number of credible firms competing for the HS2 Tender from three to two.
178. The CMA believes that the factors raised by the Parties would not result in them continuing to compete independently in the HS2 Tender following the Merger (and, on that basis, that the Merger should be considered to reduce competition in relation to that tender). In particular:
- (a) First, for the purposes of the Act, Colas Rail is controlled by Bouygues and, as such, part of the same 'enterprise'.<sup>190</sup> Even if measures are put in place to ensure that Bouygues does not participate in the decisions taken by Colas Rail to any degree at all, the CMA considers that it would be artificial to assume that any decisions taken by Bouygues' subsidiaries, which post-Merger would also control Equans, would not be influenced by the interests of their ultimate parent company and controlling shareholder—Bouygues.
  - (b) Second, Equans (through Powerlines and Ineo SCLE) is expected to have a [REDACTED] interest in the Rapide JV and, as such, will exercise at least some level of control over the commercial policy of the JV. The CMA notes that the JV has considerable operational reliance on Equans; Ineo SCLE has SNCF design expertise, which is required to meet HS2 Ltd's expectations in the context of the tender, while Keltbray is [REDACTED] (according to the Parties' own statement).<sup>191</sup>
  - (c) Third, arrangements such as firewalls and ring-fencing mechanisms are unlikely to ensure that competition between the two bids is maintained

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<sup>187</sup> [REDACTED].

<sup>188</sup> [REDACTED]. See also [REDACTED].

<sup>189</sup> [REDACTED]. See also [REDACTED].

<sup>190</sup> As explained in paragraph 4.16 of CMA2Revised, 'Ceasing to be distinct' is defined in section 26 of the Act as two enterprises being brought under common ownership or common control. 'Control' is not limited to the acquisition of outright voting control but may include situations falling short of outright voting control. Section 26 of the Act distinguishes three levels of interest (in ascending order): a) material influence, b) de facto control, and c) a controlling interest (also known as 'de jure', or 'legal' control).

<sup>191</sup> FMN, paragraph 15.121 and 15.122.

under common ownership. In particular, such arrangements would still not prevent the change in the Parties' incentives that the Merger would bring about.

179. The CMA notes, in addition, that, in the event only one of the Merged Entity's bids can continue to participate in the HS2 Tender process, the process allows affected tenderers to choose which bid should continue to participate. The CMA therefore notes that there is no certainty that the 'weakest' bid from HS2 Ltd's perspective would be removed (albeit that the Parties would still have to take into account the risk that putting forward a weaker bid would increase the likelihood that the tender would be lost to a remaining bidder).
180. In response to the Issues Letter, the Parties reiterated that both Colas Rail and Equans are operationally independent of their parent businesses, and that it is unclear why their incentives would change post-Merger.<sup>192</sup> In keeping with the ordinary principles of corporate organisation, the CMA considers that a subsidiary of a broader group is likely to consider the effects of its actions on the interests of its broader corporate group, in light of its parent company's interests in maximising the group's overall commercial success. In addition, while the CMA recognizes that both Parties' OCS businesses may be largely operationally independent and could be ring-fenced, they are still subject to oversight and scrutiny of their decision-making from their parent companies.<sup>193</sup> On this basis, the CMA cannot exclude that the incentives of Colas Rail and Equans' OCS businesses would change as a result of the Merger, to the detriment of competition between them, notwithstanding an absence of operational coordination.
181. The CMA notes that there is some evidence to suggest that the wholly-owned nature of Colas Rail could provide the Merged Entity with an incentive to favour the Colas bid over that of the Rapide JV. In principle, the Merged Entity would extract more revenues from the HS2 Tender through the Colas Rail bid compared to the Rapide JV, where it is anticipated that around [X] of the equity in the business will be held by Keltbray.<sup>194</sup> The CMA considers that the Merged Entity could therefore have a preference to withdraw the JV's bid in favour of Colas Rail's if required to do so by HS2 Ltd.<sup>195</sup>

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<sup>192</sup> Parties' annotated response to the Issues Letter, page 29.

<sup>193</sup> For example, minutes from Equans' SPL Powerlines submitted in response to Section 9 of the FMN, repeatedly discuss the need to [X], and to receive [X].

<sup>194</sup> Parties' response to the CMA's request for information dated 3 May 2022, paragraph 1.3.

<sup>195</sup> This assessment of the Merged Entity's ability to withdraw from the Rapide JV and Keltbray's ability to participate in the HS2 Tender alone would also be relevant in the event that HS2 Ltd allowed both Parties' tenders to proceed and the Merged Entity decided to withdraw the Rapide JV bid unilaterally.

- *Viability of Keltbray as an effective bidder in the OCS HS2 Tender, without Equans as a partner*
182. Equans' participation in the HS2 Tender is through a consortium with Keltbray that will ultimately form the Rapide JV. The CMA has assessed whether Keltbray could continue to compete against the Merged Entity on its own or with another partner.
183. The CMA considers that Equans remains able, in practice, to withdraw from its participation in the Rapide JV consortium.<sup>196</sup> In the event Equans did withdraw from the Rapide JV consortium, Equans and Keltbray have both acknowledged that: (1) Keltbray would not have the necessary capabilities to continue alone, and (2) Keltbray would be unable to find a partner to replace Equans' capabilities within the remaining tender process, including because of the time to qualify or requalify any new partnership.<sup>197</sup>
184. On this basis, the CMA has not, for the purposes of its competitive assessment, considered that it is plausible that the Rapide JV bid could continue to credibly compete for the HS2 Tender in the event that Equans were to withdraw from the JV. The CMA's competitive assessment also takes into account the position that Equans is not 'locked in' to the Rapide JV consortium and would be able to withdraw from the JV or alter its bidding strategy (at least to some extent) post-Merger.
- *Extent to which harm to the competitive process could occur at this stage of the HS2 Tender*
185. The Parties submitted that there is no realistic prospect of an SLC in respect of the ongoing HS2 Tender process, given that, to a significant extent, competition between the Parties has already taken place. On 20 April 2022, each of Colas Rail and the Rapide JV submitted their bids to HS2 Ltd.
186. The Parties consider that competition on key parameters such as technical ability and price has therefore already taken place, and any remaining negotiations with HS2 Ltd will take place within these pre-established parameters. The Parties consider the remainder of the process will involve HS2 Ltd assessing the credibility of the bids they have received and can best be characterised as 'finetuning'.<sup>198</sup> In particular, the Parties stress that

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<sup>196</sup> The CMA notes that: (a) the Rapide JV agreement [REDACTED]. [REDACTED] (see Parties' response to the CMA's request for information dated 25 May 2022, paragraph 1.1. [REDACTED]).

<sup>197</sup> Parties' response to the CMA's request for information dated 3 May 2022, paragraph 3.7; Keltbray response to the CMA's questionnaire.

<sup>198</sup> Parties' Submission on UK catenaries market, page 2.

negotiations would be expected to occur within a very tight timeframe and that [REDACTED].<sup>199</sup>

187. The Parties further submitted that, notwithstanding [REDACTED].
188. HS2 Ltd is in evaluation stage of the specific final tenders submitted on 20 April 2022.<sup>200</sup> While the CMA recognizes that each of 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 amendments. In particular, the CMA understands that, within the remaining HS2 Tender process, [REDACTED].<sup>201</sup>
- (a) [REDACTED];
- (b) [REDACTED]; and
- (c) [REDACTED].
189. The CMA has seen little evidence to support the Parties' submissions that only very limited changes to commercial terms are possible at this stage of the tender process. The Parties' submissions have not substantiated why prices could not increase as a result of future negotiations beyond asserting that the prices indicated in their earlier bids would [REDACTED]. This would, in any event, not exclude the possibility of further competitive activity, as suppliers could be pressed to reduce elements of their bids.
190. The suggestion that there is limited scope for negotiation also appears to be contradicted by a Bouygues internal document, which highlights the importance of late-stage negotiations in HS2 tenders, and considers that Colas Rail expects to achieve its commercial [REDACTED] only through negotiations that would take place at [REDACTED].<sup>202</sup>
191. As regards CREG, [REDACTED], the CMA considers that the evidence suggests that [REDACTED] considers CREG not to be an effective alternative for HS2 Ltd (which is consistent with evidence from other market participants).<sup>203</sup> [REDACTED].

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<sup>199</sup> Parties' annotated response to the Issues Letter, page 34.

<sup>200</sup> HS2 Ltd response to the CMA's questionnaire.

<sup>201</sup> [REDACTED].

<sup>202</sup> Bouygues Annex S109.3.004 to the CMA's s109 notice dated 8 April 2022, [REDACTED]. The CMA notes that this document assesses potential bids for both OCS and sections of track for HS2, but that the quoted text comes immediately after a recommendation [REDACTED], which would include OCS. However, even if the discussion relates only to the track tenders, the CMA considers that it demonstrates the ability of bidders to engage in late-stage negotiations during lengthy tender processes, and that [REDACTED]. The CMA notes that the Parties have not provided the CMA with any concrete explanation as to why they could not attempt to negotiate a higher price with HS2 Ltd in the OCS tender.

<sup>203</sup> [REDACTED] Annex 18 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 20.

