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***Case No COMP/M.6504 -  
LINDE / AIR PRODUCTS  
HOMECARE***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION  
Date: 18/04/2012

***In electronic form on the EUR-Lex website under document  
number 32012M6504***



EUROPEAN COMMISSION

Brussels, 18.04.2012  
C(2012) 2683

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PUBLIC VERSION

MERGER PROCEDURE

**To the notifying parties:**

Dear Sir/Madam,

**Subject: Case No COMP/M.6504 – LINDE / AIR PRODUCTS HOMECARE  
Commission decision pursuant to Article 6(1)(b) of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 24 February 2012, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation") by which Linde AG ("Linde") acquires sole control within the meaning of Article 3(1)(b) of the Merger Regulation over the whole of the homecare business of Air Products and Chemicals, Inc ("AP", USA) in Belgium, France, Germany, Spain and Portugal ("APH") by way of purchase of shares.

**I. Linde and APH**

2. Linde is an international gas and technology group. Its gas division focuses on the production and supply of industrial and medical gases for a wide range of applications. It also includes Linde's respiratory homecare business which provides healthcare treatments to patients in their homes. This includes an equipment business, which installs, maintains and repairs equipment in patients' homes, and collects it at the end of service. It also provides the delivery of on-going oxygen supplies, other supplies and support services.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1. With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

3. AP is an international gas and technology group. Its homecare business is conducted through APH, the primary business of which is respiratory homecare services.

## **II. THE OPERATION AND THE CONCENTRATION**

4. The notified transaction concerns the acquisition of APH by Linde from AP. APH comprises the homecare activities of AP in Belgium, France, Germany, Spain and Portugal. AP will retain (i) its other, upstream, business activities in these countries, including the supply of medical oxygen to hospitals and at wholesale level and (ii) the homecare business in the UK and Ireland.
5. The transaction is a concentration within the meaning of Article 3.1(b) of the Merger Regulation.

## **III. EU DIMENSION**

6. The undertakings concerned had in 2010 a combined aggregate world-wide turnover of more than MEUR 2 500<sup>2</sup> (Linde: MEUR 12,900 and APH: MEUR [...]). In each of at least three Member States the combined aggregate turnover of all the undertakings concerned is more than MEUR 100 ([...]). In each of at least three Member States the aggregate turnover of each of at least two undertakings concerned was more than MEUR 25 ([...]). The aggregate Union-wide turnover of each of at least two of the undertakings concerned was more than MEUR 100 (Linde: MEUR [...] and APH: MEUR [...]). Linde and APH did not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension under Article 1(3) of the Merger Regulation.

## **IV. RELEVANT MARKETS**

7. Homecare services comprise:
  - (i) The provision of oxygen-based respiratory services to patients by means of liquid oxygen ("LOX"), gaseous oxygen ("GOX") or concentrator oxygen ("COX"). LOX and GOX require regular provision of medical grade oxygen to the patient's home whereas COX involves concentrating oxygen from the air in a machine located at the patient's home;
  - (ii) The supply of other respiratory services including (i) ventilation therapy (provision of ventilator support through the patient's upper airway by means of a mask or similar device), (ii) sleep therapy (delivery of ambient air to prevent apnoea) and (iii) aerosol therapy (inhalation of a drug directly to the lungs); and
  - (iii) The provision of other, non-respiratory services. Pertinent for this case is the provision of monitoring services for sudden infant death syndrome (SIDS).
8. The transaction gives rise to horizontal overlaps in the five countries where APH is active but affected markets occur only in Belgium, Germany, Spain and Portugal. There are no horizontally affected markets in France.

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<sup>2</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

9. The transaction also gives rise to a vertical relationship between the upstream market for the supply of medical oxygen and the downstream markets for the oxygen therapies GOX and LOX, which constitute affected markets in Germany and France and possibly in Belgium.

## **IV.1. HORIZONTAL OVERLAPS**

### **IV.1.A Product market definition**

10. Both Linde and APH are active in the supply of homecare services. The Commission has not yet defined relevant markets for the provision of these services.
11. Linde takes the view that homecare services and hospital care services form part of different product markets as they have distinctive demand and supply sides. In particular, from the demand point of view, Linde asserts that homecare services and hospital care services are not interchangeable for patients and, most importantly, the actual purchasers of these services are typically distinct. From the supply-side perspective, Linde stresses that the provision of hospital and homecare services requires different resources. Indeed, hospitals are large and sophisticated purchasers that require the provision of services on a large scale. They typically have storage facilities that make bulk supply possible. Moreover, they do not need nursing or advisory services for patients from the supplier of medical oxygen. Homecare, in turn, requires a distribution network that is geared to provide small volumes to individual patients' homes. Homecare service staff, including specialist nurses, technicians or drivers need to frequently visit individual homes and act as a patient's direct contact as well as to provide maintenance services regarding the equipment.
12. With regard to homecare services, Linde submits that these should either be considered as one single product market or segmented into respiratory and other homecare services.
13. The argument in favour of one market for homecare services is essentially based on supply side substitutability. In particular, Linde argues that:
  - i) homecare is principally a distribution business (for a bundle of equipment and services) and that having set up the logistics required for the delivery of one type of therapy, suppliers can easily expand and deliver the entire spectrum of homecare services;
  - ii) the devices and pharmaceutical products which form part of the bundle are or may be sourced from third parties and homecare providers are typically not vertically integrated. Expanding into other homecare activities then becomes a matter of training staff in the provision of the service and ensuring reimbursement from the national health authority.
14. In favour of a division in respiratory and other homecare services, Linde submits that:
  - i) in countries where homecare services are procured through tenders or contracts with operators of the national health authority, purchasers typically require suppliers to make offers for the full range of respiratory homecare services, but not for other homecare services;
  - ii) in countries where suppliers 'hunt' for customers, and where the physicians/prescribers are therefore the critical gatekeepers for access to patients, prescribers

for all respiratory homecare therapies are typically the same specialists (whereas non-respiratory homecare therapies are often prescribed by different doctors).

15. With regard to the existence of narrower relevant markets within respiratory homecare services, Linde claims that a further segmentation along individual homecare respiratory services (oxygen, non-oxygen services) is unlikely to be justified. In defending this argument, Linde submits that, although patients' requirements are heterogeneous, the purchasing<sup>3</sup> of the respiratory services typically concerns the full bundle, and providers of respiratory homecare services offer the full range of such services. Moreover, Linde asserts that the oxygen therapies are generally interchangeable in terms of the functions they perform; the differentiating factors between COX, LOX and GOX are limited and the choice depends on both the physician's and patient's experience, preference and the patient's condition.
16. The Commission agrees with Linde and considers that hospital care services and homecare services should belong to different product markets. Therefore, the market investigation focused on homecare services alone.
17. The market investigation indicated that respiratory services and respectively non-respiratory services should be considered as separate product markets<sup>4</sup>. In particular, respondents indicated that this distinction is mainly due to the supply-side requirements of respiratory services: respiratory therapies require more service and time for and with the patient, different technology/equipment and broader medical knowledge<sup>5</sup>.
18. The market investigation was inconclusive with regard to the need to segment further the respiratory services. Indeed, the replies<sup>6</sup> and comments to questionnaires suggest that, while oxygen therapies are different from the non-oxygen services, both groups of therapies should belong to the same product market. Respondents suggesting that these groups of therapies are different indicate that: oxygen therapies require stricter safety measures and faster delivery; oxygen being a medicine requires strict regulatory measures; and each requires different production and logistics infrastructure. Respondents in favour of one respiratory services market indicate that these are both respiratory services and are related, both are provided by the same personnel and sometimes to the same patients.
19. The results of the market investigation with regard to oxygen services seem to be inconclusive. At first instance, respondents take the view there is no need for a further segmentation of oxygen therapies<sup>7</sup> given that oxygen services are usually

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<sup>3</sup> The purchasers of these services are not the end users (patients) but, depending on the individual country, (statutory or private) health insurers, regional health authorities, hospitals or pharmacies.

<sup>4</sup> See questions 13 and 18 in Q1- questionnaire to competitors, question 17 in Q3- questionnaire to health insurers, questions 8 and 15 in Q6 - questionnaire to regional health authorities and hospitals (Spain), in Q7- questionnaire to regional health authorities and hospitals (Portugal) and question 18 in Q8- questionnaire to hospitals and pharmacies (Belgium).

<sup>5</sup> See questions 13.1 and 18.1 in Q1- questionnaire to competitors and question 17.1 in Q3.

<sup>6</sup> See question 14 and 19 in Q1- questionnaire to competitors and questions 11 and 18 in Q3 – questionnaire to Health Insurers.

<sup>7</sup> See questions 20 and 21 in Q1- questionnaire to competitors; questions 19 and 20 in Q3 – questionnaire to Health Insurers; question 17 in Q6-questionnaire to Spanish Hospitals and Health Authorities; questions 17 and 18 in Q7– questionnaire to Portuguese Hospitals and Health Authorities; questions 27 and 28 in Q8– questionnaire to Belgian Hospitals and Pharmacies.

supplied by the same companies, not differentiating for oxygen source (GOX, LOX or COX).

20. However, when asked about different oxygen therapies, namely LOX, GOX and COX, respondents indicate a lack of substitutability. According to the inquiry<sup>8</sup>, LOX, GOX and COX therapies do not have the same characteristics (they have different purity and flow levels and do not allow for the same degree of mobility) and prices<sup>9</sup> and they are not feasible substitutes for the same treatment (different pathologies may require different therapies and GOX is to a certain degree used as back-up). However, according to the same market investigation, there is a certain, variable, degree of substitutability of each oxygen therapy with each other<sup>10</sup>. In addition, demand trends seem to support potential substitution among oxygen therapies: GOX demand is declining while COX and LOX demand are rising.
21. The majority of the respondents expressing a view with regard to the necessity of further segmenting the non-oxygen therapies indicated being in favour of a single market<sup>11</sup>.
22. However, in the absence of competition concerns, there is no need to precisely define the product market for the purpose of this decision.

