BOUYGUES GROUP INTERNAL CHARTER ON REGULATED AGREEMENTS

INTERNAL CHARTER

INTRODUCTION

The present charter (the "Charter") reflects the regulatory framework applicable to unregulated and regulated agreements, as in force further to the Pacte law of 22 May 2019.

The Charter (i) summarises the scope of application of the control procedure for regulated agreements; and (ii) provides clarification on the procedure used in the Bouygues group (the "Group") to determine whether or not a new agreement qualifies as "regulated", and if necessary to submit that agreement to the authorisation procedure required by law.

The Charter applies to all French companies with in the Group. In preparing the Charter, reference was made to the report on regulated agreements issued by the Compagnie Nationale des Commissaires aux Comptes – "CNCC" (French statutory auditors' board) (see Appendix 1), and to recommendations issued by the Autorité des Marchés Financiers – "AMF" (French financial markets authority)[1].

The Charter is available on the Bouygues website.

I – SCOPE OF APPLICATION OF THE CONTROL PROCEDURE

A. Group entities covered by the regulations

The "regulated agreements" regime applies to Group entities in any of the following legal forms:

- *Société Anonyme* – "SA" (public limited company);
- *Société en Commandite par Actions* – "SCA" (partnership limited by shares);
- *Société par Actions Simplifiée* – "SAS" (simplified limited company);
- *Société À Responsabilité Limitée* – "SARL" (private limited company) and *Entreprise Unipersonnelle à Responsabilité Limitée* – EURL (private limited company under sole ownership);
- *Société Civile* (civil law partnership);
- non-trading private-law entities carrying on a business (Article L. 612-5 of the French Commercial Code).

The "regulated agreements" regime does not apply to entities in the form of a *Société en Commandite Simple* (limited partnership), *Société en Nom Collectif* – "SNC" (general partnership), or Economic Interest Groupings (EIGs) with a commercial purpose.

[1] Proposal No. 4.1 of AMF Recommendation 2012-05 of 2 July 2012 (amended on 5 October 2018), recommending that the charter should define the criteria adopted by the company when adapting CNCC guidance on regulated agreements to reflect its specific circumstances, in agreement with the company's statutory auditors.

B. Agreements subject to control procedures

1. Regulated agreements

A "regulated agreement" is any agreement contracted between:

- **The company and, directly or through an intermediary** (as defined in section 3 below):
  - its Chief Executive Officer;
  - a Deputy Chief Executive Officer;
  - a member of its Board of Directors (including legal entities);
  - the standing representative of any of its directors;
  - any of its managing directors or managing partners;
  - any shareholder holding more than 10%[2] of the voting rights or, in the case of a corporate shareholder, the company that controls that corporate shareholder within the meaning of Article L. 233-3 of the French Commercial Code (or any company included in the chain of control of that company).

- **The company and any person with an indirect interest** (as defined in section 2 below) and

- **The company and any undertaking with a "senior executive in common"** (as defined in section 4 below).

If an agreement is contracted with another company under the control of the same parent (i.e. with a sister company), it is necessary to determine whether the parent company has an indirect interest in the agreement (in which case the agreement must be subject to the regulated agreements control procedure), as this does not automatically apply.

2. Indirect interest

Under the French Commercial Code, the control procedure applies not only to agreements between the company and its senior executives or shareholders, but also where a senior executive or shareholder is not party to an agreement but has an indirect interest in it.

The Group recommends using the definition of "indirect interest"[3] proposed by the AMF[4]: "A person is regarded as having an indirect interest in an agreement to which they are not a party if they derive or are likely to derive benefit from the agreement by virtue of their links with the parties, or their power to influence the behaviour of the parties".

For example, an indirect interest was held to exist in the following circumstances: a CEO who gets his company to guarantee the commitments of another company of which he is Chairman, insofar as that guarantee supported him in his position as Chairman, enabling him to remain in office and to receive remuneration and benefits for doing so.
Each indirect interest must be assessed on its own merits.