192. Therefore, the CMA considers that there is still some scope for negotiation in the HS2 Tender with the current bidders and that such upcoming negotiations may result in material changes to commercial conditions. The CMA therefore considers that it is not the case that competition for the HS2 Tender has effectively concluded and, in turn, that the Merger might lead to a worse outcome in those negotiations by reducing the number of current bidders absent a competitive process.<sup>204</sup>

*Third-party views about the effects of the Merger on the HS2 Tender*

193. The CMA received concerns from two competitors [X] out of six about the effect of the Merger in relation to the current HS2 Tender for the supply of high-speed OCS:
- (a) One competitor stated that ‘SPL and Colas are competitors within the UK high speed OCS and conventional OCS markets. A merger will diminish the competitiveness of the UK market and if they remained as separate entities we would have concerns where they separately bid the same schemes as there would inevitably be issues around conflicts of interest and confidentiality’.<sup>205</sup>
  - (b) Another competitor expressed concerns with the impact of the Merger on the Rapide JV.<sup>206</sup>
194. HS2 Ltd submitted the impact of any change as a result of the Merger to the supply chain within the HS2 Tender will be managed by the procurement process, where in the event the Merger occurs before the contract is awarded, HS2 Ltd would still have competition between at least two tenderers in the process. HS2 Ltd, therefore, does not have any concern regarding the conclusion of its own procurement process for OCS if the Merger were to proceed.<sup>207</sup>
195. In response to the Issues Letter, the Parties submitted that the CMA must properly weigh competitor submissions regarding the Merger’s impact on competition against that of HS2 Ltd, and that HS2 Ltd’s absence of concerns must be assessed in light of its obligation to achieve the most economically advantageous outcome from the HS2 Tender process.<sup>208</sup>

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<sup>204</sup> For the reasons explained above in paragraph 178, the Merged Entity would step into the shoes of Equans in the Rapide JV. The CMA considers that, as the Merged Entity would be parent company of Colas Rail and the [X] in the JV, there would not be rivalry between the Parties during the negotiations.

<sup>205</sup> Third-party response to the CMA’s questionnaire.

<sup>206</sup> Keltbray response to the CMA’s questionnaire.

<sup>207</sup> HS2 Ltd response to the CMA’s questionnaire.

<sup>208</sup> Parties’ annotated response to the Issues Letter, page 36.

196. By way of background, the CMA notes that the assessment of a merger's impact on competition is not driven solely by customer views but instead takes into account the (typically wider) range of evidence that is available to the CMA in a given case. There is no set hierarchy between different types of evidence, and the CMA may attach greater weight to one type of evidence or another based on its relative quality.<sup>209</sup>
197. The weight given to customer views is also likely to vary from case to case, with the weight given to such views likely to depend on factors such as reasons provided to support a customer's position (and the relevance of those reasons for the assessment of competition), as well as any evidence provided to support that position, and any other factors that might influence the customer's views.
198. [REDACTED],<sup>210</sup>[REDACTED]. [REDACTED].
199. The CMA has also taken into account a range of evidence of direct relevance to competitive dynamics in relation to the HS2 Tender from other sources (including internal documents provided by the Parties, internal documents provided by the third parties and views of other market participants with material insight into the HS2 Tender). [REDACTED].

#### *Conclusion on competition for the current HS2 Tender*

200. The Parties are close competitors and are currently competing to supply HS2 Ltd – the only contract in the recent years for the supply of catenary to high-speed in the UK.
201. The Parties are two of only a very limited number of tenderers participating in the HS2 Tender. The CMA considers that the Merger would 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. [REDACTED], CREG is not a credible alternative supplier to HS2 Ltd.
202. Alternatively, in the event that the Parties are 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

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<sup>209</sup> [Merger Assessment Guidelines](#), paragraph 2.25. See too, *Aberdeenn Journals v OFT* [2003] CAT 11, at paragraph 128 ('there is in our view no rule of law which requires the Director to base his case on consumer surveys and market studies if he considers that his case is sufficiently proved by other evidence' and 'In deciding whether the evidence is sufficient, the Tribunal will pay attention to evidence about the attitudes of consumers or users, or the absence thereof, but that is only one element of the Tribunal's assessment of the evidence as a whole').

<sup>210</sup> [REDACTED].

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

203. The CMA notes that it would be difficult, in practice, for HS2 Ltd to introduce a new (or previously eliminated) supplier into the tender process at such an advanced stage.<sup>i</sup> On this basis, the CMA considers that the Merger gives rise to significant competition concerns in relation to the ongoing HS2 Tender.
204. Therefore, the CMA considers that the Merger may raise significant competition concerns in relation to the HS2 Tender, because it will weaken competition between the remaining three credible competitors in the upcoming negotiations for the HS2 Tender and may lead to the removal of the most competitive bid.

#### *Competition for future UK high-speed OCS contracts*

205. In its assessment of competition for future UK high-speed OCS contracts, the CMA considered:
- (a) the Parties' submission on the timeframe for the competitive assessment and the CMA's views;
  - (b) closeness of competition between the Parties; and
  - (c) the competitive constraints from alternative suppliers.

#### *The Parties' submissions on the timeframe for the competitive assessment and the CMA's views*

- *Parties' submissions*

206. The Parties submitted that future high-speed opportunities in the UK (beyond the current HS2 Tender) are expected to be limited and noted that there is still significant uncertainty about whether HS2 Phase 2b will happen.<sup>211</sup> Equans anticipates that the earliest date at which a potential Phase 2b catenary tender could conceivably take place is 2028 to 2030.<sup>212</sup> As such, the Parties submitted that there is no 'market' for future high-speed OCS in the UK since there are no foreseeable tenders.<sup>213</sup>
207. The Parties further submitted that the timeframe for the CMA's competitive assessment in relation to future UK high-speed OCS contracts is

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<sup>211</sup> Parties' Issues Meeting presentation, slide 26.

<sup>212</sup> Parties' Issues Meeting presentation, slide 26.

<sup>213</sup> Parties' Issues Meeting presentation, slide 26.



unreasonably long, given that the CMA's starting point is to conduct its competitive assessment over a time horizon of two years and that, in order to find an SLC for future high-speed OCS, the CMA would need to extend the horizon to at least six to eight years.<sup>214</sup> The Parties also submitted that it would be 'highly unusual / unprecedented' 'to stretch' the time horizon until the next HS2 tender.<sup>215</sup> In particular, the Parties noted that the Competition Appeal Tribunal (**CAT**) had recently stated, in *Meta v CMA*,<sup>216</sup> that it doubted 'if an impairment to dynamic competition that is not thought to manifest itself within five years at the outside can be considered to be an expectation'.

208. The Parties also submitted that, even if HS2 Phase 2b proceeds, there can be no assumption that either the catenary system used for the future tender, in terms of SNCF technology, or the structure of the tender, in terms of running a standalone high-speed OCS tender, will be the same as in the current HS2 Tender.<sup>217</sup>

- *CMA's assessment*

209. The only future high-speed project of which the CMA is aware is HS2 Phase 2b.<sup>218</sup> A hybrid bill for the Western leg was re-introduced to Parliament on 11 May 2022<sup>219</sup> and, although no legislative steps have been taken to that effect at the present date, it cannot be excluded that the Eastern leg will also go ahead. Even if the precise timing of any future tender is uncertain, the CMA considers there is a realistic prospect that competition for these contracts will occur within a time horizon within which it is reasonable for the CMA assess the effects of the Merger on competition.
210. The CMA understands that the Parties' submissions relating to *Meta v CMA* take the position that the judgment supports a general proposition precluding the CMA's ability to carry out a competitive assessment over a longer period. The CMA notes, in this regard, that such a forward-looking approach is widely used in cases involving bidding markets (where tenders might occur relatively infrequently),<sup>220</sup> or where existing contracts limit the extent to which customers are likely to go to market within the near-term future.<sup>221</sup> These

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<sup>214</sup> Parties' Issues Meeting presentation, slide 27.

<sup>215</sup> Parties' annotated response to the Issues Letter, page 38.

<sup>216</sup> [1429/4/12/21 Meta Platforms, Inc. v Competition and Markets Authority](#), [2022] CAT 26, paragraph 105.

<sup>217</sup> Parties' Issues Meeting presentation, slide 28.

<sup>218</sup> See <https://www.hs2.org.uk/what-is-hs2/hs2-in-parliament/>, last accessed 17 June 2022.

<sup>219</sup> See [Phase 2b: Crewe to Manchester - HS2](#) and [Phase 2a: West Midlands to Crewe - HS2](#), HS2 website.

<sup>220</sup> See for example ME/6484-14 Xchanging/Agencyport Software Europe, 2 December 2014, paragraph 103, citing Competition Commission, Tradebe Environmental Services Limited/Sita UK Limited.

<sup>221</sup> The CMA notes that in Cellnex/Hutchinson (anticipated acquisition by Cellnex UK Limited of the passive infrastructure assets of CK Hutchison Networks Europe Investments S.À.R.L, Final Report, 3 March 2022), the CMA's assessment extended well beyond 2031. In that case, the CMA noted that it was 'concerned about

were not the circumstances at issue in *Meta v CMA*, in which the CAT considered the CMA's approach to the assessment of a 'dynamic competition' theory of harm (which is described by the CMA in its guidance as 'where the merger firms compete by making efforts or investments towards entry or expansion (or respond to such efforts made by potential entrants)'<sup>222</sup>).

