

061 0114

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 William E. Kovacic
 J. Thomas Rosch

In the Matter of

LINDE AG,
 a corporation, and

THE BOC GROUP PLC,
 a corporation.

Docket No. C-4163

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Public Record Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Linde AG (“Linde”) of Respondent The BOC Group plc (“BOC”) hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and whi

not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets ("Hold Separate"):

1. Respondent Linde AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Abraham-Lincoln-Straße 21, 65030 Wiesbaden, Germany.

2. Respondent BOC is a corporation organized, existing, and doing business under and by virtue of the laws of England whose registered principal office is located at Chertsey Road Windlesham, Surrey GU206HJ, England.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Hold Separate, the following definitions shall apply:

- A. "Linde" means Linde AG, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its controlled joint ventures, subsidiaries, divisions, groups and affiliates controlled by Linde AG (including BOC, after Linde's acquisition of BOC is consummated), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "BOC" means The BOC Group plc, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups and aff

or sale of products at plants other than the Atmospheric Gases Plants To Be Divested,
then only those por

2. following the issuance and service of a final Decision and Order by the Commission, the final Decision and Order issued by the Commission.
- K. “Effective Date of Divestiture” means the date on which the mandated divestiture of the Atmospheric Gases Assets To Be Divested occurs.
- L. “Held Separate Business” means the Atmospheric Gases Assets To Be Divested and all Held Separate Business Employees of the Atmospheric Gases Assets To Be Divested.
- M. “Held Separate Business Employees” means all full-time, part-time, or contract employees whose duties take place at, or primarily relate to, the Held Separate Business or have taken place at, or primarily related to, the Held Separate Business at any time during the period commencing twelve months prior to the Effective Date of Divestiture.
- N. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the date the Hold Separate becomes final and terminate pursuant to Paragraph V. hereof.
- O. “Hold Separate Trustee” means the individual appointed to act as the Hold Separate Trustee pursuant to Paragraph II.D. hereof.
- P. “Key Atmospheric Gases Employees” means those Employees identified in Confidential Appendix B attached hereto.
- Q. “Material Confidential Information” means competitively sensitive or proprietary information including, but not limited to, all customer lists, price lists, and marketing methods; *provided, however*, Material Confidential Information does not include information in the public domain or independently known to a Person.
- R. “Person” means any individual, partnership, firm, trust, association, corporation, joint venture, unincorporated organization, or other business or governmental entity.
- S. “Bozrah Plant” means Linde’s Atmospheric Gases Plant located in Bozrah, Connecticut.
- T. “Canton Plant” means Linde’s Atmospheric Gases Plant located in Canton, Ohio.
- U. “Carrollton Plant” means Linde’s Atmospheric Gases Plant located in Carrollton, Georgia.
- V. “Dayton Plant” means Linde’s Atmospheric Gases Plant located in Dayton, Ohio.
- W. “Jefferson Plant” means Linde’s Atmospheric Gases Plant located in Jefferson, Georgia.

D. Linde shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. Richard M. Klein shall serve as Hold Separate Trustee, pursuant to the agreement executed by the Hold Separate Trustee and Linde and attached as Confidential Appendix C to this Hold Separate (“Trustee Agreement”).
 - a. The Trustee Agreement shall require that, no later than five (5) days after this Hold Separate becomes final, Linde shall transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order;
 - b. No later than five (5) days after this Hold Separate becomes final, Linde shall, pursuant to the Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate and consistent with the purposes of the Decision and Order;
 - c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision and Order, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for monitoring Linde’s compliance with its obligations pursuant to this Hold Separate and the Decision and Order;
 - d. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business and to any other relevant information as the Hold Separate Trustee may reasonably request, including, but not limited to, all documents and records kept by Linde in the ordinary course of business that relate to the Held Separate Business. Linde shall develop such financial or other information as the Hold Separate Trustee may reasonably request and shall cooperate with the Hold Separate Trustee. Linde shall take no action to interfere with or impede the Hold Separate Trustee’s ability