#### **IV.1.B Geographic market definition**

23. In a number of cases involving products similar to homecare services, the Commission considered that the geographic scope of the markets was not wider than national<sup>12</sup>.
24. In general, Linde takes the view that many of the reasons which led the Commission to conclude in those cases that markets were national in scope also apply to this case. They submit that: i) homecare services are normally covered by health insurance; ii) healthcare reimbursement systems are generally national; iii) regulatory regimes, prescription practices and market organisation (e.g. tenders by healthcare authorities or insurers, direct contracts with providers, influence of prescribing doctors on

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<sup>8</sup> See questions 12 and 15 in Q1- questionnaire to competitors; questions 12 and 13 in Q3 – questionnaire to Health Insurers; questions 11 and 13 in Q4; questions 10 and 12 in Q6- questionnaire to Spanish Hospitals and Health Authorities and Q7– questionnaire to Portuguese Hospitals and Health Authorities; questions 20 and 21 in Q8– questionnaire to Belgian Hospitals and Pharmacies.

<sup>9</sup> LOX appears to be the most expensive.

<sup>10</sup> See questions 9,10 and 11 in Q1- questionnaire to competitors;

<sup>11</sup> *Question* 21 in Q1- questionnaire to competitors; question 20 in Q3 – questionnaire to Health Insurers; question 18 in Q6- questionnaire to Spanish Hospitals and Health Authorities; question 18 in Q7– questionnaire to Portuguese Hospitals and Health Authorities; question 28 in Q8– questionnaire to Belgian Hospitals and Pharmacies.

<sup>12</sup> COMP/M.2861-Siemens/Drägerwerk/JV, para. 35; COMP/M.4540, Nestlé/Novartis (Medical Nutrition Business), para. 54. Different reimbursement systems at national level were also considered in COMP/M.4367, APW/Nordic Capital/ Apsa/Capio, para. 44 *et seq.*, although the exact market definition was ultimately left open.

choice of provider) are different in each Member State and iv) most players operate at national level and compete for patients across the national territory.

25. The market investigation largely confirmed Linde's<sup>13</sup> claims. Similar to other medical sectors, the presence of public reimbursement systems in a large number of Member States has organised the markets at national level, although sometimes there are differences between different regions of the same country. Regulatory regimes and market organisation are national. Moreover, many players operate at national level and compete for patients across the national territory. In addition, competitors submit that their sales forces and marketing are organised at national level,<sup>14</sup> even in case of multinational companies<sup>15</sup>.

27. In view of the above, homecare services are assessed in the present decision on a national level.

## **VERTICALLY RELATED MARKETS**

### **IV.2.A Product market definition**

28. In a previous case<sup>16</sup>, the Commission found that some gases used for industrial purposes are also used for medical applications. These gases are mainly oxygen, nitrogen, carbon dioxide and nitrous oxide (N<sub>2</sub>O). The market investigation in that case found that demand-side substitutability with industrial gases is limited since the customers (hospitals), can use only the gases that have the label “medical”, which ensures the quality and traceability of the gases used. Although it ultimately left the exact market definition open, the Commission examined a separate potential market for oxygen used for medical purposes.

29. The Commission further considered that (industrial/medical) gases are supplied in different forms (gaseous or liquid) and via different distribution channels (tonnage<sup>17</sup>, bulk<sup>18</sup> and cylinders<sup>19</sup>). The distribution in tonnage and cylinders is generally made in gaseous form while bulk distribution generally means supply in liquid form. The

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<sup>13</sup> See replies to questions 22, 34, 54, 47 and 62 of Q1 – questionnaire to competitors; to questions 21, 27, 34, 41 and 49 of Q3 – questionnaire to Health Insurers; to questions 19 and 25 of Q6 – questionnaire to Spanish Hospitals and Health Authorities; to questions 19 and 26 to Q7 – questionnaire to Portuguese Hospitals and Health Authorities; and to questions 33 and 34 of Q8 – questionnaire to Belgian Hospitals and Pharmacies.

<sup>14</sup> See replies to question 25 of Q1 – questionnaire to competitors.

<sup>15</sup> See replies to question 25.1 of Q1 – questionnaire to competitors.

<sup>16</sup> *COMP/M.4141, Linde/BOC*, para. 13.

<sup>17</sup> Supply in tonnage consists of the delivery of large quantities of gases in gaseous form either by pipeline or dedicated ASUs installed on or close to the customer's site.

<sup>18</sup> Bulk supply mainly covers the supply of gases in liquid form, often by transport in cryogenic tankers, to customers whose demand is not as large as that of customers who operate in the tonnage business.

<sup>19</sup> Cylinders are used when the quantities requested by customers are small.

Commission found that gases supplied in tonnage, bulk and cylinders each qualify as separate product markets. Therefore, Linde submits that the upstream product market for oxygen used for medical purposes may be further divided according to the form of supply (tonnage, bulk or cylinders).

30. Linde submits that most of the oxygen produced in Europe is medical grade and that even oxygen for industrial purposes is typically physically and chemically identical with medical oxygen.
31. The market investigation did not confirm Linde's claims; the majority of respondents being of the opinion that the production of medical oxygen is different from the production of industrial oxygen and did not share the view that most of the oxygen produced in Europe would be medical grade<sup>20</sup>.
32. For the purpose of this decision, however, the precise delineation of the product market will be left open in the absence of competition concerns.

#### **IV.2.B Geographic market definition**

33. The Commission indicated that the supply of gases in bulk and cylinders is national in scope.<sup>21</sup> More specifically, it found that bulk oxygen can be distributed economically over distances of approximately 200 km from the production plant. However, despite the fact that in many instances the mentioned shipping distances do not cover an entire Member State, the overlapping catchment areas of the various production plants and the existence of swap agreements between suppliers to reduce transportation costs permit competition in bulk and cylinder markets for standard industrial gases to take place at national level.<sup>22</sup> According to Linde, medical oxygen is only supplied in bulk/dewars and cylinders. In any event, Linde submits that medical oxygen is transported over longer distances than industrial oxygen (in bulk, over 300-400 km).
34. Linde submits that the relevant market can be left open in this case as there would be no competition concerns.
35. The market investigation largely indicated a national scope for the wholesale supply of medical oxygen.
36. Therefore, for the purpose of the present decision, the national scope of the geographic market will be maintained.

### **V. COMPETITIVE ASSESSMENT**

#### **V.1 HORIZONTALLY AFFECTED MARKETS**

##### **BELGIUM**

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<sup>20</sup> Questionnaires to competitors (Q1) and to wholesale suppliers of medical oxygen (Q2).

<sup>21</sup> COMP/M.1641, *Linde/AGA*, paras 25 and 26; COMP/M.4141, *Linde/BOC*, para. 52.

<sup>22</sup> COMP/M.4141, *Linde/BOC*, paras. 47 and 50.

## General description of the health care system

37. In Belgium most patients<sup>23</sup> are covered by statutory health insurance. Reimbursement prices are set by the RIZIV/INAMI. Respiratory homecare service providers contract with hospitals and pharmacies<sup>24</sup>. Whilst tenders exist, bi-lateral contracting is more common<sup>25</sup>. A reimbursement contract with a hospital or pharmacy does typically not guarantee a level of sales to a homecare provider but only allows for reimbursement once a customer/patient is won, which in most cases requires winning the prescription from the prescribing physician i.e. homecare providers have to 'hunt' for patients.
38. The Belgian healthcare reimbursement system distinguishes between chronic versus short-term (acute) therapies. Chronic therapies (LOX, COX, GOX sleep and ventilation) are prescribed by doctors working in hospitals. Hospitals are reimbursed a regulated price from which the price invoiced by homecare suppliers is deducted. Pharmacies, which provide short-term therapies (GOX, COX) prescribed by general practitioners, are also reimbursed by regulated prices but these are then directly passed on to the homecare supplier<sup>26</sup>. As a result, hospitals have an incentive to negotiate discounts with homecare providers whereas pharmacies do not.
39. Currently, the reimbursement levels and their modalities are under reform by RIZIV/INAMI, details thereof are not yet settled. According to the Linde<sup>27</sup> and Oxycure<sup>28</sup>, authorities are considering to:
- a. Split all reimbursement modalities between short term (limited to 3 months) and long term;
  - b. Move long terms indications for an oxygen therapy into the hospital convention; and
  - c. Lower the provision for GOX, LOX and COX.
40. Point (a) and (b) imply that the border between homecare provided through pharmacies and hospitals shift towards more therapies being dealt with under the hospital convention whereas point (c) implies that the overall budget available for oxygen therapies decreases.
41. According to Oxycure, a company that cannot supply LOX (like Oxycure) for homecare will not be able to quote or to be taken into account by hospitals providing

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<sup>23</sup> Reply Parties to request of 21 March 2012. Some exceptions, such European Civil servants, exist.

<sup>24</sup> Form CO, reply to question 61 of competitors questionnaire Reply to question 35 hospital and pharmacies questionnaire.

<sup>25</sup> Form CO, reply to questions 88, 89, 91 and 92 of competitors questionnaire. Reply to question 37 hospitals and pharmacies questionnaire.

<sup>26</sup> Form CO, reply to question 62 of competitors questionnaire Reply to question 36 hospitals and pharmacies questionnaire.

<sup>27</sup> Reply parties of 23 March 2012 question 7. Reply parties 2 April 2012 question 1.

<sup>28</sup> Reply Oxycure to request of 21 march 2012.

homecare because it cannot offer the different kinds of oxygen sources (LOX, COX, GOX) a hospital specialist might require for its patients.

42. The present transaction does not negatively affect Oxycure's ability to obtain supplies of LOX for its homecare service business. Consequently, whereas the present intended reform of the Belgian healthcare reimbursement system may affect competitive conditions for homecare suppliers, these are not merger specific.

43. In fact, it is likely that the transaction will facilitate Oxycure (and other non-integrated homecare provider alike) in procuring LOX. It will establish AP as a wholesale supplier of medical oxygen (including for the LOX that it is currently supplying internally to APH) with authorisations in place and without interests in the downstream market for homecare services. Moreover, Praxair has recently established itself a wholesaler medical oxygen supplying homecare providers in Belgium. Whereas it currently only supplies GOX at wholesale in Belgium, it does produce this. It does moreover not appear to have any disincentives to supply homecare providers with LOX should it consider this commercially attractive, as it has no such downstream activities itself.

