



Office of Commissioner  
Rohit Chopra

UNITED STATES OF AMERICA  
Federal Trade Commission

## **DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA**

*Regarding Petitions for Modification in the Matter of Linde AG and Praxair LLC  
Commission File Number 1710068  
November 13, 2020*

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.

### **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.<sup>1</sup> 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.<sup>2</sup>

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

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

<sup>2</sup> 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.

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.<sup>3</sup> 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 deteriorate, since they will ultimately go to a future competitor.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> In theory, the joint venture could eventually emerge as a fully independent competitor. But all of these aspects shifted risk to the public.<sup>8</sup>

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<sup>3</sup> 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](https://www.ftc.gov/system/files/documents/cases/1710068_praxair_linde-analysis.pdf).

<sup>4</sup> 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>.

<sup>5</sup> 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](https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf).

<sup>6</sup> 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](https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf).

<sup>7</sup> 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](https://www.ftc.gov/system/files/documents/cases/c4660_decision_and_ordermodified_593725_public_redacted.pdf).

<sup>8</sup> 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, *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).

## 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.<sup>9</sup> 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.

## Conclusion

Since the transaction closed, Linde has announced substantial price increases.<sup>10</sup> 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 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.

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<sup>9</sup> 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).

<sup>10</sup> *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>.