

Interlocutory Orders, Etc.

IN THE MATTER OF

**LINDE AG,
PRAXAIR, INC.,
AND
LINDE PLC***Docket No. C-4660. Order, November 10, 2020*

Letter approving the applications of the Respondents proposed modifications to agreements subject to the Commission's Order in this matter.

LETTER APPROVING APPLICATIONS

VIA EMAIL

Thomas A. McGrath, Esq.
Linklaters LLP

Re: In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Docket No. C-4660

Dear Mr. McGrath:

This is in reference to the Applications for Approval of Proposed Modifications filed by Linde AG, Praxair, Inc. and Linde PLC ("Linde") and received on June 16, 2020, and September 4, 2020 ("Applications"). Pursuant to the Decision and Order in Docket No. C-4660, Linde requests Commission approval of its proposal to modify a reverse supply agreement, and the Operations and Maintenance Agreement that are part of the asset purchase agreement between Linde and Messer Industries, GmbH. Pursuant to Rule 2.41(f) of the Commission's Rules of Practice, the Commission has determined to approve the Applications and waive the 30-day public comment period. In according its approval to Linde, the Commission has relied upon the information submitted by Linde, and the Commission has assumed that information to be accurate and complete.

By direction of the Commission, Commissioner Chopra dissenting.

Statement of the Commission

**STATEMENT OF CHAIRMAN JOSEPH J. SIMONS AND
COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON**

The Commission has approved minor modifications of two confidential agreements between Linde AG and Messer Group that are designed to effectuate the divestitures ordered by the Commission in *Linde AG et al.*, C-4660, Decision and Order (issued February 26, 2019). The parties requested one extension due to the unforeseen effects of economic disruptions associated with the global COVID-19 pandemic, as well as a short extension of another ancillary agreement. Neither of these modifications affect the achievement of the Order's remedial purpose of remedying the anticompetitive effects of the merger, and the modifications are in the public interest.

What is unusual in this matter is Commissioner Chopra's desire to reject these short-term extensions and announce an apparently more burdensome standard for such modifications: parties must show that "modifications are necessary to ensure competitive intensity." The goal of any divestiture is to replace the competition that was potentially to be lost by the merger. After the Commission approves a divestiture, our primary concern is to ensure that the divestiture succeeds in order to protect and promote competition. In appropriate circumstances, achieving this goal may entail providing the acquirer with sufficient transitional support.

In the face of the ongoing health and economic crisis caused by the COVID-19 pandemic, we believe that the requested modification of the agreement relating to Transitional Assistance is reasonable, will not affect the remedial purposes of the order, and is in the public interest.¹ The other request is to extend an ancillary agreement relating to the divestiture of the industrial gas business from Linde to Messer. We believe that maintaining the progress toward transferring these assets to Messer is also in the public interest.

Putting differences aside, we agree with Commissioner Chopra's observation in 2018 that "the proposed order requires substantial divestitures that might preserve or even increase competition in some product markets."² Modifications to the Order through Rule 2.41(f) enable the Commission to protect the competition that the Order restored. Contrary to Commissioner Chopra's unsupported concerns, the Commission's Rule 2.41(f) procedures are a strength of the divestiture process, not a weakness; they enable the Commission to react to changed circumstances and address requests such as these in order to preserve the efficacy of the ordered relief. Considering the large number of Commission-approved divestitures and the overall dearth

1 See, e.g., <https://thedaylyphiladelphian.com/uncategorized/20282/liquid-argon-market-segmentation-with-top-competitors-prax-air-air-liquide-messer-group-air-products-basf-yingde-gases-group-linde/>. This report on the Liquid Argon market where Linde and Messer are major competitors notes "several restraints due to the entry of COVID-19." (This particular report is not part of the requested modifications.) Notably, the requested extension of the agreement is still within the Commission's allowable transition period pursuant to the Order. *Linde AG et al.*, C-4660, at Paragraph II.E.1.

2 Statement of Commissioner Rohit Chopra, In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Comm'n File No. 1710068 (Oct. 22, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

Statement of the Commission

of 2.41(f) modifications, we do not agree with Commissioner Chopra's view that the Commission has been relegated to a regulatory micromanager.

Finally, as Commissioner Chopra noted in 2018, "[w]hile the divestitures go a long way to address the anticompetitive concerns, the decision to approve this remedy was still a close call."³ Although this case was difficult and involved complex divestitures, there has been no suggestion that the divestitures have failed. In fact, the very small number of order modification requests in such a complex case suggests the opposite: that Messer is performing as anticipated. The Commission should focus on ensuring the ongoing success of these divestitures, rather than re-litigating past Commission decisions.