Affected markets

44. Table 1 below sets out the market shares of the parties and their competitors for each potential market.

Table 1

Segments	Respiratory Homecare Services (% by value)				
	Oxygen (%)			Non-Oxygen (%)	
	LOX	GOX	COX	Ventilation	Sleep
Linde and APH	[20-30] (Linde: [5-10]; APH: [10-20])				
	[10-20] ([0-5];[10-20])			[30-40] ([10-20];[20-30])	
	[30-40] ([10-20];[10-20])	[10-20] ([0-5];[10-20])	[10-20] ([0-5];[5-10])	[10-20] ([0-5];[10-20])	[30-40] ([10-20];[20-30])
Air Liquide	[20-30]				
	[20-30]			[30-40]	
	[30-40]	[20-30]	[10-20]	[70-80]	[20-30]
Vivisol	[10-20]				
	[10-20]			[10-20]	
	[20-30]	[5-10]	[5-10]	[10-20]	[20-30]
Messer	[10-20]				
	[10-20]			[5-10]	
	[10-20]	[20-30]	[5-10]		[5-10]
Oxycure	[10-20]				
	[20-30]				
			[60-70]		
Belmedis	[5-10]				
	[5-10]				
		[20-30]			
IJSfabriek Strombeek	[0-5]				
	[5-10]				

Segments	Respiratory Homecare Services (% by value)				
	Oxygen (%)			Non-Oxygen (%)	
	LOX	GOX	COX	Ventilation	Sleep
		[10-20]			
Others	[0-5]				
	[0-5]			[5-10]	
			[0-5]		[5-10]

Source Form CO. For sleep, figures include sales of equipment. Market shares and overlaps do however not materially change when assessed on a 'net of pure equipment sales' basis (reply parties to request for information 21 March 2012)

45. Linde and APH overlap in Belgium in all oxygen (GOX, LOX and COX) and non-oxygen respiratory therapies (ventilation, sleep) with the exception of aerosol (where only APH is present). APH is active across Belgium and supplies primarily through pharmacies. Linde is mainly active in Flanders due to its proximity to its (medical oxygen) infrastructure in the Netherlands and only supplies homecare services to patients of hospitals.
46. The transaction give rise to significant market shares and overlaps (See table 1 above) on the following potential markets
  - d. LOX therapy.
  - e. Sleep therapy.
  - f. A wider market comprising all non-oxygen therapies, including sleep therapy as well as ventilation and aerosol therapies
47. None of the pharmacies and hospitals (the principle purchases of homecare services in Belgium) that responded in the market inquiry identified competition concerns emanating from the merger<sup>29</sup>. Neither did RIZIV/INAMI.

#### *Lox therapies*

48. LOX therapy can only be prescribed within the framework of a convention between the RIZIV/INAMI and a hospital/sleep centre. These patients can only be served under the hospital convention (and thus not by pharmacies).
49. The combined market share of the parties on a market for LOX therapies would be [30-40]%. However, several strong competitors on such a market would remain, in particular and Air Liquide (also a [30-40]% market share), Vivisol ([20-30]%) and Messer ([10-20]%).
50. APH is active across Belgium. At least Vivisol and Messer also offer their services across Belgium<sup>30</sup>. Linde is however mainly active in Flanders. Linde therefore primarily exerts competitive pressure on APH in Flanders only.
51. Indeed, the respondents to the market inquiry<sup>31</sup>, never consider the Parties as closest competitors in LOX and, always mentioned at least two competitors that are more closely positioned to either Linde or APH than the parties themselves.

<sup>29</sup> Response to Q 73 of Q8 Questionnaire to Hospitals/Pharmacies BE).

<sup>30</sup> Reply Q 87 competitors questionnaire.

<sup>31</sup> Reply Q 101 competitors questionnaire.

52. From the market inquiry it appears that entry barriers for both oxygen and non-oxygen therapies, i.e. LOX therapies in Belgium, are relatively low. In support, several respondents mention that small companies are entering the market and, hence, appear able to overcome these entry barriers<sup>32</sup>.
53. Nonetheless some market respondents have put forward that access to oxygen supplies, including LOX, is difficult. However, the merger is likely to lower entry barriers in this regard as it will establish AP as an independent wholesale supplier of oxygen without interests in the downstream market for LOX therapies. Moreover, Praxair owns a filling station in Belgium<sup>33</sup>.
54. Home care providers active in Belgium consider that national healthcare authorities, insurance companies and hospitals have bargaining power vis-à-vis their oxygen homecare suppliers<sup>34</sup>
55. Homecare providers active in Belgium consider that the healthcare system can prevent the merged entity from meaningfully increasing the prices of their respiratory homecare services<sup>35</sup>.
56. RIZIV/INAMI takes the view that it can influence significantly the final prices, conditions and/or other important parameters of respiratory homecare supply offered.<sup>36</sup>

#### *Sleep therapy*

57. Sleep therapy can only be prescribed within the framework of a convention between the RIZIV/INAMI and a hospital/sleep centre. These patients can only be served to patient of hospitals<sup>37</sup> (and not pharmacies).
58. Several significant competitors will remain active post-transaction, in particular Air Liquide ([20-30]%), Vivisol ([20-30]%) and, to a lesser extent Messer ([5-10]%).

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<sup>32</sup> Replies Q 147.2 and Q 148.2 of competitors questionnaire. Barriers of entry mentioned are (i) having or obtain supplies from a licensed oxygen filling plant (ii) marketing authorisations (iii) employees with the required expertise and (iv) to have a logistics organization with a density in patient population and client base to be able to provide the patients in a profitable way (v) a warehouse for medical devices. Reply to question 64 in hospital pharmacies questionnaire.

<sup>33</sup> The incumbent, vertically integrated suppliers of LOX and GOX (Linde, Air Products, Air Liquide, SOL, Messer) on the one hand and the (until recently) sole supplier of COX in Belgium (Oxycure), on the other hand, have a history of litigation. One of the findings in these court proceedings is that the main suppliers of medical oxygen (including AP and Linde) had entered into a concerted practise to impose a collective boycott for oxygen supplies on Oxycure. Form CO Fn 96. Reply Oxycure market inquiry. Minutes of Telephone conference with Oxycure 13 March 2012. Minutes of Telephone conference with Praxair 14 February 2012.

<sup>34</sup> Reply to question 154, 156 and 158 competitors questionnaire.

<sup>35</sup> Reply to question 163 competitors questionnaire.

<sup>36</sup> Replay INAM question 72 and 75.

<sup>37</sup> Reply parties on request 21 March. See also FORM CO Annex 6.1.f, chapter on Belgium.

59. Linde and APH are also not particularly close competitors. According to Linde, the ways hospitals operate in the provision of sleep therapy, and therefore the business model they impose on their suppliers, can be broadly categorized as follows:
- a. Full service with rental: the hospital rents the devices on a yearly basis and the homecare provider takes care of the service<sup>38</sup>.
  - b. Sale of equipment and service: the hospital buys the device. The homecare provider takes care of service.
  - c. Pure sale of equipment: the hospital just buys the device and takes care of the services itself. According to the parties, the latter model is increasingly being used by hospitals, in particular in Flanders.
60. Linde and APH are not particularly close competitors. Indeed, it appears<sup>39</sup> that APH serves patients only on a full-service basis whereas Linde estimates that only [...] % of its turnover in 2011 concerned full service.
61. Indeed, the respondents to the market inquiry<sup>40</sup> never consider Linde and APH as closest competitors in sleep therapy and, with one exception, they mentioned at least two competitors that are more closely positioned to either Linde or APH than the parties themselves.
62. From the market investigation it moreover appears that entry barriers for both oxygen and non-oxygen therapies, i.e. including sleep therapies in Belgium, are relatively low. In support, several respondents mention that small companies are entering the market and, hence, appear able to overcome these entry barriers<sup>41</sup>, such as SOS Oxygène<sup>42</sup>.
63. Homecare providers active in Belgium consider that national health care authorities, insurance companies and hospitals have bargaining power vis-à-vis their non-oxygen homecare suppliers<sup>43</sup> and that the healthcare system can prevent the merged entity from meaningfully increasing the prices of their respiratory homecare services<sup>44</sup>.

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<sup>38</sup> I.e. assisting the patient with the first installation, maintenance visits, supply of consumables, answering questions and collecting the device at the end of the therapy. The hospital pays an all-inclusive tariff, but this tariff and the services it covers differ per hospital.

<sup>39</sup> Reply parties on request 21 March 2012. See also FORM CO Annex 6.1.f, chapter on Belgium

<sup>40</sup> Reply Q 101 competitors questionnaire.

<sup>41</sup> Replies Q 147.2 and Q 148.2 of competitors questionnaire. Barriers of entry mentioned are (i) having or obtain supplies from licensed oxygen filling plant (ii) marketing authorisations (iii) employees with the required expertise and (iv) to have a logistics organization with a density in patient population and client base to be able to provide the patients in a profitable way (v) a warehouse for medical devices. . Reply to question 64 in hospital pharmacies questionnaire.

<sup>42</sup> Reply to question 151 competitors questionnaire.

<sup>43</sup> Reply to question 155, 157 and 159 competitors questionnaire.

<sup>44</sup> Reply to question 163 competitors questionnaire.

64. RIZIV/INAMI takes the view that it can influence significantly the final prices, conditions and/or other important parameters of respiratory homecare supply offered.<sup>45</sup>

#### *Non-oxygen therapies*

65. Sleep therapy and ventilation (the two non-oxygen therapies in which Linde and APH overlap) can only be prescribed within the framework of a convention between the RIZIV/INAMI and a hospital. These patients can only be served to patient of hospitals<sup>46</sup> (and not pharmacies).

66. Several significant competitors will remain active post-transaction, in particular Air Liquide ([30-40]%), Vivisol ([10-20]%) and, to a lesser extent Messer ([5-10]%).

67. The respondents to the market investigation<sup>47</sup> never considered Linde and APH as closest competitors in ventilation and sleep therapy and, with 1 exception, always mentioned at least two competitors that are closer to either Linde or APH than the Parties themselves. Linde is not present in aerosol. It follows that the Parties are not close competitors in a market for non-oxygen therapies either.

68. From the market investigation it appears that entry barriers for both oxygen and non-oxygen therapies, are relatively low. In support, several respondents mention that small companies are entering the market and, hence, appear able to overcome these entry barriers<sup>48</sup>, such as SOS Oxygène.<sup>49</sup>

69. RIZIV/INAMI takes the view that it can influence significantly the final prices, conditions and/or other important parameters of respiratory homecare supply offered.<sup>50</sup>

#### Conclusion

70. In light of the analysis above, the Commission considers that on the homecare services markets in Belgium the notified operation does not raise serious doubts as to its compatibility with the internal market.