211. As noted above, the supply of high-speed OCS is characterised by infrequent tenders (given the nature of high-speed rail projects, which are constructed infrequently). The CMA therefore considers that, in line with the approach taken in previous decisions relating to bidding markets, it is appropriate here to assess the relative competitiveness of the different suppliers on a forward-looking basis, even where there is some uncertainty about exactly when the next tender will take place. The evidence available to the CMA does not support the position, particularly within the context of a Phase 1 investigation, that there will be no market for the supply of high-speed OCS in the UK in the future.
212. Within this context, the CMA considers that an assessment beyond 5 years is appropriate.
213. Finally, in relation to the specific structure and catenary system used for any future tender, the CMA considers that [X]the process for procuring high-speed OCS for Phase 2b is likely to be similar to the current tender (although the strategic position has not yet been established), both in terms of an SNCF catenary system being used and high-speed OCS being procured on a standalone basis.<sup>223</sup>
214. As such, the CMA considers that it is appropriate to consider competition for future high-speed OCS in the UK within its assessment of whether the Merger gives rise to competition concerns within the supply of high-speed OCS. While the CMA has considered the impact of the Merger in relation to the ongoing HS2 Tender above, it notes that competition for that tender is likely to provide material insight into the competitive landscape for future bids.

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competitive effects over the long term in a market which had remained and is expected to remain relatively stable over time' with 'major contracts... which are renewed approximately every ten to 20 years, after which MNOs remain committed to their suppliers for most of their sites until the next renewal.' (paragraph 8.14)

<sup>222</sup> Merger Assessment Guidelines, paragraph 3.20.

<sup>223</sup> Third-party email response to CMA questions.

### *Closeness of competition for future UK high-speed OCS contracts*

- *Parties' submissions*

215. The Parties submitted that they are not close competitors, with Powerlines competing much more closely with other established catenary providers such as Balfour Beatty and Amey.<sup>224</sup>

- *CMA's assessment*

216. As the analysis of the HS2 Tender indicates, the Parties are currently close competitors for high-speed OCS contracts. The CMA considers that the Parties will continue to compete closely in the future for any high-speed OCS contracts, in particular because the capabilities that are relevant to compete for the HS2 Tender (eg in relation to experience with the French SNCF catenary product design) are also likely to be relevant for the Phase 2b high-speed OCS works.

### *Competitive constraints for future UK high-speed OCS contracts*

217. In line with the evidence set out above in paragraphs 144 to 148 in relation to the HS2 Tender, the CMA considers that for any possible future tenders, experience in relation to the French SNCF OCS product design will continue to be an important (limiting) factor in whether firms or consortia are able to effectively compete.
218. The CMA notes that it is common industry practice to enter into consortia arrangements to bid for high-speed OCS contracts. The evidence in paragraphs 91 and 75 above indicates that providers are aware of their ability to form JVs to both overcome a) a lack of UK experience and b) a lack of SNCF design experience. The CMA considers that there is limited evidence to suggest that having the capabilities to perform all aspects of the work required (as the Merged Entity will be able to do) will be a material competitive advantage. For that reason, the CMA's competitive assessment focusses on whether a sufficient range of suppliers would be able to bid credibly (most likely in combination) for future high-speed OCS work, by possessing either the design expertise or UK operational experience that would be necessary to do so.

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<sup>224</sup> Parties' submission on UK catenaries market, page 15.

- *Parties' submissions*

219. The Parties submitted that there at least 6 players who could credibly compete for future high-speed OCS opportunities in the UK:<sup>225</sup>
- (a) Alstom;
  - (b) ETF;
  - (c) TSO Caténaires;
  - (d) CREG;
  - (e) Keltbray in the event it wins the current HS2 Tender;<sup>226</sup> and
  - (f) Balfour Beatty, in the event it wins the current HS2 Tender.<sup>227</sup>
220. The Parties also submitted that there are several other providers that, with the right JV partner and/or design subcontractor,<sup>228</sup> could compete credibly for future high-speed OCS opportunities. The providers submitted by the Parties are Siemens, Hitachi, Electren, Elecnor, Strukton and Abengoa.<sup>229</sup>
221. The Parties also submitted that there is a pipeline of European (French) high-speed OCS opportunities over the next 6 to 8 years which will allow players without existing SNCF experience to acquire such experience and therefore become more credible suppliers in the future.<sup>230</sup>

- *Third-party evidence*

222. The CMA considers that third-party evidence is generally consistent with the position that the Parties are likely to face a material number of credible competitors in future high-speed OCS contracts. Evidence from third-parties indicates that Alstom, ETF, and TSO, in particular, would be well-placed to provide the design expertise likely to be necessary to participate in a future tender. For example:

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<sup>225</sup> Parties' Issues Meeting presentation, slide 31.

<sup>226</sup> The CMA does not consider the viability of Keltbray to compete as a high-speed OCS provider any further in its assessment, given that evidence from Keltbray and an assessment of internal documents relating to the Rapide JV indicate that Keltbray [REDACTED].

<sup>227</sup> The CMA does not consider the viability of Balfour Beatty to compete as a high-speed OCS provider any further in its assessment, [REDACTED].

<sup>228</sup> The CMA does not consider this submission further in its assessment, given that an analysis of HS2 Tender bid submissions, indicate that design subcontractors, as mentioned by the Parties, play a limited role in the 'detailed design' of the SNCF catenary system. In particular, one third-party document titled '[REDACTED]', shows that design subcontractor [REDACTED] is only accountable for less than 4% of the total value of the contract and will be led by [REDACTED].

<sup>229</sup> Parties' Issues Meeting presentation, slide 31.

<sup>230</sup> Parties' Issues Meeting presentation, slide 31.

- (a) A competitor ranked Alstom, TSO, and ETF as relatively strong alternatives to the Parties in the context of the current HS2 Tender as they all have high-speed OCS experience with SNCF type catenary systems. By contrast, the same competitor ranked other providers such as SEMI, EFACEC, Siemens and CREG as weak alternatives given the lack of SNCF experience.<sup>231</sup>
  - (b) Another competitor considered that the Balfour Beatty offering in the HS2 Tender is particularly strong, given that it is able to draw on experience of two entities which have design experience of the SNCF system (ETF and TSO). The same competitor considered that CREG had delivered the most high-speed OCS projects but noted that these were in the Chinese market, which led the competitor to view CREG as a weaker alternative.<sup>232</sup>
  - (c) Another competitor considered that both ETF and TSO are strong competitors (given previous SNCF experience in France), and that COBRA (which now forms part of the same corporate group as ETF) is a moderate constraint.<sup>233</sup>
  - (d) Another competitor considered that Alstom is a strong alternative to the Parties and that Alstom has a very strong position in France.<sup>234</sup>
223. The scores provided by OCS suppliers to competitors in the supply of high-speed OCS<sup>235</sup> show that there were five competitors (including the Parties) that scored 4 or 5 in response to the CMA's question asking for a rating of the competitive strength of high-speed OCS suppliers' offerings (where 5 was very strong and 1 was not very strong). The alternative providers to the Parties that received such rankings were Alstom, ETF and TSO.
224. One competitor stated that, if the Merged Entity wins the HS2 Tender (either through Colas Rail or the Rapide JV bid), the Merged Entity would become dominant on high-speed OCS in the UK. This competitor also noted that, after the Merger, the Merged Entity would also have strengthened its position to bid for HS2 Phase 2b (described in paragraph 208 and 209) on a standalone basis without a JV partner (whereas other competitors will need to partner with local UK contractors).<sup>236</sup>

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<sup>231</sup> Third-party response to the CMA's questionnaire.

<sup>232</sup> Third-party response to the CMA's questionnaire.

<sup>233</sup> Third-party response to the CMA's questionnaire.

<sup>234</sup> Third-party response to the CMA's questionnaire.

<sup>235</sup> CMA assessment of third-party responses to the CMA's questionnaires.

<sup>236</sup> Third-party response to the CMA's questionnaire.

225. The CMA notes that winning the HS2 Tender is likely to provide the successful supplier with some form of incumbency advantage in relation to future high-speed OCS in the UK. The extent of this advantage is not clear given the uncertainty around future OCS tenders in the UK. This is, however, a benefit that is likely to accrue to a single supplier irrespective of the Merger, and therefore does not form part of the CMA's assessment of the competition that could be lost as a result of the Merger.
226. In addition, while the Merged Entity will have the ability to bid on a standalone basis without a JV partner (as Bouygues does already), the evidence available to the CMA (including from a variety of market participants) does not suggest that having the capabilities to perform all aspects of the work required (as the Merged Entity will be able to do) will be a material competitive advantage. The CMA notes, in this regard, that two of the four pre-qualified bidders that HS2 Ltd invited to submit final bids, the Rapide JV and the Balfour Beatty JV, are consortia and that both of these players are considered as credible competitors (as described in more detail in paragraphs 150 and 162). There is no evidence, in particular, that the Colas bid has any material advantage as a result of being from a single supplier.

- *Internal documents*

227. The Parties' internal documents contain no material analysis of the expected conditions of competition in future tenders. The Parties' internal documents do, however, consistently monitor a range of suppliers with capabilities to supply OCS (including in the UK). For example, as set out in paragraph 161 above and paragraph 231 below, several of the Parties' documents identify providers that have SNCF experience, including [REDACTED], [REDACTED], [REDACTED], and [REDACTED], as material competitors. There is limited analysis of these suppliers, which in turn limits the extent to which these references can be considered to show that these competitors will exercise a significant constraint on the Parties in the future. The CMA notes, however, that such references are consistent with other evidence obtained by the CMA (including from third parties) in relation to the importance of SNCF experience as an important capability in competing for future tenders for high-speed OCS contracts.