³ *Id.*

Dissenting Statement

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

In October 2018, the Commission gave the go-ahead for Linde's acquisition of Praxair, two of the world's dominant industrial gas producers. The circumstances surrounding the Commission's investigation, settlement, and accommodation of multiple modifications by the merging parties provide a unique window into the FTC's approach. In many ways, this demonstrates how the Commission acts too often with the mindset of a deal proponent, rather than that of a law enforcement agency. I believe this should change.

I respectfully disagree with my colleagues that the latest petition for modifications are in the public interest, as it will extend contractual entanglements between competitors and it cannot be justified by issues related to COVID-19.

I. The Transaction and the Commission's Approval

The \$80 billion proposed merger between Linde and Praxair was clearly anticompetitive, as outlined in the agency's complaint. Indeed, there were many individual gas markets where the Commission had good reason to believe that competition would have been harmed.

There was a particularly unusual aspect of the transaction: under German law, the transaction would dissolve unless all approvals were obtained by October 24, 2018.¹ This timeline would have precluded resolving outstanding concerns in court. In ordinary circumstances, agencies often have to reach resolutions that are suboptimal, due to resource constraints and litigation uncertainties. But in this matter, the FTC would not have to factor in the costs and uncertainties associated with litigation that might lead to an unfavorable outcome for consumers and businesses.²

In many ways, this proved to be a natural experiment for the Commission given that resource constraints and litigation risk would not be a factor. Would the agency approach the matter with a law enforcement mindset and ensure that all necessary precautions were taken to remedy threats to competition over both the short-term and the long-term? Or would the agency approach the matter with a different mindset and shift risk to those that could be harmed by a reduction in competition, so that the merging parties could capture certain gains?

The Commission ultimately accepted an extremely complex settlement that had a number of risky features.³ For example, the Commission agreed to allow the merged entity to divest assets after closing. In these situations, the merged entity has an incentive to allow the assets to

¹ William McConnell, *Praxair, Linde Likely to Make Divestitures for FTC OK*, THESTREET (Aug. 30, 2017), <https://www.thestreet.com/markets/regulation/praxair-linde-likely-to-make-divestitures-for-ftc-ok-14287977>.

² It is typical for agencies to consider litigation risk when determining a fair resolution. Here, it would only be good government for the Commission to ensure no unnecessary risks were borne by the public.

³ See generally Analysis of Agreement Containing Consent Orders to Aid Public Comment *In the Matter of Praxair, Inc., and Linde AG*, File No. 171-0068, https://www.ftc.gov/system/files/documents/cases/1710068_praxair_linde-analysis.pdf.

Dissenting Statement

deteriorate, since they will ultimately go to a future competitor.⁴ The Commission even ended up extending the deadline for these divestitures to occur, prolonging the period of overlap.

In addition, the Commission also approved, as a buyer, a private equity-backed joint venture, that raised questions about its long-term wherewithal to make appropriate investments and about whether it might engage in opportunistic asset sales.⁵ In the past several years, there have been several incidents where Commission-approved divestiture buyers failed to restore competition. Some of these buyers had risks associated with restrictive financing arrangements or their investment strategy.⁶ Such risks are not uncommon when a financial buyer is involved and relies on high levels of debt financing. Given these recent incidents, the Commission should have carefully managed these risks in this matter, including the fact that the joint venture buyer's financing might dampen its incentives to invest and to compete aggressively.

The settlement here also included requirements that the merged firm provide certain transitional services and supplies to one of the divestiture buyers for multiple years.⁷ In theory, the joint venture could eventually emerge as a fully independent competitor. But all of these aspects shifted risk to the public.⁸

4 While the Commission issued an Order to Hold Separate requiring the appointment of a monitor, and requiring Praxair and Linde to operate separately and to continue to maintain the assets until the divestitures were completed, the parties' adverse economic incentive nonetheless remains. *See id.* at 1. This puts tremendous burden on the Commission to ensure compliance, unnecessarily using up the agency's scarce resources. For precisely these reasons, Commission officials have stated their concerns about these post-close divestitures. *See* Ian Conner, *The uphill case for a post-Order divestiture*, FED. TRADE COMM'N (Mar. 21, 2019) (noting that "upfront divestitures minimize the risks that acquired assets will lose value (due to the loss of employees, customers, and business opportunities) or that competition will be diminished while ownership of the assets remains uncertain"), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/03/uphill-case-post-order-divestiture>; *see also* *Frequently Asked Questions About Merger Consent Order Provisions*, FED. TRADE COMM'N at Q.8 (last visited Nov. 10, 2020) ("The Commission will, by requiring a buyer up front, attempt to minimize the risk that the remedy will be ineffective. Buyers up front also reduce the risk of interim harm to competition by speeding up accomplishment of the remedy"), <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq#Buyer%20Up%20Front>.