## **GERMANY**

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<sup>45</sup> Replay INAM question 72 and 75.

<sup>46</sup> Reply parties on request 21 March. See also FORM CO Annex 6.1.f, chapter on Belgium

<sup>47</sup> Reply Q 101 competitors questionnaire.

<sup>48</sup> Replies Q 147.2 and Q 148.2 of competitors questionnaire. Barriers of entry mentioned are (i) having or obtain supplies from licensed oxygen filling plant (ii) marketing authorisations (iii) employees with the required expertise and (iv) to have a logistics organization with a density in patient population and client base to be able to provide the patients in a profitable way (v) a warehouse for medical devices. Reply to question 64 in hospital pharmacies questionnaire.

<sup>49</sup> Reply to question 151 competitors questionnaire.

<sup>50</sup> Replay INAM question 72 and 75.

## General description of the healthcare system

71. In Germany, competition takes place at several levels for homecare service providers. As a first step, homecare providers contract with public or private health insurers which procure services on behalf of their customers, the patients. In other words, the insurer is the paying customer and the patient and his physician are the physical recipients of the services. Insurance providers mainly contract with service providers through bilateral/direct contracting and, more exceptionally, through tenders.<sup>51</sup>
72. With bilateral/direct contracting, a service provider either enters into an individual contract with the insurer or adheres to an existing contract and its terms and conditions. Price is an important element when insurers select service providers. Health insurers have a legal obligation to comply with the rules of cost-effectiveness and to ensure that they reimburse no more than what is appropriate and cost-efficient.<sup>52</sup> At the same time, insurance providers must also ensure that the level of services offered meets the necessary qualitative requirements.
73. A contract with a health insurer provides access to the market, but does not guarantee a certain level of sales. A contract is normally not exclusive and merely provides the legal basis for the agreed reimbursements by the insurer for the services that are provided to the insured. However, it is the prescribing physician who, in consultation with the patient, selects the type of therapy and, generally, the service provider and the devices used. The prescribing physician will primarily select service providers on the basis of qualitative factors such as service and reliable logistics. Homecare providers therefore have to 'hunt' for prescriptions by visiting the relevant practitioners and offering excellent service to existing patients in their competition for business.
74. Health insurers can and also do redistribute prescriptions between therapies and, even, from one homecare provider to another homecare provider,<sup>53</sup> should the prescribed therapy/supplier not be the most appropriate/cost-effective. The homecare provider can therefore not be certain to finally obtain business unless competitive prices and services are offered.
75. With tenders, the insurance company puts a great emphasis on price and has the possibility to find additional price competitive offers on the market. The winning service provider typically enters into an exclusive arrangement with the insurance company for a certain area/region.<sup>54</sup> However, as mentioned, tenders take place on a

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<sup>51</sup> According to Linde, tenders account for only between [0-20]% of the German market, see FORM CO, para 317. The market inquiry confirms that insurance providers mainly contract through bilateral/direct contracting, see replies to Q 22-24 and Q51, Q53 and Q55 of insurer questionnaire and replies to Q69, and Q71 of competitor questionnaire.

<sup>52</sup> See for example para. 12 of the Sozialgesetzbuch V, Social Code Book V ("SGB V"). Suppliers of medical devices must be qualified pursuant to para. 126 of the SGB V and in order to be qualified must be able to provide an appropriate, cost-efficient service.

<sup>53</sup> Linde estimates that about [10-20]% of all prescriptions are redistributed. Out of these, approximately [...] % are distributed to other providers and [...] % are distributed to other therapies (but remain with the same provider). The market inquiry shows that the majority of responding insurers have redistributed prescriptions between therapies and homecare providers, see replies to Q79-80 of insurer questionnaire.

<sup>54</sup> See FORM CO, para 362.

more exceptional basis and direct/bilateral contracting with health insurers is still the rule in Germany.<sup>55</sup>

Activities of the Parties and their competitors in Germany

76. In Germany, APH is active in the full range of respiratory homecare services consisting of (i) oxygen therapies (GOX, LOX and COX) and (ii) non-oxygen therapies (ventilation, sleep and aerosol therapies). APH is also active in (iii) services in relation to monitoring devices for SIDS.<sup>56</sup> Linde is also active in the full range of respiratory homecare services consisting of (i) oxygen therapies (GOX, LOX and COX) and (ii) non-oxygen therapies (ventilation, sleep and aerosol therapies). In contrast to APH, Linde is not active in SIDS monitoring.
77. Both Linde and Air Products are active in the wholesale supply of medical oxygen. In Germany, Linde supplies competitors to a limited extent.<sup>57</sup> APH does not supply any competitors in Germany.<sup>58</sup> For an assessment of the vertical links, see **Section V.2** below.

Affected markets in Germany

78. The operation gives rise to a significant market share only with regard to the supply of oxygen therapies (GOX, COX and LOX) in Germany. The market shares are most significant in LOX.
79. The Parties' market shares, as well as those of its competitors, on the respiratory homecare market (including market shares per possible segment) are set out in **Table 2** below. It should at this stage be noted that there are numerous competitors active on the respiratory homecare market in Germany and, in particular, that the majority of the main homecare providers active in this segment provide the full range of oxygen therapies (GOX, COX and LOX).

**Table 2**

	Respiratory Homecare Services (%)					
	Oxygen (%)			Non-Oxygen (%)		
	LOX	GOX	COX	Ventilation	Sleep	Aerosol
Linde and APH	[10-20] ([10-20];[5-10])					
	[40-50] ([20-30];[10-20])			[5-10] ([0-5];[0-5])		
	[40-50] ([30-40];[10-20])	[20-30] ([5-10];[10-20])	[20-30] (10-20);[10-20])	[5-10] ([0-5];[0-5])	[5-10] ([0-5];[0-5])	[10-20] ([0-5];[10-20])

<sup>55</sup> According to Linde, tenders account for only between [0-20]% of the German market, see FORM CO, para 317. The market inquiry confirms that insurance providers mainly contract through bilateral/direct contracting, see replies to Q 22-24 and Q51, Q53 and Q55 of insurer questionnaire and replies to Q69, and Q71 of competitor questionnaire.

<sup>56</sup> Until 2008 APH carried out some limited nutrition and infusion activities in Germany. This business was discontinued in 2009.

<sup>57</sup> Linde supplies [...] with GOX/LOX see FORM CO, para 242. It will continue its supplies post-transaction, see Linde's reply to Q19 on 14032012 in response to the Commission information request of 12 March 2012.

<sup>58</sup> Air Products supplies the following competitors in Germany: [...].

	Respiratory Homecare Services (%)					
	Oxygen (%)			Non-Oxygen (%)		
	LOX	GOX	COX	Ventilation	Sleep	Aerosol
Air Liquide	[10-20]					
	[10-20]			[20-30]		
	[10-20]	[10-20]	[10-20]	[30-40]	[10-20]	[30-40]
GTI	[0-5]					
	[0-5]					
	[0-5]	[5-10]	[0-5]			
ResMed	[10-20]					
	[0-5]			[10-20]		
			[0-5]	[5-10]	[20-30]	
H&L	[20-30]					
	[5-10]			[30-40]		
	[5-10]	[5-10]	[0-5]	[20-30]	[40-50]	[30-40]
Sapio	[0-5]					
	[5-10]			[0-5]		
	[5-10]	[0-5]	[0-5]	[0-5]	[0-5]	
Vivisol	[5-10]					
	[10-20]			[0-5]		
	[10-20]	[5-10]	[5-10]	[5-10]	[0-5]	
Oxycare	[0-5]					
	[5-10]			[0-5]		
	[0-5]	[20-30]	[20-30]	[0-5]	[0-5]	
NRI	[0-5]					
	[0-5]			[0-5]		
		[5-10]	[0-5]	[0-5]	[0-5]	
Luchs	[0-5]					
	[0-5]			[0-5]		
	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	
GMV	[0-5]					
	[0-5]			[0-5]		
		[5-10]	[0-5]	[0-5]	[0-5]	
Critical Care	[0-5]					
	[0-5]			[0-5]		
	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	
Börgel	[0-5]					
				[0-5]		
				[5-10]		
Mueller Nbg.	[0-5]					
	[0-5]			[0-5]		
	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	
Others	[5-10]					
	[0-5]			[5-10]		
	[0-5]	[5-10]	[5-10]	[5-10]	[0-5]	[20-30]

Source: Form CO.

80. As set out in **Table 2** above, the operation gives rise to affected markets only with regard to the supply of oxygen therapies (GOX, COX and LOX) in Germany. The market shares are most significant in LOX. The transaction leads to a combined market share of [40-50]% in oxygen therapies overall (Linde [20-30]% and APH [10-20]%). Per oxygen therapy segment, the combined market shares are the following:

- (i) [40-50]% in LOX (Linde [30-40]% and APH [10-20]%);
  - (ii) [20-30]% in COX (Linde [10-20]% and APH [10-20]%); and
  - (iv) [20-30]% in GOX (Linde [5-10]% and APH [10-20]%).
81. In the area of oxygen therapies where Linde will become the largest supplier ([40-50]%), its largest competitors will be Air Liquide/Vitalaire ([10-20]%) and Vivisol ([10-20]%). Furthermore, there are at least 9 other competitors with shares of between [0-5]% and [5-10]%. Both Linde and APH have lost shares over the last three years. The Parties' combined share dropped from around [40-50]% to [40-50]% in sale, whereas all of Linde's main competitors in this segment, i.e. Air Liquide/Vitalaire, Vivisol, Sapio and H&L, have increased their market share. It should be noted that Sapio and H&L have entered this segment of the market in Germany more recently.<sup>59</sup>
82. As mentioned, the majority of the main players in the oxygen therapy segment provide the full range of oxygen therapies (GOX, COX and LOX). This is also necessary, since contracts concluded with insurers typically cover all oxygen therapies.<sup>60</sup>
83. In the LOX segment of the market, the proposed transaction combines the strongest player (Linde) with the fourth strongest player (APH) in the segment (combined market share of [40-50]). Linde's largest competitors will be Vivisol ([10-20]%) and Air Liquide/Vitalaire ([10-20]%). Moreover, H&L and Sapio hold [5-10]% each in LOX despite having entered the oxygen therapy segment quite recently. In addition, there are at least 5 other competitors with shares between [0-5]% and [0-5]% of the market. Since 2008, Linde has lost around [5-10]% in sales in LOX, whereas most of its main competitors have increased their market shares.<sup>61</sup>
84. In the COX segment of the market, Linde will become the second largest player on the market ([20-30]%). Its largest competitors will be Oxycare ([20-30]%) and Air Liquide/Vitalaire ([10-20]%). Furthermore, there are at least 10 other competitors with shares of between [0-5]% and [5-10]%.
85. In the GOX segment of the market, Linde will become the second largest player on the market ([20-30]%). Its largest competitors will be Oxycare ([20-30]%) and Air Liquide/Vitalaire ([10-20]%). Furthermore, there are at least 9 other competitors with shares of between [0-5]% and [5-10]%.