- f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Hold Separate Trustee's duties;
 - g. Linde may require the Hold Separate Trustee to sign an appropriate confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his/her role as Hold Separate Trustee to anyone other than the Commission;
 - h. Thirty (30) days after the Hold Separate becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the Held Separate Business is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements; and
 - i. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Linde, which consent shall not be unreasonably withheld. If Linde has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Linde of the identity of any substitute Hold Separate Trustee, Linde shall be deemed to have consented to the selection of the proposed substitute trustee. Linde and the substitute Hold Separate Trustee shall execute a Trustee Agreement, subject to the approval of the Commission, consistent with this paragraph.
2. No later than one (1) day after the Acquisition is consummated, Linde shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to Kevin McBride ("Manager").
- a. In the event that Kevin McBride ceases to act as Manager, then Linde shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.
 - b. The Manager shall report directly and exclusively to the Hold Separate Trustee and

shall manage the Held Separate Business independently of the management of Linde. The Manager shall not be involved, in any way, in the operations of the other businesses of Linde during the term of this Hold Separate.

- c. The Manager shall have no financial interests affected by Linde's revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient ince

- (6) audit services;
 - (7) technical support and engineering services;
 - (8) information technology support services;
 - (9) processing of accounts payable and accounts receivable;
 - (10) billing and collection services;
 - (11) payroll processing;
 - (12) maintenance and repair of facilities;
 - (13) procurement of goods and services used in the ordinary course of business;
 - (14) procurement of insurance, including, but not limited to, general and product liability insurance; and
 - (15) legal services.
- b. The Held Separate Business shall have, at the option of the Manager with the approval of the Hold Separate Trustee, the ability to acquire services and products, including, but not limited to, those listed in Paragraph II.D.4.a. above, from third parties unaffiliated with Linde.
5. Linde shall cause the Hold Separate Trustee, the Manager, and each employee of the Held Separate Business having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such individuals shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing, directly or indirectly, any such information to or with any other Person whose employment relates to any of Linde's businesses other than the Held Separate Business. These individuals shall not be involved in any way in Linde's businesses that compete with the Held Separate Business.
6. No later than ten (10) days after the date this Hold Separate becomes final, Linde shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Held Separate

Business consistent with the provisions of this Hold Separate.

7. No later than five (5) days after the date this Hold Separate becomes final, Linde shall circulate to employees of the Held Separate Business and to Linde's employees who are responsible for or engaged in financial, management, production, distribution, sales or marketing functions relating to products or services that compete with product or services offered by the Held Separate Business, a notice of this Hold Separate and the Consent Agreement, in the form attached hereto as Attachment A.
8. The Hold Separate Trustee and the Manager shall serve, without bond or other security, at the cost and expense of Linde, on reasonable and customary terms commensurate with the person's experience and responsibilities.
9. Linde shall indemnify the Hold Separate Trustee and Manager and hold them harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts or omissions, or bad faith by the Hold Separate Trustee or the Manager, or their respective agents.

include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital; and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order, the Manager may substitute any capital or research and development project for another of the same cost with the consent of the Hold Separate Trustee.

11. Linde shall:

- a. not later than forty-five (45) days before the Effective Date of Divestiture, (a) provide to the Atmospheric Gases Acquirer a list of all Held Separate Business Employees and Candidate Atmospheric Gases Employees; (b) allow the Atmospheric Gases Acquirer to interview any Held Separate Business Employees and Candidate Atmospheric Gases Employees; and (c) in compliance with all laws, allow the Atmospheric Gases Acquirer to inspect the personnel files and other documentation relating to such Held Separate Business Employees and Candidate Atmospheric Gases Employees;
- b. not later than thirty (30) days before the Effective Date of Divestiture, Linde shall provide an opportunity for the Atmospheric Gases Acquirer to (a) meet personally, and outside the presence or hearing of any employee or agent of Linde, with any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees; and (b) make offers of employment to any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees;
- c. Linde shall not directly or indirectly interfere with the Atmospheric Gases Acquirer's offer of employment to any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees, not directly or indirectly attempt to persuade any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees to decline any offer of employment from the Atmospheric Gases Acquirer, and not offer any incentive to any of the Held Separate Business Employees and Candidate Atmospheric Gases Employees to decline employment with the Atmospheric Gases Acquirer;
- d. Linde shall irrevocably waive any legal or equitable right to deter any Held Separate Business Employee or Candidate Atmospheric Gases Employees from accepting employment with Atmospheric Gases Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Linde that relate to Atmospheric Gases;
- e. Linde shall not interfere with the employment by the Atmospheric Gases Acquirer of any Held Separate Business Employee or Candidate Atmospheric Gases Employees;

