UNITED STATES OF AMERICA
Federal Trade Commission

STATEMENT OF COMMISSIONER ROHIT CHOPRA

In the Matter of Linde AG, Praxair, Inc., and Linde PLC
Commission File No. 1710068
October 22, 2018

Today, the FTC is proposing to impose conditions on a merger between Praxair, Inc. (NYSE: PX) and Linde AG (FWB: LIN), the world's second- and third-largest industrial gas suppliers. While these firms may not be household names, they provide inputs to an enormous number of industrial and consumer products throughout our economy. The merger would be clearly anticompetitive in violation of the Clayton Act, with a high likelihood of harming manufacturers of a wide range of industrial and consumer products.

The Commission is proposing to order substantial divestitures across multiple lines of businesses. Notably, Linde is divesting the vast majority of its U.S. industrial gas business to a joint venture between Messer Group GmbH and CVC Capital Partners, a private equity firm. Separately, Linde will also divest other assets to Matheson Tri-Gas, Inc. While the divestitures go a long way to address the anticompetitive concerns, the decision to approve this remedy was still a close call.

The transaction, as originally structured, does not appear to have any significant merger-specific efficiencies that would guarantee benefits to customers. However, the proposed order requires substantial divestitures that might preserve or even increase competition in some product markets. But even with the proposed remedies, this transaction is not without risks to competition. In particular, I would have preferred to include additional protections for the public to safeguard against risks often posed by the private equity buyer interest in the divested assets, as well as the level of debt financing and investment horizons involved.

Divestiture Buyer Financing

Competition enforcers, including the FTC, should always examine whether its merger remedies have been successful over the long term. The FTC's 2017 Merger Remedies study highlighted some of the lessons learned from past merger remedies.[1]

When evaluating the suitability of a divestiture buyer, agencies must determine whether the buyer can meaningfully replace competitive market forces eliminated by a merger. For example, agencies need to be confident that the buyer possesses the know-how and technical capabilities to successfully operate the divested businesses. Among other things, the 2017 study found that the success of a divestiture over

[1] *See* The FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics, Federal Trade Commission, January 2017, *available at:* https://www.ftc.gov/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics

time depends, in part, on whether the buyer has adequate financing to ensure success. Given recent trends in our capital markets, we need to carefully scrutinize buyer financing.

In situations like the matter before us, I approached this line of inquiry with several questions in mind:

(1) Does the deal's financing structure allow the buyer to make significant investments to maintain and grow their business in order to vigorously compete? Does the buyer have adequate liquidity to be a nimble and opportunistic competitor?

(2) What is the buyer's level of debt financing, compared to others in the industry? Have creditors protected themselves in ways that are aligned – or misaligned – with the goal of preserving competition?

(3) Does the buyer's financing and governance structure create temptations to make asset sales that would reduce competition?

As noted above, in this matter one of the divestiture buyers, MG Industries, is a new joint venture between Messer Group GmbH, a major industrial gas company, and CVC Capital Partners, a private equity firm.

In this situation, I would have preferred terms in the proposed order that would have required prior notice to or approval by the Commission of any asset sales by MG Industries. There is past Commission precedent for doing so. In situations where there was a risk that the divestiture buyer may subsequently sell assets it acquired pursuant to a divestiture order, the Commission has sometimes ordered the divestiture buyer to agree to a prior approval provision covering any sale of the assets acquired for a defined period of time.

For example, in the Koninklijke Ahold and Delhaize Group matter, due to concern that one of the divestiture buyers (Supervalu) might later transact acquired stores, the Commission required Supervalu to seek prior approval for any such transfer of the divested stores for a period of three years.[2]

In the Nestle Holdings, Inc. and Ralston Purina Co. matter, the Commission required the divestiture buyer (a private equity fund) to seek approval by the Commission prior to the sale of certain assets held less than five years.[3] The buyer would later seek permission from the Commission to sell assets, reducing the likelihood of needing to litigate an anticompetitive transaction.

Special Considerations with Financial Buyers

Private equity funds continue to play a greater role in deal activity across the globe. Notably, private equity participation is associated with higher levels of debt financing, which can amplify both risk and returns on equity. At the most basic level, heavy debt burdens can increase the likelihood of insolvency. Private equity participation is also associated with other firm behavior that can reduce long-term competition, including opportunistic asset sales. This risk may be more acute when funds purchase assets in unusual and distressed situations.

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[2] In the Matter of Koninklijke Ahold and Delhaize Group, C-4588 (Consent) (July 22, 2016), available at: https://www.ftc.gov/enforcement/cases-proceedings/151-0175/koninklijke-ahold-delhaize-group.
[3] In the Matter of Nestle Holdings, Inc., and Ralston Purina Company, C-4028 (Consent) (December 11, 2001), available at: https://www.ftc.gov/enforcement/cases-proceedings/0110083/nestle-holdings-inc-ralston-purina-company.

Enforcers must carefully examine investors’ unique incentives that can drive firm behavior in ways that affect competition. To assess these incentives, we must always actively probe the entire circumstances of investor involvement in a merger transaction under review. For example, what is the buyer’s investment thesis and strategy? How has the investor typically realized gains out of past investments? Does the buyer plan to invest more of its own equity capital into the business or simply further rely on debt financing? When and how does the investor intend to exit its investment? Given all of this, what really is the long-term impact on competition?

While Commission staff certainly ask many of these questions in their review of divestiture buyers, it will be important to ensure that we are conducting careful and adequate due diligence with respect to buyers that are heavily reliant on debt financing and where investment firms exert significant control.