### Linde's claims and the results of the market inquiry

#### *Oxygen therapies*

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<sup>59</sup> Both companies entered the German market in the last 6 years.

<sup>60</sup> See responses to Q Q23-24 of the insurers questionnaire and responses to Q28 of competitor questionnaire.

<sup>61</sup> Air Liquide/Vitalaire and Vivisol have each gained [0-5]% in sales and H&L has gained [0-5]% in sales since 2008. Sapio and the remaining competitors have remained stable.

86. Linde claims that it faces strong competitive constraints in respiratory homecare and that the proposed transaction does not raise any competition concerns in Germany for the following reasons:

- (i) Health insurers have strong negotiation power and have the possibility to redistribute prescriptions to the most appropriate/cost-effective supplier/therapy;
- (ii) Competition takes place at several levels, including not only at the contracting level with health insurers but also at the prescription hunting level with practitioners/patients;
- (iii) The merged entity will continue to face significant competitive pressure from competing homecare providers and Sanitätshäuser, i.e. suppliers of medical devices, orthopaedic aids and medical equipment; and
- (iv) In any event, there is no material obstacle to market entry and expansion by third parties.

87. The market investigation confirms that competition in the homecare segment of the market takes place on several levels in Germany: (i) when service providers contract with health insurers in order to access the market; (ii) when service providers 'hunt' for prescriptions by visiting the relevant practitioners and offering their service to patients in their competition for business; and (iii) when health insurers redistribute prescriptions between therapies and even from one homecare provider to another.<sup>62</sup>

88. A majority of market respondents confirms that insurance companies have buyer power and, in particular, that they significantly influence reimbursement levels, and other important conditions, for the contracted services vis-à-vis homecare providers.<sup>63</sup> Insurance companies typically negotiate on a non-exclusive basis with homecare providers and therefore have the ability to play one off against the other. The applicable legislation provides that those service providers that do not already have a contract themselves may opt to adhere to the existing agreement.<sup>64</sup> Competition is further strengthened by the legal obligation on health insurers to comply with the rules of cost-effectiveness and to ensure that they reimburse no more than what is appropriate and cost-efficient.<sup>65</sup> Moreover, insurance companies may issue calls for tenders should for example the reimbursement levels negotiated prove too high.<sup>66</sup>

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<sup>62</sup> See replies to Q76 of the insurer questionnaire and replies to Q72 of competitor questionnaire. See replies to Q79-80 of insurer questionnaire: a majority of responding insurance companies confirm that they have redistributed prescriptions between suppliers and an even bigger majority confirm that they have redistributed prescriptions between different oxygen therapies.

<sup>63</sup> See in particular replies to Q156-157, Q165 of competitor questionnaire; replies to Q75 and 95 of the insurer questionnaire; and replies to Q22 of KOL questionnaire.

<sup>64</sup> See para 127, Section 2a, of Sozialgesetzbuch V, Social Code Book V ("SGB V"). See also para 392, second bullet of Form CO.

<sup>65</sup> See para. 12 of the Sozialgesetzbuch V, Social Code Book V ("SGB V"). Suppliers of medical devices must be qualified pursuant to para. 126 of the SGB V and in order to be qualified must be able to provide an appropriate, cost-efficient service.

<sup>66</sup> According to the Parties, tenders account for only between [0-20]% of the German market. The market investigation confirms that insurance providers mainly contract through bilateral/direct contracting, see

89. The insurance companies' ability to exercise price pressure on homecare suppliers is moreover reinforced by the possibility to redistribute prescriptions between different therapies and even between different suppliers should the supplier/therapy chosen not be the most appropriate/cost-efficient one. The majority of responding insurance companies confirms that they have redistributed prescriptions between different oxygen therapies and different suppliers.<sup>67</sup> Even though a small amount of all prescriptions appear to actually be subject to redistribution,<sup>68</sup> this mechanism ensures that the homecare provider cannot be fully certain to finally obtain business unless competitive services and prices are offered.
90. Whereas a majority of responding insurance companies do not consider that medical device retailers (*Sanitätshäuser*) exercise a competitive pressure on dedicated homecare providers in Germany,<sup>69</sup> a majority of the respondents to the market inquiry confirms that there is a sufficient number of suppliers and competitive offers available in respiratory homecare, including for oxygen therapies, and moreover that other companies are likely to expand their existing sales or enter the market if Linde were to increase prices post-transaction.<sup>70</sup> That competition is effective in the oxygen therapy segment of the market is moreover illustrated by the fact that Linde's and APH's combined share dropped from around [40-50]% to [40-50]% in sales during the last three years, whereas all of Linde's main competitors in this segment, i.e. Air Liquide/Vitalaire, Vivisol, Sapio and H&L (including some quite recent entrants) have increased their share.
91. Finally, from the market inquiry it appears that entry barriers are not insignificant but also not insurmountable for respiratory, including oxygen, therapies. In support, there are quite a few smaller players active on the market and many respondents refer to the low nature of costs as well as to categories of costs typically connected with a logistics and distribution business, such as costs for necessary equipment, know-how, qualified personnel, a good supply base etc. Respondents also refer to the competitive landscape of the market and the low prices and aggressive competition as a potential obstacle to entry.<sup>71</sup>
92. Some market respondents also refer to it being advantageous (e.g. from a cost and supply perspective) for an oxygen therapy provider to have an own source of medical oxygen supply. A limited number of market respondents have put forward that

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replies to Q 22-24 and Q51, Q53 and Q55 of insurer questionnaire and replies to Q69, and Q71 of competitor questionnaire.

<sup>67</sup> See replies to Q79-80 of insurer questionnaire.

<sup>68</sup> The Parties estimate that about [10-20]% of all prescriptions are redistributed. Out of these, approximately [...] % are distributed to other providers and [...] % are distributed to other therapies (but remain with the same provider).

<sup>69</sup> See responses to Q81 of insurer questionnaire.

<sup>70</sup> See responses to Q19 of KOL questionnaire; responses to Q64 of insurers questionnaire.

<sup>71</sup> See responses to Q147 and 148 of competitor questionnaire and responses to Q87-88 of insurers questionnaire.

access to oxygen supplies, including LOX, can be difficult.<sup>72</sup> However, in addition to the vertically integrated homeware suppliers (such as Air Liquide and Vivisol) there are currently eight non-vertically integrated medical oxygen suppliers currently active in Germany<sup>73</sup> from whom homeware providers can source medical oxygen. Moreover, the merger is likely to lower entry barriers in this regard as it will establish AP as an independent wholesale supplier of oxygen without interests in the downstream market for GOX and LOX therapies.

### *LOX*

93. A limited number of market respondents raised oligopoly concerns regarding LOX in Germany, stating inter alia that LOX would be used more often than other oxygen therapies and that the merged entity would be able to increase prices for LOX.
94. On the narrowest market definition, the proposed transaction combines the strongest player (Linde) with the fourth strongest player (APH) in the **LOX** segment. However, the combined entity will face competition from 9 suppliers of whom three are integrated into oxygen supply.<sup>74</sup> Moreover, the market investigation confirms the buyer power of the health insurance companies and that competition is effective in this segment.<sup>75</sup> As mentioned, since 2008, Linde has lost around [5-10]% market share for LOX, where it traditionally has had a stronghold, whereas most of its biggest competitors have increased their market shares.<sup>76</sup>
95. The market investigation confirms that in Germany, respiratory (oxygen and non-oxygen) therapies often are contracted together by health insurers. When this is not the case, i.e. when oxygen therapies are contracted separately, LOX, GOX and COX are still contracted together in a majority of cases.<sup>77</sup> This means that it will be difficult for Linde to increase prices for e.g. LOX if it wants to contract business for its other oxygen therapies (GOX and COX).
96. Even when LOX, GOX and COX are contracted separately, only a small proportion (of approximately [0-5]%) of medical oxygen therapy patients in Germany require LOX to treat their illness.<sup>78</sup> It is not possible for Linde to price discriminate against these patients as it has no means of knowing which customers require LOX when

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<sup>72</sup> See responses to Q147 and 148 of competitor questionnaire and responses to Q87-88 of insurers questionnaire.

<sup>73</sup> Linde's reply of 15032012, Annex 1, to the Commission request for information on 12032012.

<sup>74</sup> Linde's reply of 15032012, Annex 1, to the Commission request for information on 12032012.

<sup>75</sup> See responses to Q19 of KOL questionnaire and responses to Q64 of insurers questionnaire.

<sup>76</sup> Air Liquide/Vitalaire and Vivisol have each gained [0-5]% in sales and H&L has gained [0-5]% in sales since 2008. All other competitors in this segment have remained stable.

<sup>77</sup> See responses to Q Q23-24 of the insurers questionnaire and responses to Q28 of competitors questionnaire.

<sup>78</sup> Linde's reply of 15032012 to Q7 of the Commission request for information on 12.03.2012.

contracting with health insurers and its contracts have uniform LOX prices.<sup>79</sup> However, even when patients do not require LOX for medical reasons, they might have a preference for LOX.<sup>80</sup> Linde would not be able to discriminate against these patients for the reasons set out above. Furthermore the market investigation confirms that, when LOX is not required from a medical point of view, it can to a large extent be substituted by the other cheaper oxygen therapies, in particular concentrated oxygen (COX).<sup>81</sup> Health insurers can and also do redistribute prescriptions to other cheaper oxygen therapies and/or suppliers.<sup>82</sup> The threat of redistribution constitutes an additional restraint on Linde's ability to increase LOX prices. Moreover, COX provides the large majority of patients/physicians with an attractive alternative to LOX.

## Conclusion

97. In light of the analysis above, the Commission considers that on the homecare services markets in Germany the notified operation does not raise serious doubts as to its compatibility with the internal market.