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[2] Shares with double voting rights, voting right certificates, and treasury shares must be taken into account when determining if the 10% voting rights threshold is met.
In the case of a private limited company (SARL), agreements between the company and any of its shareholders are covered, regardless of the percentage interest held.

[3] Under the French Commercial Code, the concept of "indirect interest" does not expressly apply to companies in the form of a simplified limited company (SAS) or private limited company (SARL).

[4] Proposal No. 4.2 in AMF Recommendation No. 2012-05 of 5 October 2018.

3. Intermediary

An “intermediary” is any natural person or legal entity that enters into an agreement with the company where the actual beneficiary of the agreement is a corporate officer or shareholder of that company.

Interpreting whether or not a person is an “intermediary” is solely a matter for the courts ruling on the merits. For example, the courts have ruled that a chairman's spouse was an intermediary, as was a nominee who had acquired company assets through funds provided by a senior executive with whom the company had refused to deal directly.

The presence of an intermediary only points to the existence of an indirect interest, which explains why the courts use both of these concepts cumulatively.

4. Senior executives in common

The control procedure for regulated agreements is not limited to contracts between the company and its senior executives or shareholders.

Article L. 225-38 of the French Commercial Code also covers agreements between a limited company and another undertaking in cases where a senior executive or director of the company is the owner or unlimited liability partner of the undertaking in question, or more broadly is a senior executive of that undertaking.

These regulations also apply to agreements between a French company and a foreign undertaking[5].

The concept of “senior executives in common” is defined broadly. For a public limited company (SA), it covers:

- within the company itself: directors, Chief Executive Officers, Deputy Chief Executive Officers, and members of the Management Board or Supervisory Board; and

- within the undertaking that is party to the agreement: directors, Chief Executive Officers, Deputy Chief Executive Officers, managing directors or partners, members of the Management Board or Supervisory Board, and more generally any senior executive of that undertaking. If the undertaking is a simplified limited company (SAS), it includes the Chairman and other senior executives (whose status will depend on how the SAS is organised).

Agreements between a public limited company (SA) and another undertaking also require prior authorisation by the Board of Directors if any senior executive of the SA (director, Chief Executive Officer, Deputy Chief Executive Officer, member of the Management Board, etc) is also the **owner**[6] or **unlimited liability partner**[7] of the undertaking.

[5] CNCC Bulletin, December 2004, page 706.
[6] The term “owner” covers the owner-manager of a single-person undertaking, but it could reasonably be extended to other roles (such as a senior executive of a public limited company (SA), simplified limited company (SAS) or private limited company (SARL) who also owns a majority of that company’s capital).
[7] In practice, this applies to a partner in a general partnership (SNC) or civil law partnership, or to the managing partner in a limited partnership.

C. Unrestricted agreements not subject to the procedure

Under Article L. 225-39 of the French Commercial Code, the following are not subject to control procedures:

- agreements relating to "***ordinary transactions and contracted on an arm's length basis***", as defined below; and

- agreements contracted between **"*two companies where one holds, directly or indirectly, the entire share capital of the other*"**, *after deducting (where applicable) the minimum number of shares needed to comply with the requirements of Article 1832 of the French Civil Code or Articles L. 225-1 and L. 226-1 of the French Commercial Code.*

This means that any agreement between a parent and a virtually 100%-owned direct or indirect subsidiary is exempt from the "regulated agreements" regime, because there is no risk of a conflict of interest. This exemption applies even when there are senior executives in common.

D. Prohibited agreements

"*Directors other than legal entities are prohibited from contracting any form of loan from their company, from being granted an overdraft by their company via a current account or other means, and from getting the company to guarantee or stand surety for their commitments to third parties, and any contract to such effect shall be null and void... The same prohibition shall apply to the Chief Executive Officer, Deputy Chief Executive Officers, and standing representatives of corporate directors.*" (Article L. 225-43 of the French Commercial Code).

To facilitate intra-group transactions, this prohibition does not apply to legal entities.

By extension, the prohibition also applies to the spouse, ascendants and descendants of the senior executives listed above, and to any person acting as intermediary

E. Transactions subject to specific controls

The control procedure for regulated agreements does not apply to arrangements for which the legislator has stipulated a specific control procedure.

