EUROPEAN COMMISSION
DG Competition

Case M.10575 - BOUYGUES / EQUANS

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Decision on the implementation of the commitments - Purchaser approval

Date: 28/09/2022

EUROPEAN COMMISSION

Brussels, 28.9.2022
C(2022) 7019 final

PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Bouygues S.A.
32, avenue Hoche
75008 Paris
France

Dear Sir or Madam,

Subject: Case M.10575 – BOUYGUES / EQUANS
Approval of EQOS Energie Deutschland GmbH as purchaser of the Divestment Business following your letter of 5 September 2022 and the Trustee's opinion of 9 September 2022

1. FACTS AND PROCEDURE

(1) By decision of 19 July 2022 (the "Decision") based on Article 6(1)(b) in connection with Article 6(2) of Council Regulation No 139/2004[1], the Commission declared the operation by which Bouygues S.A. ("Bouygues", France) acquired, within the meaning of Article 3(1)(b) of the Merger Regulation, sole control of Equans S.A.S. ("Equans", France) compatible with the internal market, subject to conditions and obligations (the "Commitments"). Bouygues and Equans are together referred to as "the Parties".

[1] OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

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(2) In particular, the Commitments provide for the divestment of Colas Rail Belgium, a Belgian legal entity, currently wholly owned by Bouygues, which is active in installation and maintenance of catenaries and overhead contact lines and tracks works in Belgium, excluding any liability for the Liège Tramway Project under the terms described in Schedule 2 to the Commitments attached to this Decision ("the Divestment Business").

(3) The Divestment Business includes, as described in Schedule 1 to the Commitments:

- (a) all tangible and intangible assets necessary to provide catenary and overhead contact line installation and maintenance services as well as track installation and maintenance services, including a real estate site, machinery, and software programmes;
- (b) licenses, permits and authorisations necessary for the tendering for and execution of catenary and overhead contact line engineering and rail works projects, as well as quality and security certifications;
- (c) customer contracts for any ongoing and future catenary and overhead contact line installation and maintenance as well as track works projects;
- (d) customer accounts, credit and other records held by Colas Rail Belgium;
- (e) the personnel included in Table 2 of Schedule 1 to the Commitments;
- (f) Key personnel, notably Colas Rail Belgium's CEO, CFO, and COO; and
- (g) transitional arrangements for a number of products and services.

(4) By email of 5 September 2022, the Parties proposed EQOS Energie Deutschland GmbH ("EQOS", Germany) for approval by the Commission as purchaser of the Divestment Business and submitted the proposed Share Purchase Agreement dated 2 September 2022 and related agreements (the "Proposed Agreements"). The acquisition of the Divestment Business by EQOS will be referred to as the "Proposed Transaction".

(5) In its reasoned opinion dated 9 September 2022 (the "Reasoned Opinion"), received by the Commission on 12 September 2022, the Monitoring Trustee Alcis Advisers (the "Trustee") has assessed EQOS' suitability as a purchaser and, in particular, has indicated that it fulfils the criteria of the purchaser requirements in section D of the Commitments attached to the Decision. In its Reasoned Opinion, the Trustee also indicated that, on the basis of the Proposed Agreements, the Divestment Business would be sold in a manner consistent with the Commitments.

2. ASSESSMENT OF THE PROPOSED PURCHASER

2.1. Legal framework

(6) Pursuant to paragraph 17 of the Commitments, the Commission has to verify that the purchaser fulfils the purchaser criteria and that the Divestment Business is being sold in a manner consistent with the Commitments.

(7) According to paragraph 16 of the Commitments, in its assessment of the proposed purchaser, the Commission should ensure in particular that:

(a) the Purchaser is independent of and unconnected to the Notifying Party[2] and its Affiliated Undertakings;

(b) the Purchaser has the financial resources, proven expertise in railway infrastructure and incentives to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;

(c) the acquisition of the Divestment Business by the Purchaser is neither likely to create, in light of the information available to the Commission, *prima facie* competition concerns, nor to give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

2.2. Description of the proposed purchaser

(8) EQOS is a German-based multinational group specializing in the construction, maintenance and optimization of infrastructure solutions in the areas of railway technology, overhead line construction, energy, communications, industrial technology and engineering. EQOS' activities began in 1920 within ENERGIE Gesellschaft für elektrische und industrielle Unternehmungen mbH, a company founded by Wilhelm Blättchen in Stuttgart (Germany), which later became ALPINE-ENERGIE (in 2002 following a joint-venture with ALPINE Bau GmbH in Austria), then EQOS Energie (in 2014, following its takeover by Triton).