- f. Linde shall continue employee benefits to Held Separate Business Employees and Candidate Atmospheric Gases Employees until the Effective Date of Divestiture, and the employee benefits provided to other similarly situated Linde employees that become employees of Linde after the Effective Date of Divestiture, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses; and
 - g. Linde shall provide a retention incentive bonus to Key Atmospheric Gases Employees who accept employment with the Atmospheric Gases Acquirer, equal to ten (10) percent of such employees' annual salary to be paid upon the employees' completion of one (1) year of continuous employment with the Atmospheric Gases Acquirer after the Effective Date of Divestiture.
12. Linde, subject to the provisions of Paragraph II.D.13. below, for a period of one (1) year from the Effective Date of Divestiture, shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Held Separate Business Employees and Candidate Atmospheric Gases Employees who have accepted offers of employment with the Atmospheric Gases Acquirer to terminate their employment with the Atmospheric Gases Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Atmospheric Gases Acquirer; (2) Linde advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Linde hires employees who apply for employment with Linde, as long as such employees were not solicited by Linde in violation of this paragraph.
13. Notwithstanding the provisions of Paragraph II.D.12. above, for a period of six (6) months from the Effective Date of Divestiture, Linde shall not employ or make offers of employment to any Held Separate Business Employees or Candidate Atmospheric Gases Employees who have accepted offers of employment with the Atmospheric Gases Acquirer unless any such individual's employment with the Atmospheric Gases Acquirer has been terminated by the Atmospheric Gases Acquirer.
14. Except for the Manager, employees of the Held Separate Business, and support services employees involved in providing services to the Held Separate Business pursuant to Paragraph II.D.4., and except to the extent provided in Paragraph II.A., Linde shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.
15. Linde's employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to Paragraph II.D.4.) shall not receive,

have access to, or use or continue to use any Material Confidential Information of the Held Separate Business except:

- a. as required by law; and
- b. to the extent that necessary information is exchanged:
 - (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
 - (3) in complying with the Hold Separate or the Consent Agreement;
 - (4) in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the financial controls of the Held Separate Business;
 - (5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Held Separate Business; or
 - (6) in obtaining legal advice.

Nor shall the Manager or employees of the Held Separate Business receive, have access to, or use or continue to use, any Material Confidential Information about Linde and relating to Linde's businesses, except such information as is necessary to maintain and operate the Held Separate Business. Linde may receive aggregate financial and operational information relating to the Held Separate Business only to the extent necessary to allow Linde to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this paragraph shall be used only for the purposes set forth in this paragraph.

16. Linde and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Linde, to audit Linde's networks and systems to verify compliance with this Hold Separate.

III.

IT IS FURTHER ORDERED that Linde shall notify the Commission at least thirty (30) days prior to: (1) any proposed dissolution of Linde; (2) any proposed acquisition, merger, or consolidation of Linde; or (3) any other change in Linde that may affect compliance obligations arising out of this Order, including but, not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Linde.

IV.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this Hold Separate Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Linde, Linde shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Linde and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Linde relating to any matters contained in this Hold Separate Order; and
- B. Upon five (5) days' notice to Linde and without restraint or interference from it, to interview officers, directors, or employees of Linde, who may have counsel present, regarding any such matters.

**NON-PUBLIC
APPENDIX C
TO THE ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS**

**HOLD SEPARATE TRUSTEE AGREEMENT
[Redacted From the Public Record Version But Incorporated By Reference]**