

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

*Regarding a Petition for Modification
in the Matter of Linde AG et al., C-4660*

November 13, 2020

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

¹ See, e.g., <https://thedayphiladelphian.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.

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 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.*