- *CMA's assessment*

228. In the round, the evidence available to the CMA indicates that a range of suppliers would be able to bid credibly (most likely in combination) for future high-speed OCS tenders in the UK, with several possessing either the design expertise or UK operational experience that would be necessary. There is also a range of standard OCS providers with UK operational experience with whom

these providers can partner with, if they do not have an UK OCS presence themselves (see paragraph 233).

229. The CMA considers that there are at least three providers which would be able to provide the design expertise (and, in particular, SNCF experience) to constrain the Parties in future tenders:
- (a) There is strong evidence from both the Parties' internal documents and third parties that Alstom is considered to have significant SNCF experience (as well as some degree of UK operational experience). Both Parties' internal documents indicate that [REDACTED]. Although Alstom did not ultimately pre-qualify for the current HS2 Tender, the CMA understands that [REDACTED], and that this is not considered likely to present a significant impediment to Alstom's ability to bid for future work.<sup>237</sup>
  - (b) There is also strong evidence that TSO would be a strong independent constraint. TSO is participating in the HS2 Tender as part of the Balfour Beatty JV, and the evidence from internal documents, third parties and previous case studies from French high-speed OCS projects indicates that TSO has capabilities to provide the design capabilities that would be required to compete for future UK OCS work.
  - (c) Vinci, which owns both ETF and COBRA, is also considered likely to be a strong independent constraint in the future. While ETF is currently participating in the HS2 Tender as part of the Balfour Beatty JV (ie along with TSO), the evidence from internal documents, third parties and an assessment of previous case studies of French high-speed OCS projects indicates that ETF has the design capabilities that would be required to compete for future UK OCS work (and would be able to do so independently of TSO). Furthermore, the CMA also notes that Vinci acquired COBRA in 2021, further boosting its capabilities to meet the scale that HS2 tenders require.
230. The CMA notes that some of these players have not proceeded to the later stages of the current HS2 Tender process and that, in some cases, the tender process has identified challenges that may need to be overcome in order to compete credibly for future OCS work in the UK. By way of example, HS2 Tender feedback indicates that [REDACTED] would be required to [REDACTED].<sup>238</sup> The CMA considers that such challenges do not appear to be significant for a supplier

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<sup>237</sup> Third-party response to the CMA's questionnaire.

<sup>238</sup> HS2 Ltd document titled '[REDACTED]', page 7 and 8, and HS2 Ltd response to the CMA's questionnaire.

like [X], with a large existing presence in Europe, significant resources, and an established ability to execute SNCF design high speed OCS in France.

231. The CMA notes that there is also some evidence to suggest that two other players, Eiffage Genie Civil UK and Electren, could be able to provide the design expertise (and, in particular, SNCF experience) to constrain the Parties, to some extent, in future tenders (albeit that these suppliers appear to be weaker constraints than Alstom, TSO, and Vinci):

(a) Eiffage Genie Civil UK [X], [X]. Eiffage has one case study in which it carried out high-speed OCS works in France which required SNCF expertise.<sup>239</sup>

(b) Electren [X], but has one case study in which it carried out high-speed OCS works in France which required SNCF expertise.<sup>240</sup>

232. Furthermore, the fact that there will be a relatively long period between the conclusion of the HS2 Tender and any future tenders for high-speed OCS in the UK generally provides an opportunity for suppliers to develop their capabilities in order to compete in any future UK tenders. In particular, the wide use of the SNCF design platform across Europe provides suppliers with opportunities outside the UK to develop the design expertise likely to be required in a future tender.<sup>241</sup> While there is, of course, some uncertainty about whether ‘new’ suppliers (who lack any SNCF experience) would be able to credibly compete for these contracts, they provide opportunities for suppliers with some SNCF experience to broaden their capabilities before the next UK tender.

233. Finally, the CMA considers that there are a range of standard OCS providers with UK operational experience (as assessed in paragraphs 251 to 257 below), with whom the suppliers offering high-speed OCS design expertise that assessed above would be able to partner with for any future high-speed OCS contracts. In doing so, such providers will be able to overcome both high-speed design, as well as scale and UK operational requirements to credibly compete for future high-speed OCS contracts.

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<sup>239</sup> The Parties submitted that Eiffage won a tender for high-speed OCS works in France along the Le Mans – Rennes route. Parties’ response to the CMA’s request for information dated 23 June 2022.

<sup>240</sup> The Parties submitted that Electren won a tender for high-speed OCS works in France along the LGV Atlantique – from Paris to Bretagne/ Le Mans / Nantes. Parties’ response to the CMA’s request for information dated 23 June 2022.

<sup>241</sup> For example, there are at least nine French high-speed OCS projects in which such providers can boost their case study experience to compete more strongly for future high-speed UK OCS tenders. See Annex 1 to the CMA’s request for information dated 23 June 2022.



234. On this basis, the CMA considers there will be sufficient competition to constrain the Parties in relation to any future high-speed OCS contracts in the UK.

*Conclusion on competition for future high-speed OCS contracts*

235. While the outcome of the ongoing HS2 Tender is likely to be relevant to competition for future tenders in this market, the competitive choices available to customers are likely to be different to those that HS2 Ltd currently faces, in particular because of the significant lead-time before the earliest future tender.
236. The CMA notes that it is common industry practice to enter into consortia arrangements to bid for high-speed OCS contracts and that there is limited evidence to suggest that having the capabilities to perform all aspects of the work required (as the Merged Entity will be able to do) will be a material competitive advantage. The CMA considers that a range of suppliers would be able to bid credibly (most likely in combination) for future high-speed OCS work, with several possessing either the design expertise or UK operational experience that would be necessary. On this basis, the CMA finds that the Merger does not give rise to competition concerns in relation to future high-speed OCS contracts.

*Entry and expansion*

237. Entry or expansion of existing firms can in some cases mitigate the initial effect of an acquisition on competition, and may mean that there is no SLC. However, the CMA generally considers that entry and expansion preventing an SLC from arising would be rare.<sup>242</sup>
238. In this case, the CMA's concerns are limited to the current HS2 Tender process. As the tender is already in its final stages, additional entry and expansion is not possible and the CMA therefore does not consider that the SLC may be mitigated by them. As regards competition for future tenders, the CMA has already taken account of competitors' ability to enter and expand into the UK as part of its competitive assessment above, and concluded that there are no competition concerns in relation to future high-speed OCS contracts.

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<sup>242</sup> Merger Assessment Guidelines, paragraph 829.

### *Conclusion on horizontal unilateral effects in the supply of high-speed OCS in the UK*

239. The CMA found that the Merger may raise significant competition concerns as a result of horizontal unilateral effects in relation to the supply of high-speed OCS to HS2 Ltd. The CMA considers that these concerns are limited to the current HS2 Tender and that there would be sufficient competition for any future high-speed OCS tenders in the UK

### ***Horizontal unilateral effects in the supply of standard OCS in the UK***

240. The concern under this theory of harm is that the removal of one party as a competitor may reduce competition between suppliers bidding for current and future tenders for standard OCS in the UK, resulting in worsened contractual terms for the end customer in the current and future tenders.

241. In order to assess the likelihood of the Merger resulting in unilateral effects, the CMA considered:

- (a) shares of supply;
- (b) closeness of competition between the Parties; and
- (c) competitive constraints.

#### *Shares of supply*

242. The Parties submitted that competitor shares for the supply of OCS in the UK are not readily available.<sup>243</sup> The Parties submitted that for major<sup>244</sup> UK catenary projects Equans had a c.[40-50]% share in 2019 and 2020, whilst Bouygues had a [0-5]% share.

243. When considering all UK catenary projects in 2020, the Parties estimate that Equans had a [20-30]% share whilst Bouygues had a [0-5]% share based on a third-party report.<sup>245</sup>

244. The CMA considers, however, that in markets where tender contracts are infrequent and therefore most revenues are generated from only a few contracts, as is the case for standard OCS projects, shares of supply do not provide a useful indication of the Parties' relative competitive strength. The

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<sup>243</sup> Parties' response to request for information dated 15 March 2022, 29 March 2022, paragraph 4.4.

<sup>244</sup> Parties define this as enhancement works (new electrification projects) and renewals with project values over £10 million per annum. Estimates are based on Equans' market knowledge and by examining major projects in the UK that Equans was aware of and estimating competitor revenues (Parties' response to the CMA's request for information dated 15 March 2022, Table 5).

<sup>245</sup> Annex 22 to the FMN, page 54. Market size estimate is based on 'Average market volume for railway electrification 2020' in the UK.

CMA instead considers that an analysis of competition for such contracts is more indicative of OCS providers' competitive strength.

245. As such, the CMA has placed more weight on evidence regarding the closeness of competition for OCS tenders and the extent to which there are other competitive constraints within the context of standard OCS in the UK.

### *Closeness of competition*

246. The Parties submitted that Bouygues is a minor player in OCS in the UK,<sup>246</sup> and was not one of the four suppliers to Network Rail's Electrification Framework Agreement in 2014, nor did it pass the pre-qualification stage for that tender.<sup>247</sup>
247. The Parties also submitted that Equans typically focuses on [REDACTED] electrification projects than Bouygues. Indeed, whilst Bouygues focuses on electrification of [REDACTED], Equans focuses on [REDACTED].<sup>248</sup> Bouygues also focuses on electrification projects in the [REDACTED].<sup>249</sup> This is supported by Network Rail's internal documents that note Bouygues was considered in the tender for CP5 of the Network Electrification Programme (NEP) for [REDACTED] of the six regions (which were concentrated in the South of England), while Equans was considered for [REDACTED] regions across the UK.<sup>250</sup>
248. The Parties' internal documents also indicate that neither Party currently monitors the other particularly closely, compared to other competitors.<sup>251</sup>
249. However, the CMA considers that the Parties' internal documents show that Bouygues, [REDACTED].
- (a) One internal document shows that Bouygues [REDACTED].<sup>252</sup>
- (b) A further internal document shows that Bouygues [REDACTED].<sup>253</sup>
250. Third-party responses were also mixed as to how closely the Parties compete for standard OCS but most noted that Equans, through SPL Powerlines, has a stronger position.

