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European Commission conditionally approved Praxair/Linde

On 20 August 2018 the European Commission **conditionally approved** the proposed merger between two of the four major global industrial gas firms, Linde and Praxair. The Commission's clearance comes at a high cost to the parties with the Commission requiring an extensive package of remedies including the sale of Praxair's entire EEA gas business to resolve the Commission's competition concerns.

Background of the merger

German Linde and US based Praxair are two of the world's top four industrial gas companies. They are both active throughout the supply chains of various industrial, medical and specialty gases. The merger would create the world's largest industrial gas company and the Commission considered that it would reduce the number of major gas players from four to three.

This deal has been on the cards for a while having first been announced in 2016. The deal was only formally notified to the Commission in January this year. Despite the parties engaging in what is understood to have been lengthy prenotification discussions, the Commission's final decision still took over seven months following various extensions to the deadline.

The Commission's substantive concerns

The Commission's reasoning is yet to be published, but it is understood that the Commission was concerned about the impact of the deal on the EEA markets for the supply of industrial, medical and specialty gases as well as with respect to the worldwide sourcing market for helium and national markets for the retail supply of helium.

The parties contended that competition issues were unlikely given the presence of many active competitors. However, the Commission found that, with the exception of the big four global producers (the parties, Air Liquide and Air Products), most market participants had a limited geographic presence and lacked the necessary financial backing and technical capabilities to constrain the parties post-merger. Furthermore, the parties would unlikely be constrained by the threat of new entry given the high entry barriers in this industry. Ultimately,

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the Commission could not be satisfied that the merger would not significantly impede effective competition.

The parties' remedies

To resolve the Commission's concerns, the parties agreed to:

- Divest Praxair's entire EEA gas business to an approved purchaser. The package will also include helium sourcing contracts necessary to meet EEA demand. The Japanese gas company Taiyo Nippon Sanso Corporation has already agreed to buy significant European assets from Praxair.
- Transfer Praxair's entire stake in Italian joint venture SIAD, which is a chemical group active in Central and Eastern Europe, to its joint venture partner Flow Fin.
- Divest helium sourcing contracts in addition to those required to meet EEA demand to an approved purchaser in order to address worldwide competition concerns.

The commitments removed the entire overlap between the parties' EEA activities, meaning that the merger would no longer be a significant impediment to effective competition. The Commission was also satisfied that the commitment to divest additional helium sourcing contracts will assuage any remaining global competition worries in respect of the market for helium sourcing.

Next steps

The Commission's stance on the deal is now clear, as is the extent of the remedies required to resolve its concerns. The parties are still awaiting approvals from the US and Chinese antitrust authorities.

Linde has **announced** that the divestments required by antitrust authorities globally are expected to exceed the threshold stated in the merger control condition in the merger agreement. Linde had previously announced that the regulatory requirements could be more burdensome than formerly thought. This has led to **press speculation** that the parties may walk away.

Other developments

Merger control

CMA instructs European Metal Recycling to divest five sites post-merger

On 14 August 2018 the Competition and Markets Authority (CMA) **announced** that European Metal Recycling (EMR) will have to sell five sites following its merger with Metal Waste Recycling (MWR).

The CMA issued its **final report** following a phase 2 investigation. The acquisition which completed in August 2017 combines EMR, the largest metal scrap recycler in the UK and MWR, the fourth largest. The inquiry gathered responses from over 850 concerned suppliers and customers.

The CMA found that the merger could "*lead to a worse deal for customers and suppliers*". The final report concluded that the merger would harm the choices available to suppliers (such as car breakers) that supply shredder feed (scrap metal that needs to be shredded) in the South East of England, and others such as car manufacturers that sell large volumes of scrap metal through tendered contracts in the West Midlands and the North East of England. Furthermore, the CMA found that the merger is likely to lead to a worse deal for customers in the UK that buy a certain type of scrap metal known as new production steel.

To ensure competition is maintained the CMA has ordered the divestiture of five sites: three in the West Midlands, one in the North East and one in the South East.

According to Lesley Ainsworth (chair of the inquiry group) "*Having an efficient and competitive metal recycling industry is good for the environment and is important for both suppliers and waste metal customers, including those in the automotive and steel manufacturing industries*."

Antitrust

Taiwan Fair Trade Commission announces settlement with Qualcomm in abuse of dominance case

On 10 August 2018 the Taiwan Fair Trade Commission (TFTC) **announced** that it has reached a settlement with Qualcomm Incorporated to resolve an antitrust case. Last October the TFTC handed down an infringement **decision** against Qualcomm, which imposed a fine of NT$23.4 billion (approximately US$763 million) on the chipmaker. This decision has now been replaced by the newly negotiated settlement terms.

Qualcomm possesses considerable standard essential patents which relate to the production of baseband chips for data transmission in CDMA, WCDMA and LTE mobile communications. The TFTC initiated an investigation into Qualcomm's patent licensing arrangements in 2015. In October 2017 the TFTC fined Qualcomm for monopolistic conduct, including refusing to license its patents to rivals except on restrictive or exclusionary terms. For example, as a condition of licensing its patent, Qualcomm would require other chipmakers to disclose their prices, sales targets, sales volume and other sensitive distribution information. Such conduct amounted to "*directly or indirectly prevent any other enterprises from competing*" and hence was in breach of Taiwan's Fair Trading Act. (Further information is available in **Issue 21/2017** of our newsletter.) Qualcomm denied the allegations and launched an appeal in the Taiwan Intellectual Property Court. The TFTC then entered into settlement talks with the chipmaker and both parties agreed to replace the original penalty decision with the settlement terms.

As part of the settlement, the parties agreed that the NT$2.73 billion which Qualcomm has already paid towards the original penalty will be retained by the TFTC and no further amounts will be due. Qualcomm will honour and give effect to certain commitments, including re-negotiating in good faith with local handset manufacturers which consider themselves to be subject to unfair licensing terms imposed by Qualcomm. In addition, Qualcomm has also committed to drive certain commercial initiatives in Taiwan, including 5G collaborations, new market expansion and the development of an operation and manufacturing centre in Taiwan.

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Ofcom imposes £50 million fine on Royal Mail

On 14 August 2018 Ofcom **announced** that it has imposed a fine on Royal Mail of £50 million for abuse of dominance under Section 18 of the Competition Act and Article 102 of the Treaty on the Functioning of the European Union. The fine follows an investigation opened by Ofcom in 2014, which was initiated by a complaint made by Whistl, one of Royal Mail's wholesale customers.

Ofcom found that Royal Mail's notified price changes discriminated against its competitors in bulk mail delivery. It concluded that Royal used its position as a near-monopoly provider of delivery services to penalise any wholesale customer that sought to compete with it in bulk mail delivery.

Royal Mail has **announced** that it intends to appeal the decision to the Competition Appeal Tribunal.

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