ACQUISITIONS (INDUSTRIAL GASES): THE BOC / L'AIR LIQUIDE CASE

Subject: Acquisitions
Investigation

Industry: Industrial gases
(Some implications for other industries)

Parties: BOC Group plc
L'Air Liquide SA
Air Products and Chemicals Inc

Source: Commission Statement IP/99/688, dated 17 September 1999

(Note. This is a second-phase investigation, which indicates that the Commission is unhappy about the proposed operations. These are complicated by the fact that, in addition to the immediate subject of investigation into the plans for L'Air Liquide to take over parts of BOC, there are further plans for L'Air Liquide and the US corporation Air Products and Chemicals to take over the rest of BOC. The outcome of the Commission's "in-depth" investigation is expected in January.)

The Commission of the European Communities has opened a full investigation into the proposed acquisition of parts of the BOC Group plc, UK, by the French company L 'Air Liquide SA in the industrial gases industry. Air Liquide and the US company Air Products and Chemicals Inc have announced a joint bid for BOC. After completion of the takeover bid, Air Liquide and Air Products plan to split up BOC's businesses and assets. The operation is considered in the context of an on-going global consolidation in the industrial gases industry. The companies involved are leading global suppliers of industrial gases and related equipment and services. Areas of concern are, among others, the strong position Air Liquide will obtain in particular in the markets for the supply of oxygen and nitrogen in large quantities to industrial users (so-called tonnage markets), in the markets for helium and for speciality gases used in the electronics industry.

Air Liquide and BOC both produce and/or distribute air gases (oxygen, nitrogen, argon), carbon dioxide, hydrogen and some speciality gases, in particular, helium, medical gases and electronics speciality gases (ESG). Industrial gases are supplied to different industries including, for example, iron, steel, refining, chemicals, glass, electronics, paper and pulp industries. Gases are either supplied in small quantities in cylinders (cylinder market), or in larger quantities in liquid from using tanker trucks (bulk market), or are produced in very large quantities directly on the customers' premises using on-site production units or pipelines (tonnage market). Air Liquide is the world's number one in the production and distribution of industrial gases and BOC the number two.

Air Liquide and Air Products have announced a joint pre-conditional recommended cash offer under the UK Takeover Code for all the shares in BOC. Upon regulatory approval and after completion of the bid, Air Liquide and Air Products have agreed to divide the world-wide businesses and assets of BOC. The Commission is assessing only those businesses and assets of BOC which Air Liquide proposes to acquire, notably the European Economic Area (EEA) businesses located in the UK and Ireland.

This assessment will cover each affected gases market separately on either a national, an EEA or a global basis, if necessary. The preliminary view of the Commission is that each gas constitutes a separate product market, although some limited possibilities of substitution between certain gases and processes seem to exist. This view is generally shared by the industry. Another decisive factor in assessing these markets is the quantity of gases required and thus the method of distribution.

The possible geographic markets particularly affected by the operation are the UK and Ireland. There may also be wider geographic markets. The Commission will also focus its investigation on the effects of the acquisition in the production/distribution of helium, electronics speciality gases and medical gases markets. The Commission will investigate whether the acquisition of BOC by Air Liquide may have adverse effects on the functioning of these markets, where Air Liquide, BOC and Air Products are leading operators.

The Commission must now take a final decision within four months. The Commission and the US antitrust authorities (the Federal Trade Commission) have been collaborating closely and will continue to do so, especially if the two authorities identify common competition concerns.

Background

Any investigation under the Merger Regulation is conducted under a legally binding timetable. From the date that the Commission is fully informed of the details of the transaction (so-called notification), the Commission has a period of one month to make an initial assessment of the notified transaction. If the Commission comes to the conclusion that there are serious concerns whether an operation is compatible with the competition rules in the common market a full investigation is initiated. For this investigation a further four months is allowed before the Commission adopts a final decision whether or not to allow the proposed transaction to proceed. The opening of a full investigation is a procedural step without prejudice to the final outcome of the case.

Now that the Commission has opened a full investigation in this case it will continue a detailed fact-finding exercise. The legal test is the likelihood that the acquisition will create or reinforce a dominant position, held either by a single entity (single dominance) or by a cluster of competitors presenting the structural characteristics of an oligopoly (collective dominance). □