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<sup>246</sup> FMN, paragraph 15.74 and 15.78.

<sup>247</sup> FMN, paragraph 15.79.

<sup>248</sup> FMN, paragraph 15.102.

<sup>249</sup> FMN, paragraph 15.105

<sup>250</sup> Network Rail document titled '[REDACTED]', page 18.

<sup>251</sup> Annex 21 to the FMN, slide 49; Equans Annex 129 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 17 and 18; Bouygues Annex S109.3.041 to the CMA' s109 dated 8 April 2022, slides 17 to 26.

<sup>252</sup> Annex 17 to the FMN, slide 8,9 and 10.

<sup>253</sup> Bouygues Annex S109.3.035 to the CMA' s109 dated 8 April 2022, slide 12.

- (a) One customer stated that Equans was a stronger alternative to Bouygues, than vice versa. However, it also ranked both providers as providing strong alternatives to one another based on factors such as technical methodology and commercial strategy.<sup>254</sup>
- (b) One competitor considered that Equans is a stronger competitor than Colas Rail. Equans is considered to be the market leader in the UK whilst Bouygues is a mid-market provider, with good international but not UK experience.<sup>255</sup>
- (c) Another competitor considered both Parties as equally strong alternatives to one another.<sup>256</sup>
- (d) Another competitor did not view the Parties as competing particularly closely, stating that it has never bid against Bouygues in projects for Network Rail, in contrast to Equans, which was awarded contracts as part of CP5.<sup>257</sup>

### *Competitive constraints*

- 251. The CMA considered whether there are alternative suppliers which would provide a competitive constraint on the Merged Entity in relation to standard OCS in the UK.
- 252. The Parties submitted that there are a large number of competitors that will constrain the entity post-Merger, including Balfour Beatty, Amey, Alstom, Babcock, Costain, Keltbray, and VolkerRail.<sup>258</sup>
- 253. The Parties' internal documents are consistent with the position that there are a number of potentially strong alternative providers to service standard OCS mainline projects in the UK.
  - (a) An Equans internal documents mentions [REDACTED], [REDACTED] and [REDACTED] as part of an 'overview of Competition in UK' with respect to electrification works.<sup>259</sup> The same document [REDACTED].<sup>260</sup>
  - (b) An ENGIE document also indicates that [REDACTED].<sup>261</sup>

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<sup>254</sup> Third-party response to the CMA's questionnaire.

<sup>255</sup> Third-party response to the CMA's questionnaire.

<sup>256</sup> Third-party response to the CMA's questionnaire.

<sup>257</sup> Third-party response to the CMA's questionnaire.

<sup>258</sup> Parties' Submission on UK catenaries market, paragraph 2.9.

<sup>259</sup> Annex 21 to the FMN, slide 49.

<sup>260</sup> Annex 21 to the FMN, slide 50.

<sup>261</sup> Equans Annex 19 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN).

(c) Bouygues' internal documents do not generally monitor other providers extensively in relation to standard OCS projects in the UK. However, one internal document, in relation to electrification works for Network Rail as part of the [REDACTED] opportunity, indicates that Bouygues expects competition for such projects from [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].<sup>262</sup>

254. An internal document from a customer Network Rail in relation to a previous tender for a standard OCS project is consistent with the Parties' position that there are a number of alternative suppliers competing in the NEP framework for UK electrification projects. In particular, seven competitors ([REDACTED]) are all identified as alternative providers that were considered as part of CP5.<sup>263</sup>

255. As part of the tender process for CP5, which assessed both technical capabilities and commercial offerings (amongst other factors) across providers, the CMA notes that SPL Powerlines (at the time in a JV with Carillion) achieved an overall evaluation score of at least [REDACTED] and that Colas Rail achieved an overall evaluation score of at least [REDACTED]. In this regard, the CMA has considered the overall evaluation scores of the following providers as compared to SPL Powerlines scores in CP5 to assess the extent to which they constitute strong alternatives:<sup>264</sup>

(a) [REDACTED] are all considered to be strong alternatives relative to SPL Powerlines as part of the tender process. For example, in the final NEP summary of results, in relation to technical and commercial offering, including collaborative assessment:

(i) [REDACTED] attained at least [REDACTED]% scores across all the regions it submitted a tender for [REDACTED].

(ii) [REDACTED] achieved at least [REDACTED]% scores in all [REDACTED] regions it submitted a bid for.

(iii) [REDACTED] attained at least [REDACTED]% scores in all [REDACTED] regions it submitted a bid for.

(b) [REDACTED] appear to be mid-market alternatives, where scores of at least [REDACTED]% were achieved in all [REDACTED] regions they submitted bids for. However, in contrast to [REDACTED], they did not win the tender in any of the regions.

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<sup>262</sup> Annex 1 to the Parties' Submission on UK catenaries market.

<sup>263</sup> Network Rail document titled '[REDACTED]'.

<sup>264</sup> Network Rail document titled '[REDACTED]'.

(c) [X] appear to be weaker constraints, scores of [X]% were achieved in all [X] regions where they submitted bids.

256. This analysis is also consistent with Network Rail's response to the CMA's market questionnaire and anticipation of alternatives available for CP7.<sup>265</sup>
257. Furthermore, competitor responses also indicated that there are a variety of alternatives which may constrain the Merged Entity. The alternatives included Amey, Balfour Beatty, Volker Rail, Alstom, Babcock, Keltbray, and Siemens.<sup>266</sup>

*Conclusion on horizontal unilateral effects in the supply of standard OCS in the UK*

258. For the reasons set out above, the CMA found that Bouygues is a relatively recent entrant in the UK, [X]. The Parties do not appear to be particularly close competitors, and there are several well-established players in the UK. Furthermore, even if Bouygues, would have, absent the Merger, competed more extensively for the CP7 work, there will remain several other well-established players in the UK.
259. Accordingly, the CMA considers that the Merger does not raise competition concerns as a result of horizontal unilateral effects in relation to the supply of standard OCS in the UK.

***Horizontal unilateral effects in the supply of hard FM services to healthcare customers in the UK***

260. The concern under this theory of harm is that the removal of one party as a competitor may reduce competition between providers supplying hard FM services to healthcare customers in the UK.
261. In assessing whether the Merger raises competition concerns in the supply of hard FM services to healthcare customers in the UK, the CMA considered:
- (a) shares of supply;
  - (b) closeness of competition;
  - (c) other competitive constraints; and
  - (d) the future of public healthcare FM post-PFI.

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<sup>265</sup> Network Rail response to the CMA's questionnaire.

<sup>266</sup> Third-party responses to the CMA's questionnaire.

262. As mentioned above, the Parties' supply of hard FM services to healthcare customers is largely through PFI contracts, therefore the focus of the competitive assessment is on PFI contracts. However, in keeping with the forward-looking approach adopted in most merger control investigations, the CMA has considered, as part of its competitive assessment, how PFI contracts will evolve in the future.

### *Shares of supply*

#### *Parties' submissions*

263. The Parties estimated that the total market size for hard FM revenues in relation to healthcare PFI contracts in the UK was c. £[~~8~~] million in 2021 (including revenues from both hard FM only contracts and the hard FM component of TFM contracts). As such, the Parties estimated that their combined share in 2021 (based on revenues from both hard FM only contracts and the hard FM component of TFM contracts) was around [20-30]%, with an increment of around [5-10]% being brought about by the Merger.<sup>267</sup>

#### *CMA's assessment*

264. In relation to the analysis above, the CMA has been unable to verify all the assumptions that underly the Parties' market size estimates for healthcare PFI FM contracts.<sup>268</sup>
265. Nevertheless, the CMA has attempted to reconstruct market shares for the supply of hard FM only services to healthcare PFI customers, as well as for the supply of TFM services to healthcare PFI customers based on competitors' direct revenues for 2021. As the CMA did not receive a response from three of the less sizeable competitors ([~~8~~]), the market sizes may underestimate the total market size and, therefore, the estimated market shares should be considered an upper bound:
- (a) For the supply of TFM services to healthcare PFI customers, the CMA estimates that the Parties have a combined share of [20-30]%.
  - (b) For the supply of hard FM-only services to healthcare PFI customers, the CMA estimates that the Parties have a combined share of [40-50]%.

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<sup>267</sup> Parties' submission in relation to public healthcare PFI FM services (hard) dated 7 June 2022.

<sup>268</sup> In particular, Bouygues has made assumptions about the average revenue allocated to both the Hard FM and Soft FM component of contracts, whilst also estimating the proportion of such contracts which have a Soft FM and Hard FM component.

266. Furthermore, the CMA has also received data from the IPA, which tracks the total number of PFI healthcare FM projects in the UK. Based on such data, the CMA estimates that the Parties account for [20-30]% of all current hard PFI healthcare FM projects in the UK (where Equans accounts for [10-20]% and Bouygues accounts for [5-10]%).