## **SPAIN**

### General description of the health care system

98. The Spanish market for respiratory homecare services is a tendering market, where regional healthcare authorities issue tenders providing exclusivity in relation to a certain sub-region. In most regions, regional authorities issue a single tender for all respiratory homecare therapies and for one or more geographic areas within the region. The duration of these contracts varies (normally 4 to 5 years)<sup>83</sup>, but there is a statutory maximum duration of ten years (which Linde claims is seldom reached). In Andalusia tenders are issued by individual hospitals<sup>84</sup>. However, tenders in Andalusia are similar in the sense that they grant exclusivity to the supplier for the relevant territory. Once a winner is chosen, the relevant homecare provider administers therapies to those patients which have been referred to it by each

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<sup>79</sup> Contracts never provide specific pricing for the patient group that relies on LOX for medical reasons. However, prices may be fixed for the different (LOX) flow rates, see Linde's reply of 26032012 to Q12 of the Commission request for information on 21032012.

<sup>80</sup> The market investigation confirms that LOX demand is raising in Germany, see Q77 of competitors questionnaire.

<sup>81</sup> According to the market investigation, on average 27% of LOX can be substituted by GOX and 44% of LOX can be substituted by COX, see Q9-11 in competitor questionnaire.

<sup>82</sup> A majority of insurance companies confirms that they have redistributed prescriptions between suppliers and between different oxygen therapies.

<sup>83</sup> Paragraph 709, form CO.

<sup>84</sup> The system for tendering in Andalusia is also under revision and is likely to consolidate, with tenders to be organised at province level, according to *Servicio Andaluz de Salud*.

hospital<sup>85</sup>. Thus, competition takes place each time a tender is issued and not at the patient's level.

99. Contracts can specify a price per patient per day, but there are also contracts with a fixed amount for a whole year regardless of the number of patients, as well as contracts with formulae specified in the tenders. Being a tender market, rebates or discounts are not relevant in Spain; once the price is agreed there can be no ad hoc discounts during the contract<sup>86</sup>.

100. Private insurers sign contracts following bilateral negotiations. Overall, Linde estimates that around [...] patients (about [5-10]% of the patient population of Spain) are provided with respiratory homecare therapies through the private medical insurance channel<sup>87</sup>.

Affected markets

101. The parties overlap in Spain in all therapies. However, APH (trading as Carbueros Medica) is the number one player and Linde is number seven. While APH is present across Spain<sup>88</sup> Linde is mainly active in two regions. The parties' activities overlap mainly in Andalusia.

102. The Parties have aggregated shares of little over [30-40]% in all therapies or groups of therapies. However, overlaps are limited as Linde's position is modest ([0-5]% in respiratory therapies; its highest share being in GOX – [5-10]%).

103. Enough players will remain active post transaction in all therapies, as illustrated in Table 3 below.

Table 3

Market	Homecare Services (% by value)						
Segments	Respiratory Homecare Services (%)						Other
	Oxygen (%)			Non-Oxygen (%)			
	LOX	GOX	COX	Ventilation	Sleep	Aerosol	SIDS
Combined (Linde, APH)	[30-40] ([0-5];[30-40])						[30-40] ([0-5];[30-40])
	[30-40] ([0-5];[30-40])			[30-40] ([0-5];[30-40])			
	[30-40] ([0-5];[30-40])	[30-40] ([5-10];[20-30])	[30-40] ([0-5];[30-40])	[30-40] ([0-5];[30-40])	[30-40] ([0-5];[30-40])	[30-40] ([0-5];[30-40])	
Gasmedi	[20-30]						[20-30]
	[10-20]			[20-30]			
	[10-20]	[10-20]	[10-20]	[20-30]	[20-30]	[20-30]	
Praxair	[20-30]						[20-30]
	[20-30]			[20-30]			

<sup>85</sup> Paragraph 615, form CO.

<sup>86</sup> Paragraph 616, form CO.

<sup>87</sup> Paragraph 715, form CO.

<sup>88</sup> Paragraphs 619 and 622: APH has won tenders in Castilla y León, Aragón, Madrid, the Balearic Islands, Castilla la Mancha, the Basque country and Comunidad Valenciana and also has activities in Andalusia and Catalonia; Linde's homecare activities in Spain are limited to two regions: Andalusia and Murcia and has also some activities in relation to private patients in Catalonia and Madrid (about [...] patients with an annual turnover of circa €[...]).

Market	Homecare Services (% by value)						
Segments	Respiratory Homecare Services (%)						Other
	Oxygen (%)			Non-Oxygen (%)			
	LOX	GOX	COX	Ventilation	Sleep	Aerosol	SIDS
	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	[20-30]	
Air Liquide	[10-20]						[10-20]
	[20-30]			[10-20]			
	[20-30]	[20-30]	[20-30]	[5-10]	[10-20]	[10-20]	
Esteve Teijin	[5-10]						[5-10]
	[5-10]			[5-10]			
	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	[5-10]	
Oxigen Salud	[0-5]						[0-5]
	[0-5]			[0-5]			
	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	
Oxigen Salud /Contse JV	[0-5]						[0-5]
	[0-5]			[0-5]			
	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]	

Source: Annex 7.1.5.a, form CO

104. Linde submits<sup>89</sup> that competition concerns should be excluded because: i) Spain is a tender market and shares based on past performance are of limited relevance; ii) several important competitors are active in Spain; iii) the parties are not close competitors; iv) barriers to entry are low; v) purchasers exert significant buyer power, which puts pressure on prices and service level; and vi) entry is attractive as the exclusive tenders awarded lead to high value contracts that guarantee return on investment.

105. According to the respondents to the market investigation, 90 to 95% of contracts<sup>90</sup> are obtained through tenders where between 3 and 8 suppliers participate<sup>91</sup>. The winners enjoy exclusivity in a certain area for a period between 2 years (in Andalusia) to a maximum of 10 years but usually contracts are signed for 4 to 6 years<sup>92</sup>. The majority of respondents indicated that all therapies are tendered together<sup>93</sup>. Bilateral contracts are concluded with private insurers and they cover at least oxygen therapies respectively non oxygen therapies in one contract<sup>94</sup>.

106. According to the participants to the market inquiry, an internal source of medical oxygen constitutes a major advantage for a potential entrant<sup>95</sup>. However,

<sup>89</sup> Paragraphs 638-657, Form CO.

<sup>90</sup> Questionnaires to competitors (Q1).

<sup>91</sup> Questionnaires to competitors (Q1) and to Spanish Regional Health Authorities and hospitals (Q6).

<sup>92</sup> Questionnaires to competitors (Q1) and to Spanish Regional Health Authorities and hospitals (Q6).

<sup>93</sup> Questionnaires to competitors (Q1) and to Spanish Regional Health Authorities and hospitals (Q6).

<sup>94</sup> Questionnaires to Health insurers (Q3).

<sup>95</sup> Questionnaires to competitors (Q1), to Spanish Regional Health Authorities and hospitals (Q6) and Questionnaires to Health insurers (Q3).

according to competitors, vertical integration is not a must since medical oxygen is available at wholesale level; it is rather necessary for security of supply and cost reasons<sup>96</sup>.

107. The majority of respondents replied that the transaction would have no or little effect on the wholesale supply of medical oxygen in Spain<sup>97</sup>. One respondent indicated that the transaction could lead to higher prices<sup>98</sup> and one was of the opinion that the Spanish market will lose a competitor and move to a more restricted oligopoly<sup>99</sup>. However, it is unlikely that the transaction could have the potential to lead to higher prices as the number of medical oxygen suppliers will increase after the transaction. Since AP (the number one player in homecare services and which currently does not sell medical oxygen on the market) would not be vertically integrated after the transaction and would be able and have every incentive to sell medical oxygen on the market, this could lead to lower prices.

108. The market investigation revealed that the transaction would have no or little effect on the homecare services in Spain<sup>100</sup>. In addition, the majority of competitors estimated that the transaction would have no or little effect on their businesses. One competitor indicated that the transaction could lead to a stricter oligopoly. However there will remain seven competitors active in all therapies in Spain after the transaction.

109. The respondents consider that, while barriers to entry are not negligible, they are not insurmountable. Among the ones listed there are: necessary permits and authorisations, initial investment in logistics, filling stations, know-how and the competitive pressure from the established suppliers. However, the respondents provided a list of companies having recently entered the market: Esteve Teijin, JLV Medical (SOL) and Oxipharma and being active in all therapies. A list of potential entrants was also provided.

110. The market investigation revealed that the Spanish healthcare system could prevent the merged entity from meaningfully increasing the prices of their respiratory homecare services through, *inter alia*, fixed reimbursement levels, price ceilings and other elements. In addition, the majority of respondents indicated that regional health authorities and hospitals issuing tenders can influence significantly the final prices,

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<sup>96</sup> Questionnaires to competitors (Q1).

<sup>97</sup> Questionnaires to competitors (Q1), to Spanish Regional Health Authorities and hospitals (Q6) and Questionnaires to Health insurers (Q3).

<sup>98</sup> Questionnaires to Spanish Regional Health Authorities and hospitals (Q6).

<sup>99</sup> Questionnaires to competitors (Q1).

<sup>100</sup> Questionnaires to competitors (Q1), to Spanish Regional Health Authorities and hospitals (Q6) and Questionnaires to Health insurers (Q3) for respiratory services and Questionnaires to competitors (Q1) and to Spanish Regional Health Authorities and hospitals (Q6) for SIDS monitoring.

conditions and other important parameters of respiratory homecare supply given that there is large space for negotiation<sup>101</sup>.

111. Moreover, the majority of respondents considered that customers (regional health authorities and hospitals) would be able to change their respiratory homecare suppliers in an effective and timely manner, should Linde increase the prices for its services/devices (by 5-10%) or otherwise worsen the conditions of supply<sup>102</sup>. One respondent indicated that providers of homecare services cannot modify the conditions of supply, the customer being in a position to put an end to the contract<sup>103</sup>. In addition, rising prices when applying for new tenders would make Linde's offer uncompetitive, reducing its chances of winning the tenders.

112. Spain is mainly a tender market therefore previous performance is not a guarantee for future success. APH's position has eroded constantly between 2008 and 2010: from [30-40]% to [30-40]% in oxygen therapies (from [30-40]% to [20-30]% in GOX), from [30-40]% to [30-40]% in non-oxygen therapies and from [30-40]% to [30-40]% in SIDS monitoring<sup>104</sup>.