(9) EQOS is currently wholly owned by funds advised and managed by Triton. Triton is an international investment firm founded in 1997, which invests primarily in German-speaking countries, the Nordic countries, the Benelux region, France, Italy, Spain and the United Kingdom, and focuses on medium-sized businesses operating in the Industrial, Business Services and Consumer/Health sectors.

(10) EQOS is present in 40 locations across 5 countries: Germany, Austria, France, Belgium and Luxembourg and employs approx. 1,600 employees (80% of which in technical professions, i.e., engineering and installation service). EQOS' activities are organized under 4 business units, including high-voltage (overhead) powerline construction, energy technology, communication technology and railway technology.

(11) The Railway Technology business unit employs approx. […] FTEs across Germany, Austria, and Belgium and is active in construction, installation, and maintenance of overhead contact lines (catenary systems) for tramways and/or long-distance railway, including technical equipment.

(12) In Belgium, EQOS has been active in local transportation for more than 15 years and currently employs […] FTEs. EQOS possesses all required certificates to perform construction works in relation to catenaries and overhead contact lines, including a qualification in Category H2 Class 8, meaning that EQOS is technically capable of performing catenaries and overhead contact line installation services in Belgium.

2 All capitalised terms used in this decision shall have the meaning as set out in the Decision or in the Commitments, as the case may be, unless otherwise specified.

2.3. Independence from the Parties

(13) Pursuant to paragraph 16(1) of the Commitments, in order to be approved by the Commission, the Proposed Purchaser must be independent from and unconnected to the Notifying Party and its Affiliated Undertakings.

(14) According to the information provided by the Trustee in the Reasoned Opinion, there is no direct or indirect capital interest between EQOS and the Parties, nor between EQOS' and the Parties' Affiliated Undertakings. EQOS also does not share any executive or non-executive directors with the Parties.[3]

(15) According to the Trustee, EQOS does not have any commercial relationships with any of the Parties, or the Parties' Affiliated Undertakings.[4]

(16) On the basis of the information provided by the Notifying Party and taking into account the Reasoned Opinion, the Commission considers that the Proposed Purchaser is independent from and unconnected to the Notifying Party and its Affiliated Undertakings.

2.4. Financial resources, proven expertise and incentive to maintain and develop the Divested Business as a viable and active competitor

(17) Pursuant to paragraph 16(2) of the Commitments, in order to be approved by the Commission, the Proposed Purchaser must have the financial resources, proven expertise in railway infrastructure and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.

(18) The Trustee submits, in its Reasoned Opinion, that the Proposed Purchaser has sufficient financial resources, proven expertise and incentives to maintain and develop the Divestment Business as a viable and active competitive business.

Financial resources

(19) According to its most recent audited annual report and financial statements, EQOS' turnover for the year 2021 was EUR […] and it had an EBITDA of EUR […] and a net profit of EUR […].

(20) The total funding needed to successfully complete the acquisition of the Divestment Business will amount to EUR […]. The Trustee notes that no significant additional funding from EQOS will likely be required, as the Divestment Business is cash-generating and, therefore, largely self-financing. If nonetheless required, EQOS would be capable and willing to provide complementary funding to the Divestment Business.[5]

(21) The Trustee submits that EQOS has steadily grown its sales and managed to significantly increase its EBITDA in the last three years. EQOS demonstrates a sound financial and cash position and plans to fund the Proposed Agreements solely with its available cash, without raising any bank debt nor applying for any

[3] See Reasoned Opinion, paras. 53 *et seq*.
[4] See Reasoned Opinion, para. 55.
[5] See Reasoned Opinion, para. 96.

subsidies for this purpose. The Trustee has not identified any risk affecting EQOS' payment capabilities and concludes that EQOS' financial resources are more than sufficient to maintain and develop the Divestment Business.[6]

Proven expertise in railway infrastructure

(22) EQOS has extensive and proven experience in the railway technology business in Germany, Austria and Belgium. According to the Trustee, EQOS relies on a well-equipped fleet of catenary installation equipment and holds all necessary certificates and qualifications to operate in the market for installation and maintenance of catenaries and overhead contact lines in Belgium.[7] The Trustee further submits that EQOS has a track record of successful railway electrification projects, including in Belgium.[8] The management of EQOS is considered by the Trustee to possess sufficient expertise and resources to provide support to the Divestment Business for its growth and viability.[9] Based on the above, the Trustee concludes that EQOS possesses sufficient proven expertise and experience to successfully complete the acquisition of the Divestment Business and to develop and maintain it.[10]

Incentive to maintain and develop the Divestment Business

(23) According to the Trustee, EQOS intends to expand its activities in the railway business, as well as its overall activities in Belgium.[11] In Belgium, EQOS is currently active mainly on the tramway segment and the Proposed Agreement will allow EQOS to expand in the long-distance rail segment, as well as to diversify its portfolio by entering the market for track construction.