### *Closeness of competition*

#### *Parties' submissions*

267. The Parties have submitted that given the historic market context and the long-term nature of the PFI contracts, the following distinctions should be made in terms of how suppliers can compete for PFI contracts.

(a) **Primary PFI market** – this is the market for new PFI projects. 86% of PFI contracts were signed before 2010,<sup>269</sup> and the supply of new projects for public healthcare PFI is very limited.<sup>270</sup>

(b) **Secondary PFI market** – this is where existing PFI projects are re-tendered due to:

- (i) benchmarking provisions in the existing contract. Benchmarking terms provide for a price adjustment every five to seven years. If the revised benchmark cannot be agreed with the incumbent supplier, the contract is market tested.<sup>271</sup> Benchmarking provisions are typically only included for soft FM services and only a small number of PFI contracts require hard FM services to be benchmarked every 10 years.<sup>272</sup>
- (ii) incumbent supplier's insolvency – such as the insolvency of Carillion;<sup>273</sup>
- (iii) termination based on performance.<sup>274</sup>

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<sup>269</sup> FMN, paragraph 13.21.

<sup>270</sup> FMN, paragraph 13.20 and 21.

<sup>271</sup> FMN, paragraph 13.11.

<sup>272</sup> FMN, paragraph 13.38(iii). The Parties are only aware of [§] where hard FM services have been benchmarked.

<sup>273</sup> FMN, paragraph 13.39. Carillion was a major supplier of construction and FM services, which went into liquidation in 2018. As a result of this process, other FM suppliers stepped-in to provide the services that Carillion had been providing, with a number of customers reallocating work through secondary tenders.

<sup>274</sup> FMN, paragraph 13.38.



268. The Parties also submitted that they are [X] of the other competitors involved in the Secondary PFI market space and therefore neither Party is aware of having to ‘defend’ its contract from the other.<sup>275</sup>

*Recent Secondary PFI market opportunities*

269. With respect to the Primary PFI market for healthcare FM customers, opportunities for new PFI contracts became rare, mainly after 2014 and, as a result, there has not been competition between the Parties and their competitors for these opportunities.<sup>276</sup> As such, in the analysis below, the CMA focuses on the extent to which the Parties compete closely in relation to the Secondary PFI market for hard FM opportunities for healthcare customers **(Secondary PFI market opportunities)**.
270. Within these Secondary PFI market opportunities, the Parties submitted that there have been three opportunities in which both Parties participated since the collapse of the former PFI healthcare FM provider Carillion, in 2018:<sup>277</sup>
- (a) [X], a hard PFI FM tender in Secondary PFI market where both Parties participated but were unwilling to provide services to the customer due to the difficult terms of the contract. The Parties submitted that they were unaware of which other providers competed for this opportunity.
  - (b) [X], a hard PFI FM tender in the Secondary PFI market from 2016 in which the Parties were the [X] suppliers that progressed to the ‘Best and Final Offer Stage’, with [X] ultimately winning the contract.<sup>278</sup>
  - (c) [X], a hard FM tender which was tendered outside of the PFI framework in which both Parties participated. [X] was eventually selected as the provider but was later replaced by [X].<sup>279</sup> The Parties submitted that they were unaware of which other providers competed for this opportunity.
271. While it was not possible to precisely quantify the total number of Secondary PFI market opportunities in recent years, evidence from third parties consistently suggests that there have been only a limited number of opportunities.<sup>280</sup> On this basis, the fact that the Parties overlapped in only a small number of [X] tenders cannot, by itself, be taken to mean that they are not close competitors.

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<sup>275</sup> Parties’ response to the CMA’s request for information dated 6 May 2022, paragraph 4.1.

<sup>276</sup> Parties’ response to the CMA’s request for information dated 6 May 2022, paragraph 3.1 to 3.3.

<sup>277</sup> Parties’ response to the CMA’s request for information dated 6 May 2022, paragraph 4.1.

<sup>278</sup> Parties’ response to the CMA’s request for information dated 6 May 2022, paragraph 8.6.

<sup>279</sup> Parties’ response to the CMA’s request for information dated 6 May 2022, paragraph 10.6 and 10.7.

<sup>280</sup> Third-party response to the CMA’s questionnaire.

272. Furthermore, in addition to Secondary PFI market opportunities, the Parties also submitted that the insolvency of Carillion was a unique disruption to the market. The Parties submitted that ‘step in’ arrangements were made, where both of the Parties were active in such arrangements with:
- (a) Bouygues being awarded [REDACTED] healthcare PFI (hard) FM projects as part of the process – [REDACTED].
  - (b) Equans being awarded [REDACTED] healthcare PFI (hard) FM project as part of the process – [REDACTED].
273. Other suppliers of healthcare FM services that were active with ‘step in’ arrangements were Serco, Equans, Vinci Facilities, Skanska, Mitie, and Robertsons.<sup>281</sup>

#### *Internal documents*

274. The Parties’ internal documents provide mixed evidence on the extent to which they compete closely in relation to PFI healthcare FM contracts. Some internal documents indicate that the Parties are strong competitors for FM services in the UK.<sup>282</sup> For example, in one Bouygues document, Bouygues notes that Equans is [REDACTED] in the UK with regards to FM.<sup>283</sup> However, other documents mention a wider set of competitors in relation to healthcare FM customers. For example, one Equans document sets out the strengths and weaknesses of the top [REDACTED] competitors in healthcare FM (see 280(b)), with there is no specific focus on Bouygues than the other competitors mentioned in the same document.<sup>284</sup>

#### *Third-party views*

275. The CMA also received mixed evidence from customers on the extent to which the Parties compete closely in the supply of hard FM only services to healthcare PFI customers.
- (a) One SPV considered that Bouygues and Equans were two of the biggest, most capable and scalable FM providers, particularly for healthcare PFI projects.<sup>285</sup> The SPV also considered Bouygues and Equans are stronger and more focused historically on hard FM, but noted that there are very

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<sup>281</sup> FMN, paragraph 13.39, ii).

<sup>282</sup> See for example, Bouygues Annex S109.3.027 to the CMA’s s109 notice dated 8 April 2022, slide 13.

<sup>283</sup> Bouygues Annex S109.3.027 to the CMA’s s109 notice dated 8 April 2022, slide 13.

<sup>284</sup> Equans Annex 125 to the CMA’s s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), slide 4.

<sup>285</sup> Note of call with a third party.

few new opportunities to compete for in terms of Secondary PFI market opportunities.<sup>286</sup>

- (b) Another SPV indicated that Bouygues and Equans offer similar solutions to tenders.<sup>287</sup>
- (c) Another SPV indicated that both Equans and Bouygues are very strong providers of hard FM only services to healthcare PFI customers.<sup>288</sup>
- (d) Another SPV indicated that both Equans and Bouygues are very strong providers of hard FM only services to healthcare PFI customers, as both have strong track records and experience within the hard FM service delivery.<sup>289</sup>
- (e) Another SPV considered that Bouygues and Equans have not competed directly against each other in tenders for market tested services across its entire portfolio of contracts in healthcare.<sup>290</sup>
- (f) Another SPV stated that Equans is not particularly strong in relation to Secondary PFI market opportunities, where Bouygues is stronger but not on its 'go-to list'.<sup>291</sup>
- (g) NHS trusts that responded to the CMA's questionnaire did not have sufficient knowledge or oversight of the FM services to comment on the closeness of competition between the Parties.

276. The majority of competing providers of FM services indicated that Bouygues and Equans directly compete for Secondary PFI market opportunities.<sup>292</sup>

### *Conclusion on closeness of competition*

277. Based on the evidence above, the CMA considers there is a significant degree of competitive interaction between the Parties. The Parties have competed against each other in several recent tenders, but do not appear to appear against each other with a high degree of frequency, and many customers do not regard the Parties as close alternatives.

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<sup>286</sup> Third-party response to the CMA's questionnaire.

<sup>287</sup> Note of call with a third party.

<sup>288</sup> Third-party response to the CMA's questionnaire.

<sup>289</sup> Third-party response to the CMA's questionnaire.

<sup>290</sup> Note of call with a third party.

<sup>291</sup> Third-party response to the CMA's questionnaire.

<sup>292</sup> Third-party responses to the CMA's questionnaire; Note of call with a third party; Note of call with a third party.

278. The extent to which the Parties will compete closely in relation to the supply of hard FM only services to healthcare PFI customers once PFI is phased out is discussed below at paragraphs 286 to 303.

### *Competitive constraints*

#### *Parties' submissions*

279. The Parties submitted that there are a number of providers of hard FM only services to healthcare PFI customers that will be able to constrain the Merged Entity, in particular Mitie, Serco, Galliford Try, Kier, Robertsons, Skanska, and Vinci.<sup>293</sup>

#### *Internal documents*

280. The Parties' internal documents indicate that there are some other providers that the Parties consider as competitors in the supply of of hard FM only services to healthcare PFI customers.

(a) A Bouygues internal document notes that [X], [X], [X], [X], and [X] are their main competitors in FM at a global level.<sup>294</sup> In particular, Bouygues appears to consider [X] and [X] as very strong competitors. For example:

- (i) [X] is considered to be 'the largest UK competitor' where 'they are highly competitive and highly commercial'.
- (ii) [X] is considered to be 'very technically competent... with an aggressive pricing policy followed by a strong commercial push... very aggressive at the moment in all markets'.