113. The majority of respondents considered that the parties competed closely before the transaction<sup>105</sup>. However, APH is number one and Linde number seven in terms of market shares in respiratory homecare services<sup>106</sup> and they are both present mainly in Andalusia. In addition, according to Linde, it is rare that the parties are the winner and the runner up in tenders; the parties were only two times the winner and the runner up in the same tender<sup>107</sup> in the last 52 tenders, representing less than [0-5]% of the value of these tenders.

### GOX

114. Linde and APH's combined shares in Spain are little over [30-40]% (except in GOX, [30-40]%) as a result of the fact that usually all therapies are covered by the same tender.

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<sup>101</sup> Questionnaires to competitors (Q1), to Spanish Regional Health Authorities and hospitals (Q6), to Key opinion leaders (Q4) and to Health insurers (Q3).

<sup>102</sup> Questionnaires to competitors (Q1), to Spanish Regional Health Authorities and hospitals (Q6), to Key opinion leaders (Q4) and to Health insurers (Q3).

<sup>103</sup> Questionnaires to Spanish Regional Health Authorities and hospitals (Q6).

<sup>104</sup> Annex 7.1.5.a, Form CO; market shares by value. Linde's position in overall homecare services remained constant during this period.

<sup>105</sup> Questionnaires to competitors (Q1), to Spanish Regional Health Authorities and hospitals (Q6) and to Key opinion leaders (Q4).

<sup>106</sup> Annex 7.1.5.a, form CO; APH is number one and Linde is number eight in SIDS monitoring

<sup>107</sup> Para 681, Form CO.

115. Linde and APH are not each other's closest competitor in GOX therapy; APH is number one and Linde is number five in terms of market shares by value in 2010<sup>108</sup>.

116. According to Linde access to medical oxygen supply is not problematic, providing Messer as a source of medical oxygen<sup>109</sup> for non-vertically integrated suppliers of homecare services. In addition, AP will become independent after the proposed transaction, therefore becoming an additional source of medical oxygen.

117. Even if there were a separate market for GOX, Linde could not have market power. In addition to the fact that the prices for on-going contracts cannot be modified, there is a list of established players which could challenge its position in new tenders were Linde to raise prices when applying for new tenders. In addition, new entrants could enter the market if prices were attractive. Moreover, oxygen therapies are contracted together and the decision on the appropriate therapy<sup>110</sup> is taken by prescribing physicians, not Linde. In addition, the majority<sup>111</sup> of respondents to the market investigation expressing opinions indicated that GOX demand is declining. The magnitude of this evolution is illustrated by Linde's data: total GOX patients number in Spain dropped from [...] in 2008 to [...] in 2010<sup>112</sup>.

### Conclusion

118. In light of the analysis above, the Commission considers that on the homecare services markets in Spain the notified operation does not raise serious doubts as to its compatibility with the internal market.

## **PORTUGAL**

### General description of the health care system

119. In Portugal respiratory homecare service providers contract mainly with the authorities of the Portuguese National Health Service ("NHS"), which provides universal coverage to the majority of the population. The contracts with the NHS account for about [70-80]% of the total value of the homecare services business in Portugal. The policies of the Portuguese NHS are implemented through five regional health administrations (*Administrações Regionais de Saúde* - "ARS"): (i) North, (ii) Centre, (iii) Alentejo, (iv) Algarve, and (v) Lisbon (where the districts of Setubal and Santarem are located).

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<sup>108</sup> Annex 7.1.5.a, Form CO.

<sup>109</sup> Para 634 and 648, Form CO.

<sup>110</sup> Given that there is a certain degree of substitutability between oxygen therapies, as confirmed by the market investigation.

<sup>111</sup> Questionnaires to competitors (Q1) and to Spanish Regional Health Authorities and hospitals (Q6).

<sup>112</sup> (Annex 7.1.5.a).

120. The procurement of homecare services in Portugal has been characterised by large tenders set up by the ARSs, some of which granted exclusivity in a given territory to the selected bidder, while others granted semi-exclusivity to two companies allowing them to "hunt for prescriptions". Some of these tenders were awarded in the mid-1980s and the relevant contracts are still in force today.

121. As shown in the Table hereunder, Linde benefits from exclusivity in Algarve and Setubal, while APH provides services under a semi-exclusivity regime with Air Liquide in Santarem - Lisbon, and in North, Centre and Alentejo. The existing contracts have been renewed annually by the ARSs.

**Table 4**

<i>Region</i>	<i>Date</i>	<i>Successful</i>	<i>Award</i>	<i>Exclusivity</i>
<i>North, Centre and Alentejo</i>	<i>Pre 1990</i>	<i>Air Liquide and APH</i>	<i>GOX, sleep and aerosol</i>	<i>Semi-exclusive</i>
<i>Algarve</i>	<i>2000</i>	<i>Linde</i>	<i>All respiratory therapies</i>	<i>Exclusive</i>
<i>Setúbal (district)*</i>	<i>1998</i>	<i>Linde</i>	<i>All respiratory therapies</i>	<i>Exclusive</i>
<i>Santarem &amp; Lisbon (districts)*</i>	<i>1998</i>	<i>Air Liquide and APH</i>	<i>All respiratory therapies</i>	<i>Semi-exclusive</i>

\* *Lisbon, Setubal and Santarem are districts of the Lisbon region.*

122. According to the information available, the present system would change in 2012 or early in 2013 with the issuance of a new nationwide call for tender. More specifically, on 10 November 2011, it was published on the Official Journal of the European Union that the recently created Central Purchasing Authority (SPMS) will organize a new nation-wide tender for homecare services in 2012<sup>113</sup>. In addition SPMS has also published this information on its newsletter of December 2011<sup>114</sup>.

<sup>113</sup> CP 2012/100.

<sup>114</sup> This is in line with the Memorandum of Understanding on Specific Economic Policy Conditionality, May 17, 2011 ([http://ec.europa.eu/economy\\_finance/eu\\_borrower/portugal/index\\_en.htm](http://ec.europa.eu/economy_finance/eu_borrower/portugal/index_en.htm)), where Portugal, *inter alia*, committed to take measures to increase competition among private health providers and reduce the overall spending (including fees) on private providers of diagnostic and therapeutic services by at least 10% by end 2011, and by an additional 10% by end 2012. It also committed to introduce a regular revision (at least every two years) of the fees paid to private providers with the aim of reducing the cost of more mature diagnostic and therapeutic services. Also the market investigation indicated that the majority of the competitors already active in Portugal is aware and is getting ready for this new tender. In addition 5 out of 9 informative replies to question 43 of the Questionnaire to health authorities and hospitals in Portugal indicated that it is expected that a new national tender be issued in the next 12 months.

123. Given delays in the establishment of the nationwide tender (first attempt in 2005 and second one in 2008), which was put on hold due to legal challenges brought by some participants, a number of hospitals (mainly in the north) decided to issue their own tenders that in most cases covered all respiratory homecare therapies. According to Linde, these contracts account for around [10-20]% of the total value of the homecare services provided in 2010.

124. Homecare services are also provided to patients not covered by the NHS. These are patients covered by sub-national health insurance systems (for instance Army/Navy/Police/Telecom) and by the *Assistência na Doença aos Servidores do Estado* which covers civil servants and public employees who are not employed by any institutions or state owned companies that have a ‘dedicated’ sub-system. Linde estimates that the value of the services provided to these patients accounts for around [10-20]% of the total value of the homecare services provided in 2010.

Affected markets

125. Linde's and APH's activities overlap in all possible homecare segments: oxygen (LOX, GOX, COX), non-oxygen (ventilation, sleep, aerosol) and SIDS. In terms of revenue, Portugal would represent about [...] % of the combined entity's revenue (€...).

126. Table 5 depicts the market shares of the Parties and those of their competitors in each possible market in 2010.

Table 5

Activities parties and competitors Segments	Respiratory Homecare Services (% by value)						Other
	Oxygen (%)			Non-Oxygen (%)			
	LOX	GOX	COX	Ventilation	Sleep	Aerosol	
Linde and APH	[50-60] (Linde: [10-20]; APH: [40-50])						[50-60] ([10-20];[40-50])
	[50-60] ([10-20];[40-50])			[50-60] ([10-20];[40-50])			
	[60-70] ([20-30];[40-50])	[50-60] ([10-20];[40-50])	[50-60] ([0-5];[50-60])	[60-70] ([30-40];[30-40])	[50-60] ([10-20];[40-50])	[50-60] ([0-5];[50-60])	
Air Liquide	[30-40]						[30-40]
	[30-40]			[30-40]			
	[20-30]	[30-40]	[30-40]	[20-30]	[30-40]	[30-40]	
Praxair	[0-5]						[0-5]
	[0-5]			[0-5]			
	[0-5]	[0-5]	[5-10]	[0-5]	[0-5]	[0-5]	
Gasmedi	[5-10]						[5-10]
	[5-10]			[5-10]			
	[5-10]	[5-10]	[5-10]	[0-5]	[5-10]	[0-5]	
D'Ar Saude	[0-5]						
				[0-5]			
					[0-5]		
Sonocare	[0-5]						
				[0-5]			
					[0-5]		

Source: Form CO

127. As shown in Table 5, the operation will give rise to high combined market shares ranging from [50-60]% to [60-70]%, regardless of the product market definition retained. The competitors' market shares at the homecare respiratory services level (all therapies) are: Air Liquide [30-40]%, Gasmedi [5-10]%, Praxair [0-5]%, and D'Ar Saude [0-5]%. For non-oxygen therapies, another minor competitor is also present, Sonocare. Finally, mention should be made of Acaïl an industrial and medical gas company that has the necessary facilities and medical oxygen supply (and recently obtained the relevant marketing authorization) but which does not yet have a market position. The shares of sales in the table are calculated on revenues mainly achieved through contracts with ARSs ([70-80]% of the total value). They also include sales made through the recent tenders run by hospitals and homecare services provided to patients not covered by the NHS ([20-30]% of the total value).

128. Focussing on the latter (i.e. services provided outside the contracts with ARSs), it can be observed that the newcomers, Gasmedi and Praxair, are more successful than the Parties.

129. Indeed as shown in the table below, while the Parties have only managed to achieve a combined share of [20-30]% of the total value of the tenders recently run by hospitals outside the NHS regime, Gasmedi and Praxair have respectively achieved shares of [30-40]% and [20-30]%.