This applies in particular to some corporate reorganisations (mergers, demergers, and asset-for-share exchanges that qualify as demergers for legal purposes), which are within the competence of general meetings under a specific provision (Article L. 236-1 of the French Commercial Code) and are not subject to the control procedure for regulated agreements. In the case of asset-for-share exchanges that do not qualify as demergers for legal purposes, the procedure would appear not to apply to the company receiving the assets, because the exchange valuation must be approved by an extraordinary general meeting of its shareholders. However, the procedure is applicable to the company contributing the assets, because its shareholders are not required to approve the exchange at an extraordinary general meeting[8].

[8] ANSA (French national association of public limited companies) memorandum, April-June 1999, 3006.

The same applies for determining the remuneration of the Chairman, Chief Executive Officer and Deputy Chief Executive Officers, which is in principle exempt from the Article L. 225-38 procedure even though it is within the sole competence of the Board of Directors under Articles L. 225-47 and L. 225-53 of the French Commercial Code.

Companies whose securities are admitted for trading on a regulated market must submit the remuneration of their executive officers and directors to an annual shareholder vote (ex ante and ex post), under the "say on pay" procedure.

II – THE BOUYGUES GROUP PROCEDURE FOR CLASSIFYING AGREEMENTS

A. Criteria for identifying agreements relating to ordinary transactions and contracted on an arm's length basis.

How should "ordinary transactions contracted on an arm's length basis" be interpreted?

1. Ordinary transactions

"Agreements relating to ordinary transactions" could appear to warrant an extremely broad interpretation, given the very general nature of the wording.

Numerous case law decisions have sought to set the limits of this definition. Of course, it depends on the facts of each case, so differences in interpretation are possible; however, there is broad consensus on the key elements.

The *Cour de Cassation* (French Supreme Court) has held that transactions are "ordinary" if (i) they fall within the company's corporate purpose as defined in its articles of association and are customary for that company or (ii) they are carried out by the company in the ordinary course of business and (in the case of transfers of property) are contracted on terms sufficiently customary to equate to usual transactions.

The *Cour de Cassation* has also held that agreements that are unique in nature are inconsistent with classification as "ordinary transactions".

And a transaction that is usual for a company ceases to be "ordinary" if that transaction has exceptional financial implications.

At the very least, consistency and continuity should be applied when interpreting this concept at the level of each company.

2. Arm's length basis

The purpose of the regulations is to exempt from the control procedure agreements where the terms offered to the co-contracting party are not more favourable than those that would be offered to a third party.

"Arm's length basis" is therefore generally defined as "terms comparable to those ordinarily granted by the company, or by another company in the same sector, for the same type of transaction."

So in assessing whether an agreement is on an arm's length basis, the first step is to compare its financial terms with a market price or customary market terms. Case law also refers to the "balance of reciprocal benefits", which suggests a need to refer not just to the price itself but also to the broader terms and conditions (such as payment terms, guarantees or termination clauses).

3. Agreements with minor or major financial implications

Agreements with only minor financial implications can be assumed in most cases to be "ordinary" transactions and hence exempt from the control procedure, as long as (i) the small financial consideration paid reflects arm's length terms and (ii) the agreement does not have major financial implications for the co-contracting parties. In other words, a prudent approach is required. It is for the Legal Affairs department of each business segment to assess the situation in practice, depending on the company involved and the materiality threshold for "minor financial implications".

Conversely, a prudent approach to agreements with major financial implications would involve ensuring that in most cases they are subject to the control procedure.

4. Intra-group agreements

Do the agreements customarily entered into between companies in the same group qualify as "ordinary transactions" within the meaning of the regulations? How should the "arm's length" concept be interpreted within a group? That depends on the circumstances:

4.1 Commercial transactions within the scope of the company's usual business

These transactions are straightforward, and can be classified as "ordinary transactions".

However, in assessing whether a transaction is on "arm's length" terms, all the benefits of belonging to the group (such as preferential supply chain access and cash pooling facilities) need to be taken into account, since price alone cannot be the sole criterion.