(b) An Equans internal document which sets out its [X] competitors in the healthcare FM space, in addition to [X], [X], [X], [X], and [X].<sup>295</sup> The strengths and weaknesses of each competitor are summarised in the document:

- (i) [X] strengths are its ability to respond at scale to new opportunities quickly, whilst its weakness is a heavy reliance on its supply chain.

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<sup>293</sup> Parties' response to the CMA's request for information dated 6 May 2022, paragraph 6.3.

<sup>294</sup> Bouygues Annex S109.3.027 to the CMA's s109 notice dated 8 April 2022, slide 13 and 7.

<sup>295</sup> Equans Annex 125 to the CMA's s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN).

- (ii) [REDACTED] strengths are its ability to offer a one stop shop approach to FM, whilst its weakness is that it is mostly seen as a regional provider with a focus on Scotland and North England.
- (iii) [REDACTED] strengths are its brand name and track record in healthcare FM, whilst its weakness is that there is a both a financial and cultural integration cost post its [REDACTED].
- (iv) [REDACTED] strength is its increased ability to undertake lifecycle works to complex buildings in-house, whilst its weakness is that FM may not be its specialty.

### *Third-party views*

281. Third-party views of customers and competitors are consistent with the position that there are a number of credible alternatives to the Parties in relation to Secondary PFI market opportunities.
- (a) Mitie has been ranked consistently by competitors, SPVs and some NHS trusts as being a very strong competitor to the Parties in relation to Secondary PFI market opportunities.<sup>296</sup>
  - (b) CBRE, although not currently active in the Secondary PFI market opportunities space, was mentioned by four competitors as a particularly strong competitor in the supply of hard FM services to healthcare customers due to its technical expertise.<sup>297</sup> CBRE also indicated that it has extensive experience of successfully delivering hard FM services in acute healthcare environments for many of their existing customers and has the capabilities required to win public healthcare contracts in the PFI secondary market.<sup>298</sup>
  - (c) Serco has previously competed for supply of hard FM only services to healthcare PFI customers. and has a significant offering in the supply of soft FM services to healthcare PFI customers.<sup>299</sup> A number of SPVs indicated that Serco has a strong presence in the supply of hard FM only services to healthcare PFI customers.<sup>300</sup> An internal document from another third party also states that [REDACTED].<sup>301</sup>

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<sup>296</sup> Third-party responses to the CMA's questionnaire; Third-party responses to the CMA's questionnaire.

<sup>297</sup> Third-party responses to the CMA's questionnaire.

<sup>298</sup> Third-party response to the CMA's questionnaire.

<sup>299</sup> Third-party response to the CMA's questionnaire.

<sup>300</sup> Third-party responses to the CMA's questionnaire.

<sup>301</sup> Third-party document titled '[REDACTED]', slide 15.

- (d) Sodexo has a limited offering in the supply of hard FM only services to healthcare PFI customers but has a significant offering in the supply of soft FM services to healthcare PFI customers. Three competitors ranked Sodexo as moderate in strength as an alternative to the Parties.<sup>302</sup> Furthermore, Sodexo was ranked by two SPVs as providing a moderate strength alternative to the Parties.<sup>303</sup> An internal document from another third party also states that Sodexo [X].<sup>304</sup>
- (e) ISS has been ranked consistently as a moderate constraint across the majority of both SPV and competitor responses to the CMA's questionnaire. In particular, although ISS's activities in the supply of hard FM only services to healthcare PFI customers are limited, they have a material offering in the supply of TFM services to healthcare PFI customers.
- (f) Robertson FM's activities are concentrated towards the North East of England and it is regarded as a moderate constraint within this limited geographic coverage.<sup>305</sup>
- (g) Kier was regarded as a moderate strength competitor by two SPVs,<sup>306</sup> but was not mentioned by competitors in response to the CMA's questionnaire.
- (h) With respect to both Vinci and Skanska, the CMA's investigation indicates that although they have a legacy presence in relation to the supply of hard FM only services to healthcare PFI customers, they are no longer active within the sector, where such healthcare hard FM contracts are not their focus anymore.<sup>307</sup>

282. In addition to the providers listed above, with the exception of CBRE, data from the IPA further indicates that there are a number of other both national and regional players active in the supply of hard FM only services to healthcare PFI customers.<sup>308</sup> The IPA data indicates that the following providers are active despite being smaller competitors: Rydon, Accuro FM, Bellrock FM, and Walker FM. This is consistent with the Parties' submissions in relation to those regional providers having capabilities to provide such services and therefore posing a competitive constraint on the Parties.

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<sup>302</sup> Third-party responses to the CMA's questionnaire.

<sup>303</sup> Third-party responses the CMA's questionnaire.

<sup>304</sup> Third-party document titled '[X]', slide 15.

<sup>305</sup> Third-party responses to the CMA's questionnaire; third-party response to the CMA's questionnaire.

<sup>306</sup> Third-party responses to the CMA questionnaire.

<sup>307</sup> Third-party responses to the CMA's questionnaire.

<sup>308</sup> Based on CMA analysis of data submitted by the IPA.

283. In addition, a number of competitors that provided comments on the effect of the Merger noted that there was a high degree of concentration in the supply of hard FM only services to healthcare PFI customers.

*Conclusion on competitive constraints*

284. Based on the evidence above, the CMA considers there are a number of credible suppliers for Secondary PFI market opportunities that could constrain the Parties post-Merger up until the phase out of PFI. In particular, both the Parties' internal documents and third-party evidence support the position that at least Mitie and CBRE have the capabilities to be strong competitors to the Parties for hard FM healthcare customers, including in relation to PFI contracts, given their experience, technical capability, scale and financial strength. In addition, Serco, Sodexo and ISS are likely to pose a moderate constraint on the Parties, because of their experience and/or scale. Other suppliers, including regional suppliers, pose only a weak constraint on the Parties in relation to larger PFI contracts.
285. As noted above, the phase-out of the PFI framework will likely result in changes to public healthcare bodies' procurement strategies. For this reason, an assessment of the competitive constraints that the Parties face at present may not fully reflect the nature of the constraints that they are likely to face in future. The impact of these changes is considered further below.

*Future of hard FM services to healthcare customers post-PFI*

286. As noted in paragraph 58, it is now Government policy that there will not be any new PFI projects and the CMA found that market participants are planning for the expiry of the PFI contracts (and considering and implementing their strategies on this basis).
287. On this basis, when existing PFI contracts come to the end of their term, healthcare customers (NHS Trust) will have a range of options available to them, including:
- (a) extending the PFI contract;
  - (b) insourcing all or some of the FM services provided under the PFI contract;  
or
  - (c) contracting directly with a FM provider outside of the PFI structure.
288. Depending on which option each NHS Trust takes when it re-tenders its hard FM services, the contracts may become less onerous (for suppliers) than the current PFI contracts, which could, in principle, increase the incentives of

existing suppliers to compete and encourage additional entry by FM providers not currently active in the healthcare space. The CMA has therefore considered what changes to commercial models might occur post-PFI and how this could affect competition.

### *Parties' submissions*

289. The Parties submitted that PFI contracts have a greater contractual risk profile compared to non-PFI contracts, which means that PFI FM suppliers need more legal and commercial resources.<sup>309</sup> The Parties further submitted that post-PFI contracts will have a lower financial risk associated with them:
- (a) Once PFI comes to an end, NHS Trusts will shift contracting service providers on a three-to-ten-year term with options for extensions and/or breaks, rather than the 25+ contract lengths for PFI contracts.<sup>310</sup>
  - (b) Post-PFI contracts will be less onerous and not include the requirement to provide parent company guarantees.<sup>311</sup>
290. The Parties submitted that these changes to healthcare FM contract terms will increase competition for post-PFI contracts,<sup>312</sup> and open up the market to smaller service providers that are more comfortable with traditional contracting, but who have not historically participated in PFI contract.<sup>313</sup>
291. However, the Parties also submitted that the level of maintenance and reporting is more intense in a PFI environment, and some Trusts may want to see some of these components of PFI contracts embedded in their existing contracts.<sup>314</sup>

### *Third-party views*

292. The evidence received by the CMA indicates that the contract structure for post-PFI healthcare FM contracts is likely to change due to the removal of the SPV in the contracting structure.<sup>315</sup> This change in contracting structure would likely simplify the contracts for FM providers removing the onerous payment mechanisms and performance oversight the SPVs provided.

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<sup>309</sup> Parties' updated submission in relation to public healthcare facilities management services (hard) dated 10 June 2022, paragraph 1.10.

<sup>310</sup> FMN, paragraph 13.63 (iv).

<sup>311</sup> FMN, paragraph 13.63 (vii).

<sup>312</sup> FMN, paragraph 13.63 (vii).

<sup>313</sup> FMN, paragraph 13.63 (vi).

<sup>314</sup> FMN, paragraph 13.51.

<sup>315</sup> Third-party responses to the CMA's questionnaire; Third-party response to the CMA's questionnaire.



293. While several NHS Trusts did not have sufficient oversight and knowledge to comment, one thought that competition would stay the same,<sup>316</sup> another thought competition would reduce due to providers exiting,<sup>317</sup> but most expected the phase out of PFI contracts could allow more providers to compete.<sup>318</sup>
294. Generally, SPVs<sup>319</sup> and competitors<sup>320</sup> also considered that the phase out of PFI contracts would increase the level of competition for healthcare FM services.
295. The CMA also considered whether the Parties may still have an advantage in competing for post-PFI healthcare customer from their experience in providing hard FM services to healthcare PFI customers. The CMA found that such an advantage, in relation to healthcare FM contracts, would not be significant within the circumstances of the market at issue. While some NHS trusts considered that healthcare FM experience will be important when choosing providers post-PFI,<sup>321</sup> third parties in general did not consider that previous experience from having a hard FM PFI contract with a particular healthcare customer would give the current supplier of that customer an incumbency advantage, when the PFI contract end.<sup>322</sup> Furthermore, in-house supply (discussed below) is a viable option for at least some healthcare customers.