(24) On the basis of the information provided by the Notifying Party and taking into account the Reasoned Opinion, the Commission considers that the Proposed Purchaser has the financial resources, proven expertise in railway infrastructure and incentives to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other rivals.

2.5. Absence of prima facie competition problems

(25) Pursuant to paragraph 16(3) of the Commitments, the acquisition of the Divestment Business by the Proposed Purchaser must not be likely to create prima facie competition concerns, nor give rise to a risk that the implementation of the Commitments will be delayed.

(26) In light of the information provided by the Parties and the Trustee in its Reasoned Opinion, the Proposed Transaction does not create *prima facie* competition concerns.

(27) The Decision defined national markets for the provision of installation and maintenance services for catenaries and overhead contact lines, excluding third rail

6 See Reasoned Opinion, paras. 99 *et seq*.
7 See Reasoned Opinion, para. 59.
8 See Reasoned Opinion, para. 62.
9 See Reasoned Opinion, para. 93.
10 *Ibid*.
11 See Reasoned Opinion, para. 107 *et seq*.

systems.[12] The Decision considered, but ultimately left open, a potential further segmentation by type of customer (long-distance versus metropolitan rail).

(28) EQOS is currently active in catenary and overhead contact line installation and maintenance services in Belgium (primarily in the metropolitan rail segment) as well as, to a very limited extent, on the upstream level of the manufacturing and supply of catenary equipment.

(29) First, the implementation of the Commitments leads to a horizontal overlap between the Divestment Business' and EQOS' activities in catenary and overhead contact line installation and maintenance in Belgium.

(30) In its Reasoned Opinion, the Trustee notes that EQOS' and the Divestment Business' main activities are complementary,[13] as in fact, EQOS generates 90% of its revenues from catenaries and overhead line installation and maintenance activities in the metropolitan rail (tramway) segment,[14] whereas the Divestment Business is active only in the long-distance rail segment.[15]

(31) The Trustee further submits[16] that the combined market share of EQOS and the Divestment Business on the overall market comprising both long-distance and metropolitan rail will remain below [40-50]%, with a share increment below [5-10]% for each of the last three financial years. While in 2019-2020 and 2022 (YTD), the combined share was around [30-40]% (with an increment between around [5-10]%), the combined market share in 2021 was [30-40]% due to exceptional performance of the Divestment Business under two distinct framework contracts (the share increment having remained at only [5-10]%).[17] The Trustee notes that the significant combined share post-Transaction stems mainly from the Divestment Business' already significant market presence of [20-30]-[30-40]% over the last three years.

(32) In addition, EQOS and the Divestment Business will continue to face at least four large competitors in Belgium including Bouygues/Equans, Mobix, Strukton and Eiffage Duchêne with individual market shares between [5-10]% and [20-30]% each.

(33) Second, although the implementation of the Commitments technically also leads to a vertical relationship between the Divestment Business' catenaries installation

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12 M.10575 – Bouygues / Equans, paras. 25, 29.

13 The combination of EQOS' and the Divestment Business' complementary activities *prima facie* does not lead to conglomerate effects, as services in the potential segments for (i) long-distance rail and (ii) metropolitan rail are typically procured by different customers through separate tender procedures, see Decision, para. 23.

14 See Reasoned Opinion, para. 148.

15 See Reasoned Opinion, exhibit 11. EQOS and the Divestment Business therefore do not overlap on the potential segment for metropolitan rail. On the potential segment for long-distance rail, EQOS' individual market shares were below [0-5]% in each of the last three financial years. EQOS' and the Divestment Business' combined market shares in this segment ranged from [30-40]% in 2019, to [30-40]% in 2021.