5 *See* Statement of Commissioner Rohit Chopra, In the Matter of Linde AG, Praxair, Inc., and Linde PLC, Comm'n File No. 1710068 (Oct. 22, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

6 FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012: A REPORT OF THE BUREAU OF COMPETITION AND ECON., at 24 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

7 Modified Decision & Order, *In the Matter of Linde AG, Praxair, Inc. and Linde PLC*, File No. 171-0068 (Docket No. C-4660) ¶ 11.E.1 (issued Feb. 26, 2019), https://www.ftc.gov/system/files/documents/cases/c4660_decision_and_ordermodified_593725_public_redacted.pdf.

8 In situations like this, where the divested business relies on significant support from the merged firm to remain operational and viable at the outset, there is strong reason to reject a post-order divestiture, because of increased risk of asset deterioration from ongoing entanglements between the two firms that are supposed to be competing. BC staff specifically identifies this circumstance as weighing against accepting a post-order divestiture. *See* Ian Conner,

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II. The Petitions

Today, the Commission is agreeing to *additional* modifications to agreements between the merged firm and its joint venture competitor. The petitions approved today will extend the time that the joint venture will be entangled with its larger competitor.⁹ I appreciate that minor modifications to Commission orders, particularly those that are technical in nature, may be required from time to time. This is an important part of the Commission's process to ensure that a remedy does not fail. However, we should be wary about allowing entanglements between a merged party and a divestiture buyer to persist over long periods of time.

Petitioners should have to prove that modifications are necessary to ensure competitive intensity. It should not be the FTC's concern as to whether this makes the parties more or less profitable. Based on my assessment of the facts, while the modifications may help the petitioners' profitability, they will reduce the short-term incentives for the joint venture to quickly make the appropriate capital investments, so that it can stand on its own two feet. I do not believe that our approval can be reasonably justified by issues related to the COVID-19 crisis.

Now, the Commission and its staff are continuing to devote our limited resources to ongoing oversight of the transaction and adjudicating multiple petitions. I do not believe this is the appropriate role for law enforcement – this is more akin to regulatory micromanagement. The Commission is better off managing all potential risks to competition and setting clear expectations for ensuring a divestiture buyer *fully* replaces any competitive intensity lost by the transaction.

III. Conclusion

Since the transaction closed, Linde has announced substantial price increases.¹⁰ It is critical that the joint venture buyer emerge as an independent competitor as quickly as possible.

The Linde-Praxair matter is an important natural experiment that is quite telling. I do not believe that allocating substantial resources and shifting considerable risk to the public through

supra note 4 (explaining factors weighing against post-order divestiture, including, among other things, if the business relies on significant support from the merged firm to remain operational and viable).

9 Pet. For Approval of Amendments to Certain Ancillary Agreements Relating to the Divestiture of the Indus. Gases Assets and Helium Assets to Messer Indus., GMBH, *In the Matter of Linde AG, Praxair, Inc., Linde PLC*, File No. 171-0068 (Docket No. C- 4660) (June 16, 2020); *see also* Pet. For Approval of Amendments to Certain Ancillary Agreements Relating to the Divestiture of the Indus. Gases Assets to Messer Indus., GMBH, *In the Matter of Linde AG, Praxair, Inc., Linde PLC*, File No. 171-0068 (Docket No. C-4660) (Sept. 4, 2020).

10 *See* Press Release, Linde Announces Price Increases Effective December 1, 2019 (Nov. 19, 2019), <https://www.linde.com/news-media/press-releases/2019/linde-announces-price-increases-effective-december-1-2019>; *see also* Reuters Staff, *Linde eyes further profit gain in 2020 on volumes, price hikes*, REUTERS (Feb. 13, 2020), <https://www.reuters.com/article/us-linde-results/linde-eyes-further-profit-gain-in-2020-on-volumes-price-hikes-idUSKBN2071JJ>.

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complex settlements, in order to preserve the ability for the merged firm to achieve speculative benefits, is the best use of taxpayer resources and our talented staff. It will be critical to carefully evaluate whether the agency is truly adhering to its role as a law enforcement agency.

For these reasons, I respectfully dissent.

CONCURRING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

I am in favor of modifying divestiture orders where appropriate and necessary to ensure divestitures are successful. I believe the minor modifications at issue here will facilitate that goal, which is why I support them. This case, however, is instructive about the difficulties associated with complicated and entangled divestitures, and may provide a cautionary tale for the Commission when considering such remedies in the future.