*Competitive constraints from non-PFI alternative suppliers and in-house supply*

296. The Parties submitted that the end customers are the same in both PFI and non-PFI healthcare FM contracts – ie the NHS Trusts – and noted that the core services provided and the skills needed to deliver the services are largely identical. Any differences are minor and will not impact the make-up of the service delivery team.<sup>323</sup> This is consistent with evidence that the CMA received from FM competitors,<sup>324</sup> and [X].<sup>325</sup>

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<sup>316</sup> Third-party response to the CMA's questionnaire.

<sup>317</sup> Third-party response to the CMA's questionnaire.

<sup>318</sup> Third-party responses to the CMA's questionnaire;

<sup>319</sup> Note of a call with a third-party; note of a call with a third-party; and Third-party response to the CMA's questionnaire.

<sup>320</sup> Third-party response to the CMA's questionnaire.

<sup>321</sup> See for example, third-party responses to the CMA's questionnaire,

<sup>322</sup> See for example, third-party responses to the CMA's questionnaire; third-party responses to the CMA's questionnaire.

<sup>323</sup> Parties updated submission in relation to public healthcare facilities management services (hard) dated 10 June 2022, paragraph 1.10.

<sup>324</sup> Third-party response to the CMA's follow up to questionnaire; Third-party responses to the CMA's questionnaire.

<sup>325</sup> Note of a call with third-party.

297. The Parties also submitted that the competitors for the supply of FM services to healthcare non-PFI customers are the same as those for PFI customers as well as ‘a large number of additional competitors’.<sup>326</sup> The additional competitors mentioned by the Parties include CBRE, Spie, Graham Asset Management, Lorne Stewart and regional/smaller players as listed on the NHS SBS framework for hard FM services.<sup>327</sup> The Parties’ submissions in this regard are also supported by evidence submitted by some third Parties.<sup>328</sup>
298. The CMA considers that the competitors listed in paragraph 281 would also constrain the Merged Entity in relation to the supply of hard FM services to healthcare non-PFI customers. In particular, both Mitie and CBRE are also strong alternatives to the Parties for such contracts. The CMA considers that the removal of the SPV in the contracting structure and other anticipated changes to the contract terms with the end of the PFI model will likely simplify the contracts and can make the supply more attractive, including to providers such as Serco, Sodexo and ISS. These (and possible other providers) would likely provide a stronger constraint for non-PFI contracts than for PFI contracts.
299. The Parties submitted that further to the constraint posed by other FM providers, [X]% of the [X] hard FM healthcare PFI contracts will likely be insourced post-PFI.<sup>329</sup> This is supported by one Equans’ internal document, in which Equans notes that in-house supply was an alternative for a hard FM PFI tender for [X].<sup>330</sup>
300. This is also supported further by an internal document from a third party which notes that of the current healthcare FM market (both hard and soft FM), in-sourcing currently makes up around [X]%, with outsourcing at [X]%, with the split staying ‘fairly stagnant’ over the last few years.<sup>331</sup> The same third party also noted that:
- (a) Many NHS Trusts lack the knowledge or expertise to take the services in-house, but some Trusts have set up wholly owned subsidiaries to manage their FM services.<sup>332</sup>

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<sup>326</sup> Parties updated submission in relation to public healthcare facilities management services (hard) dated 10 June 2022, paragraph 2.5.

<sup>327</sup> Hard Facilities Management 2 (Hard FM), NHS Shared Business Services, available here: [Hard Facilities Management 2 \(Hard FM\) - NHS SBS](#).

<sup>328</sup> Third-party responses to the CMA’s questionnaire.

<sup>329</sup> Parties updated submission in relation to public healthcare facilities management services (hard) dated 10 June 2022, paragraph 4.18.

<sup>330</sup> Equans Annex 88 to the CMA’s s109 notice dated 8 April 2022 (as set out in Annex 061 to the FMN), page 6.

<sup>331</sup> Third-party document titled ‘[X]’, page 14.

<sup>332</sup> Third-party document titled ‘[X]’, page 22.

- (b) The NHS Property Services (NHSPS), which accounts for around [REDACTED]% of the total NHS estate, has been insourcing some of its hard FM services over the last few years [REDACTED].<sup>333</sup>
301. It is unclear, however, whether those customers that currently outsource their hard FM services would be able to easily switch to insourcing:
- (a) Responses from NHS Trusts were mixed about whether they would consider insourcing hard FM services post-PFI. Many note that their existing contracts still have many years to run and therefore have not decided what approach they will take, whilst some noted that insourcing may be an option in the future.<sup>334</sup>
- (b) Competitors indicated that, in general, NHS Trusts could consider insourcing at least some of the FM requirements. However, the CMA has received mixed responses from competitors as to what type of FM services NHS Trusts would insource, with some considering hard FM services may be insourced while others thought soft FM services were more likely to be insourced.
302. The CMA considers that post-PFI, some NHS Trusts may insource some or all of their hard FM requirements, which would provide a further constraint to the Parties, but it is unclear whether this alternative is a possibility and would meaningfully constrain the Parties, in relation to most or at least some NHS Trusts, especially in relation to some healthcare hard FM services.
303. Even if in-house supply may not be an alternative to some NHS Trusts, the CMA considers that the Parties will face sufficient competition from a number of suppliers of hard FM services to healthcare customers, including from some competitors that currently do not compete for these services, in the context of PFI contracts.

*Conclusion on horizontal unilateral effects in the supply of hard FM services to healthcare customers in the UK*

304. For the reasons set out above, the CMA found that the Parties have competed to a material extent in the relatively limited number of recent tenders for hard FM contracts. The CMA also found, however, that a number of credible alternative suppliers pose a significant competitive constraint on the Parties,

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<sup>333</sup> Third-party document titled '[REDACTED]', page 14. NHSPS accounts for about [REDACTED]% of the total NHS estate (See: <https://www.property.nhs.uk/about-us/>.)

<sup>334</sup> Third-party responses to the CMA's questionnaire.

including suppliers active nationally (eg Mitie, CBRE, Serco, Sodexo, and ISS) and, to a lesser extent, competitors present in certain regions of the UK.

305. The CMA also found that the phase-out of the project finance initiative (**PFI**) framework will likely result in changes to public healthcare bodies' procurement strategies. This is likely to increase competition for the supply of hard FM services to healthcare customers (by increasing the incentives of existing suppliers to compete and encouraging additional entry by FM).
306. As such, the CMA considers that the Merger does not raise competition concerns as a result of horizontal unilateral effects in the supply of hard FM services to healthcare customers in the UK.

## **Conclusion on substantial lessening of competition**

307. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger may be expected to result in an SLC, as a result of horizontal unilateral effects affecting current competition, in the supply of high-speed OCS to HS2.

## **Decision**

308. Consequently, the CMA believes that it is or may be the case that (i) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in an SLC within a market or markets in the United Kingdom.
309. The CMA therefore believes that it is under a duty to refer under section 33(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.<sup>335</sup> The Parties have until 26 July 25 2022<sup>336</sup> to offer an undertaking to the CMA.<sup>337</sup> The CMA will refer the Merger for a phase 2 investigation<sup>338</sup> if the Parties do not offer an undertaking by this date; if the Parties indicate before this date that they do not wish to offer an undertaking; or if the CMA decides<sup>339</sup> by 2 August 2022 that there are no reasonable grounds for believing that it might accept the undertaking offered by the Parties, or a modified version of it.

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<sup>335</sup> Section 33(3)(b) of the Act.

<sup>336</sup> Section 73A(1) of the Act.

<sup>337</sup> Section 73(2) of the Act.

<sup>338</sup> Sections 33(1) and 34ZA(2) of the Act.

<sup>339</sup> Section 73A(2) of the Act.

**Colin Raftery**  
**Senior Director, Mergers**  
**Competition and Markets Authority**  
**19 July 2022**

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<sup>i</sup> HS2 Ltd has subsequently clarified that it would in fact be contrary to the HS2 Tender rules set out in the invitation to tender for HS2 Ltd to introduce a new supplier or re-introduce an eliminated supplier.

<sup>ii</sup> 'Equans' global turnover in the financial year 2021 was approximately [REDACTED], of which approximately [REDACTED] was generated in the UK.' should be read as 'Equans' global turnover in the financial year 2021 was approximately [REDACTED], of which approximately [REDACTED] was generated in the UK.'

<sup>iii</sup> HS2 Ltd have clarified that the HS2 Tender took place through the negotiated procedure, not an open procedure.

<sup>iv</sup> 'Rapide JV document sent to HS2 Ltd titled [REDACTED]' should be read as 'Rapide JV document sent to HS2 Ltd titled [REDACTED]'

<sup>v</sup> This date has been corrected in this decision to 28 July 2021 to correct a typographical error originally stating 18 July 2021.

<sup>vi</sup> As a general observation, HS2 Ltd has further clarified that SNCF design experience is not evaluated as a specific requirement at tender evaluation stage, nor is it a mandatory pre-qualification criterion.

<sup>vii</sup> HS2 Ltd has clarified that prequalification bids are formally known as requests to participate.