16 See Reasoned Opinion, para. 157 *et seq*.

17 The exceptional character of production volumes for both projects was due to exceptional production levels in 2021 under both contracts. Forecast production levels under both contracts are significantly lower for 2022. Based on Eqos' and the Divestment Business' turnover data for H1 2022, the Trustee notes a return as of 2022 to historical average combined market share levels of around [30-40]%, see Reasoned Opinion, para. 157.

services in Belgium and EQOS' upstream activities as regards the manufacturing and supply of catenary equipment, the Commission notes that EQOS' market shares in catenary equipment manufacturing and supply on an EEA level remain below [0-5]% on the narrowest possible markets. Furthermore, EQOS does not supply catenary equipment in Belgium. The Proposed Transaction therefore does not give rise to *prima facie* concerns as regards this vertical relationship.

(34) There is no regulatory approval required for completion of the Proposed Transaction apart from the Commission's approval of EQOS as the Divestment Business' purchaser.

(35) On the basis of the information provided by the Notifying Party and taking into account the Reasoned Opinion, the Commission concludes that the acquisition of the Divestment Business by EQOS is neither likely to create *prima facie* competition concerns, nor give rise to a risk that the implementation of the Commitments will be delayed.

2.6. Conclusion on the Purchaser Criteria

(36) In light of the above considerations and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that EQOS meets the Purchaser Criteria set out in paragraph 16 of the Commitments.

3. ASSESSMENT OF THE PROPOSED AGREEMENTS

(37) The Proposed Agreements comprise (i) the Share Purchase Agreement ("SPA"), covering the sale of shares and the transfer of the Divestment Business to EQOS excluding any liability for the Liège Tramway Project, and (ii) the Transitional Services Agreement ("TSA"), which regulates the transitional services to be provided to the Divestment Business by Bouygues or any of its subsidiaries to EQOS, to ensure the operational continuance of the Divestment Business and to facilitate its smooth transfer to EQOS.

(38) According to the Trustee[18], in its Reasoned Opinion, the SPA describes the Divestment Business in accordance with the Commitments as comprising all assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business. It further comprises all licenses, permits and authorizations issued for the benefit of the Divestment Business, all contracts, leases, commitments and customer orders of the Divestment Business, as well as records of the Divestment Business and its personnel.

(39) As regards the exclusion of any liability of the Divestment Business in relation to the Liège Tramway Project, the Trustee submits[19] that the SPA accurately reflects the Commitments. According to the SPA, Bouygues shall indemnify the Proposed Purchaser against any actual loss borne by the Divestment Business in connection with the construction or maintenance of the Liège Tramway Project. Such commitment is not limited by any cap, de minimis or deductible, nor otherwise qualified in the SPA. The amount of losses shall be computed under customary standards, taking into account any net cash profit benefitting the Divestment

[18] See Reasoned Opinion, para. 173.
[19] See Reasoned Opinion, para. 190 *et seq*.

Business in connection with the Liège Tramway Project. [Details of hold-harmless mechanism][20].

(40) Based on the above considerations, the Trustee deems the SPA consistent with the Commitments.[21]

(41) The TSA provides for a transitional period of up to two years after closing of the SPA in which Bouygues will provide certain limited corporate support services to the Divestment Business, ensuring its uninterrupted operation. The Trustee submits that, from an operational point of view, the Divestment Business is largely functioning on a stand-alone basis. To the extent that any of such corporate support services cannot be assumed immediately at Closing of the SPA by EQOS, Bouygues will continue offering them to the Divestment Business on terms and conditions equivalent to those at the time of the Decision. The Trustee submits that the TSA provisions ensure that the links between the Divestment Business and Bouygues will be as limited in time and scope as possible. The Trustee further submits that EQOS will commit to keep the transitional period as short as possible and will ensure that the Divestment Business will have appropriate replacement service providers. Therefore, the Trustee deems the TSA consistent with the contents and the purposes of the Commitments.[22]

(42) In light of the above considerations, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that the Proposed Agreements are consistent with the Commitments and that, accordingly, the Divestment Business is being sold in a manner consistent with the Commitments.

4. CONCLUSION

(43) On the basis of the above assessment, the Commission approves EQOS as a suitable purchaser for the above-mentioned reasons.

(44) On the basis of the Proposed Agreements, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.

(45) This decision only constitutes approval of the proposed purchaser identified herein and of the Proposed Agreements. This decision does not constitute a confirmation that Bouygues has complied with its Commitments.

(46) This decision is based on Section D of the Commitments attached to the Commission Decision of 19 July 2022.

For the Commission

(Signed)
Olivier GUERSENT
Director-General

20 [Confidential].

21 See Reasoned Opinion, para. 220.

22 See Reasoned Opinion, para. 221 *et seq*.