4.2 Other operations specific to groups of companies

This includes inter alia financial agreements (such as cash pooling and current account agreements, loans, debt waivers and guarantee commitment fees, etc.), shared services agreements, temporary assignments of personnel, and group tax election agreements, etc.

Given their major financial implications, the Bouygues group applies the control procedure to the shared services agreements entered into every year between Bouygues SA and its principal subsidiaries, relating to services provided in the fields of management, human resources, finance, communication, sustainable development, patronage, new technologies, insurance, legal advice, and innovation consultancy.

In addition, various entities within the Group contract agreements with one another on a less systematic basis, or of lesser importance. The procedure for assessing whether such agreements (and their terms) are "ordinary" is described in section B.2 below.

B. Bouygues group procedure for identifying agreements

The procedure described below applies to the Bouygues group. It must be applied prior to the signature of any agreement, and whenever an existing agreement – even one that was not initially subject to the control procedure – is amended, renewed (including automatically) or terminated.

1. Prior notification to the Legal Affairs department of the business segment

Prior to any transaction that might constitute a "regulated agreement", the Legal Affairs department of the business segment involved must be notified immediately by:

- a person with a direct or indirect interest who is aware of a proposed agreement that might constitute a "regulated agreement"; and
- more generally, any person within the Group (in an operational unit or support function) who becomes aware of a proposed agreement that might constitute a "regulated agreement".

2. Reviewing and classifying the agreement

It is then the responsibility of the Legal Affairs department of the business segment involved and (where applicable) the Group Legal Affairs department – with support from the Finance department in some cases – to assesses whether an agreement is an "ordinary transaction on an arm's length basis" or "regulated".

Where an agreement is entered into between Bouygues SA and one of the business segments, this assessment is conducted by the General Counsel of Bouygues SA.

If there is uncertainty about whether an agreement qualifies as "regulated" or "ordinary", the statutory auditors may be asked for an opinion.

Any new agreement is assessed with reference to a list drawn up by the Group, showing the various types of agreement that are presumed to be ordinary.

The Bouygues group operates on the presumption that the following types of agreement are ordinary:

- agreements for the temporary assignment of personnel (very frequent, and to be invoiced to the user entity at cost);
- financial transactions (loans, advances, sureties, cash pooling). The terms must reflect (for example) the average cost of credit obtained on the market by the parent company or subsidiary;
- agreements for the sale or loan of shares to a corporate officer in connection with his or her duties;
- no-fee registered address agreements; and
- guarantee commitment fee agreements (at terms in line with market rates).

Assessing whether such intra-group billings are on an arm's length basis must be done case by case.

Billings can be regarded as being on an arm's length basis if they are priced at cost, or with a reasonable mark-up to cover unallocated indirect costs. Conversely, flat-rate billings that are not based on objective costings cannot be regarded as being at arm's length.

As required by Article L.225-39, paragraph 2 of the French Commercial Code, persons with a direct or indirect interest in an agreement may not be involved in assessing that agreement.

If the Legal Affairs department concludes on the basis of its assessment that an agreement is a regulated agreement, the control procedure will be applied and overseen by the Legal Affairs department(s) of the relevant business segment.

The control procedure must be conducted in compliance with legal requirements.

It is also a regulatory requirement to disclose the agreement on the company's website on or before the signature of the regulated agreement[9].

Once a year, the Board of Directors examines agreements entered into and authorised during previous financial years under which transactions continued in the most recent financial year. At the same meeting, a report is made to the Board[10] on the application of the procedure for assessing ordinary agreements contracted on an arm's length basis.

[9] This requirement applies only to those Group companies whose shares are listed on a regulated market (Article L. 225-40-2 of the French Commercial Code).

[10] This requirement applies only to those Group companies whose shares are listed on a regulated market (Article L. 225-39 of the French Commercial Code).

APPENDIX 1

CNCC REPORT

"REGULATED AND ORDINARY AGREEMENTS"

February 2014

(in French only)