

[Antitrust Law Daily Wrap Up, ACQUISITIONS & MERGERS NEWS: FTC approves modifications to agreements effectuating order that permitted Linde/Praxair merger, \(Nov. 16, 2020\)](#)

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By Peter Reap, J.D., LL.M.

Required in part due to the disruption of the COVID-19 pandemic, the amendments were found to be in the public interest over the dissent of Commissioner Chopra.

Following up the FTC's 2019 final approval of an order conditionally approving the combination of Linde AG and Praxair, Inc., two of the world's dominant industrial gas producers, the FTC has [approved](#) a petition seeking modifications of two ancillary agreements relating to the required divestiture of the Industrial Gases Assets to Messer Industries, GmbH. The Commission also waived the 30-day comment period. The amendments modify two confidential agreements—a reverse supply agreement, and the Operations and Maintenance Agreement—that are part of the asset purchase agreement between the merging entities and Messer Industries, GmbH. FTC Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson concluded that neither of these modifications would adversely affect the order's remedial purpose of remedying the anticompetitive effects of the merger, and the modifications were in the public interest. However, Commissioner Rohit Chopra disagreed, suggesting that they will extend the contractual entanglements between competitors and it cannot be justified by issues related to COVID-19 (*In the Matter of Linde AG*, FTC Dkt. C-4660, File No. 171 0068).

Background. In October 2018, the FTC [announced](#) that it would require the merging entities to divest assets in nine U.S. industrial gas product markets as a condition for the approval of their combination. According to an administrative [complaint](#) by the FTC, the proposed creation of gas giant Linde PLC would enable the firm to exercise market power unilaterally because, for many customers, the merging firms are their two best alternatives. As a result, purchasers of industrial gases likely would pay higher prices. The FTC also was concerned about collusion or coordinated action among the few remaining industrial gas suppliers. In February 2019 the FTC granted [final approval](#) of the order.

Petition for approval of amendments. According to the redacted public record version of the [petition](#), the amendments are unlikely under any plausible facts to affect achieving the remedial purposes of the order. Therefore, the merging entities requested that FTC waive the requirement that the amendments be approved, or else eliminate the comment period required for such approval.

Statement by Simons, Phillips, and Wilson. According to a [statement](#) Simons, Phillips, and Wilson, 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. Additionally, the other request—to extend an ancillary agreement relating to the divestiture of the industrial gas business from Linde to Messer—will maintain the progress toward transferring these assets to Messer and also is in the public interest.

As to Chopra's dissenting statement, the majority found Chopra's desire to reject these amendments "unusual." Instead, Chopra would apply "an apparently more burdensome standard for such modifications: parties must show that 'modifications are necessary to ensure competitive intensity.'"

Here, modifications to the order under Rule 2.41(f) allow the FTC to protect the competition that the order restored, the majority opined. Contrary to Chopra's unsupported concerns, Rule 2.41(f) procedures are a strength of the divestiture process, not a weakness. Further, the majority disagreed with Chopra's view that the

agency has been relegated to a regulatory micromanager, pointing to the large number of Commission-approved divestitures and the overall dearth of 2.41(f) modifications.

Chopra's dissenting statement. Chopra contended in his [dissenting statement](#) that these amendments are not in the public interest because they are unjustified by the COVID-19 pandemic and will extend complex contracts between competitors. Here, the agency approved an extremely complex settlement that had a number of risky features, such allowing the merged entity to divest assets after closing. It also approved, as a buyer, a private equity-backed joint venture. The settlement also included requirements that the merged firm provide certain transitional services and supplies to one of the divestiture buyers for multiple years. These features all shifted risk to the public, Chopra said. Chopra had objected to the settlement.

The approval of these proposed additional modifications to agreements between the merged firm and its joint venture competitor will extend the time that the joint venture will be entangled with its larger competitor. "[W]e 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."

Slaughter's concurring statement. In a separate [concurring statement](#), Commissioner Rebecca Kelly Slaughter said the minor modifications at issue here will facilitate the agency's goal of successful divestitures. She added: "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."

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Companies: Linde AG; Linde PLC; Praxair, Inc.; Messer Industries, GmbH

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