Table 6: share of services to bidding hospitals

Linde	APH	Combined	Gasmedi	Praxair	Air Liquide
[5-10]%	[10-20]%	[20-30]%	[30-40]%	[20-30]%	[10-20]%

Source: Linde's submission of 29 March 2012, by value (2011)

130. Similarly, as regards services provided to patients not covered by the NHS, the combined share of the Parties is [20-30]%, whereas Gasmedi and Praxair have shares respectively of [10-20]% and [20-30]% and there are other smaller players.

Table 7 : share of services to non-NHS patients

Linde	APH	Combined	Gasmedi	Praxair	Air Liquide	D'Ar Saude	Sonocare	Acaïl
[10-20]%	[10-20]%	[20-30]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%	[0-5]%	[0-5]%

Source; Linde's submission of 29 March 2012 by value (2010)

131. In addition, Gasmedi and Praxair are already very successful in Spain where they respectively achieve market shares of [20-30]% and [20-30]% of the overall market.

132. The market investigation has confirmed that there are no barriers to expansion. Indeed although reputation is a relevant factor for the selection of homecare services providers, price is the essential element for the award of the

contract<sup>115</sup>. On the other hand service providers largely rely on outsourcing, which allows them to easily and quickly increase their output<sup>116</sup>.

133. The recent success of Gasmedi and Praxair provide an indication of their competitive strength and their capacity to effectively compete with the Parties in all possible product markets for the contracts presently awarded by hospitals and for non-NHS patients. As regards contracts with the ARSs, as indicated above, the available information indicates that it is very likely that a new national tender will be organised in 2012 or early in 2013. In the new bidding market resulting from the organisation of such a tender, post-transaction there would be at least three credible players in all possible relevant markets, apart from the merged entity, namely Air Liquide, Gasmedi and Praxair, along with a number of smaller players present in some of them (Sonocare, D'Ar Saude and Acail). These four players are sufficient to ensure a competitive process. Indeed SPMS has indicated that all companies active in Portugal will be able to bid and that, experience and reputation would not be the main factors in the selection process but price<sup>117</sup>.

134. Therefore not only Air Liquide, which together with the Parties has a long-established position in dealing with the NHS, but also at least Gasmedi and Praxair will be in a position to exert a significant competitive constrain on the merged entity, particularly in view of the lack of barriers to expansions and their success in recent tenders and in the supply of non-NHS patients.

#### Conclusion

135. In light of the analysis above, the Commission considers that on the homecare services markets in Portugal the notified operation does not raise serious doubts as to its compatibility with the internal market.

## **V.2 VERTICALLY AFFECTED MARKETS**

### ***Wholesale of medical oxygen (upstream) – Oxygen homecare services (GOX and LOX, downstream)***

136. AP's production and wholesale supply of medical oxygen does not form part of the business which Linde will acquire. However, Linde and APH use medical

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<sup>115</sup> Virtually all competitors active in Portugal indicated the price as the most important element for a homecare service from the perspective of the healthcare authority/ hospital/ insurer. This has been also confirmed by the SPMS which indicated that price is typically the determinant factor to select the providers, see Non-confidential Agreed Minutes of a conference call with SPMS on 8 March 2012, paragraph 3. As to the importance of reputation in the perspective of physicians, see replies questions 18 of Questionnaire to Key Opinion Leaders (Q4) which indicated that reputation is one of the important factors, and replies to question 35 of Questionnaire to regional health authorities and hospitals in Portugal (Q7). However even those replies were not unanimous and indicated as important also other elements (quality of equipment, nurse care, etc.)

<sup>116</sup> A competitor also pointed out that distribution networks can be put in place quickly when a tender is won.

<sup>117</sup> Non-confidential Agreed Minutes of a conference call with SPMS on 8 March 2012, paragraphs 3 and 4 on the tendering criteria that will be applied to the tendering procedure mentioned in para 122 of this Decision.

oxygen and Linde produces medical oxygen in several European ASUs,<sup>118</sup> including in most countries in which APH is active. There is therefore a vertical relationship between Linde's wholesale supply of medical oxygen and APH's provision of GOX and LOX services.

### V.2.1 Potential market for medical oxygen

137. Linde only supplies medical oxygen to the merchant market at wholesale level in Belgium, Germany and France.

138. Table 8 shows Linde's and its competitors' merchant market shares of medical oxygen in 2010 in Germany and France.

Table 8

Wholesale of medical oxygen	Market shares by volume (%)	
	France	Germany
Linde	[30-40]	[5-10]
AP	[20-30]	[0-5]
Air Liquide	[30-40]	[10-20]
TMG/SOL	-	[5-10]
Praxair	-	[10-20]
SWF	-	[20-30]
WAG	-	[10-20]
Messer	-	[5-10]
SOL	[0-5]	-
Others	[0-5]	[10-20]

Source: for France: Linde's email of 5 March 2012, for Germany: Annex 7.0.a, form CO

139. Linde submits that the wholesale supply of medical oxygen to homecare suppliers does not fit the supply methods previously defined by the Commission<sup>119</sup>. First, both the distribution of medical oxygen in bulk or cylinders concerns only the downstream input for the (single) homecare oxygen market. Usually suppliers of oxygen therapies need both liquid and gaseous oxygen. Second, the term "bulk", as applied to various previous decisions in industrial gases sector, does not properly reflect the fact that in the supply of liquid medical oxygen, besides tankers, dewars (smaller containers), are used as well. However, the dewars would not necessarily be associated with "bulk" supply. Linde therefore refers to "bulk/dewars" instead of "bulk".

140. Linde submits that the parties and their competitors only supply medical oxygen in bulk/dewars and cylinders at wholesale level<sup>120</sup>.

#### Belgium

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<sup>118</sup> ASU=air separation unit

<sup>119</sup> Linde's response to Commission's request for information of 29 March 2012.

<sup>120</sup> Footnote 3 of Linde's response to Commission's request for information of 29 March 2012.

141. The only suppliers of medical oxygen at wholesale level in Belgium are Linde and Praxair. Linde only supply GOX<sup>121</sup>, to Belmedis, and Praxair supplies medical oxygen to Oxcure<sup>122</sup>. Regardless of Linde's and Praxair's positions, the transaction does not bring any lessening to competition; Linde will continue to sell medical oxygen to Belmedis and Praxair to Oxcure.

142. The parties only have an aggregated market share of [10-20]% in oxygen therapies and [10-20]% in GOX. Therefore, input foreclosure appears unlikely. Even if Linde were to foreclose Belmedis, Praxair and AP (which will not have its homecare division to supply medical oxygen to and would become an additional supplier on the market) could supply Belmedis.

#### Germany

143. In Germany Linde supplies medical oxygen downstream both in GOX (cylinders) and LOX. While the overall market share of Linde is [30-40]% (including captive use), its shares in bulk/dewars is [30-40]% and in cylinders [30-40]%. However, regardless of the supply method, Linde's market position is very small ([5-10]% of the merchant market).

144. The majority of suppliers of medical oxygen active in Germany and responding to the questionnaire<sup>123</sup> indicated that the transaction would have little or no impact on their activities. Also, the majority of respondents<sup>124</sup> considered that the transaction would have little or no impact on the wholesale of medical oxygen in Germany. Moreover, the majority of suppliers of medical oxygen were of the opinion that, were Linde to restrict the wholesale supply of medical oxygen to homecare providers in Germany, its competitors would be able to meet the demand<sup>125</sup>. Furthermore, the majority of suppliers<sup>126</sup> of medical oxygen consider that, if Linde decided to internalise the supply of medical oxygen to its own homecare business, other wholesalers of medical oxygen would have enough customers to sell their oxygen to.

145. With [5-10]% of the volume of oxygen supplied on the merchant market downstream, Linde cannot be considered a major wholesaler of medical oxygen in Germany therefore, input foreclosure appears unlikely. Moreover, COX does not require oxygen supplies but is, to a certain degree, a substitute for LOX and GOX therapies; thus efforts to foreclose inputs of oxygen for competing homecare providers are unlikely to be effective. In addition, currently, where Linde to

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<sup>121</sup> Footnote 93, Form CO: Sale and supply of gaseous oxygen in cylinders to Aprophar (Belmedis) who will act as exclusive distributor for Linde in Belgium as regards pharmacies, in the context of the pharmacists convention (homecare).

<sup>122</sup> Linde's response to Commission's request for information of 29 March 2012.

<sup>123</sup> Questionnaires to wholesale suppliers of medical oxygen (Q2).

<sup>124</sup> Questionnaires to competitors (Q1), to wholesale suppliers of medical oxygen (Q2) and to Health insurers (Q3).

<sup>125</sup> Questionnaires to wholesale suppliers of medical oxygen (Q2).

<sup>126</sup> Questionnaires to wholesale suppliers of medical oxygen (Q2).

internalise its sales of medical oxygen, this would be offset by AP's merchant sales, since the latter would not be vertically integrated anymore.

#### France

146. Linde estimates that its and its competitors' supply of medical oxygen is equally divided between bulk/dewars and cylinders<sup>127</sup>.

147. Although Linde supplies [30-40]% of the medical oxygen to homecare providers in France, it is unlikely that it can leverage its position in wholesale of medical oxygen on the downstream market since on any segment the combined entity would only have a maximum of [5-10]% market share downstream. In addition, since AP, Air Liquide and SOL already supply the downstream market, they already have licences for medical oxygen therefore it is unlikely that they would have any difficulties increasing their supplies of medical oxygen, should Linde decide to foreclose competitors in homecare services, in particular given that i) supply of medical oxygen is more lucrative than industrial oxygen and ii) AP would have every reason to supply Linde's competitors since will not be vertically integrated any more after the transaction.

#### **V.2.2 Potential market for combined medical and industrial oxygen**

148. Linde estimates that its market shares in France on the potential wholesale market for combined medical and industrial oxygen would be lower than in medical oxygen alone. In Germany, its market shares would not be materially different from the shares in medical oxygen<sup>128</sup>.

149. Therefore, the conclusions on the potential market for medical oxygen remain also valid for a potential market for the combined medical and industrial oxygen.

#### **V.2.3 Conclusion on the vertical relationship**

150. On the basis of the information provided by Linde and the results of the market investigation, the proposed operation is unlikely to raise competition concerns in relation to the said vertical relationship in Belgium, France and Germany.

151. For these reasons the Commission considers that the proposed transaction does not raise serious doubts as to its compatibility with the internal market regarding the said vertical relationships in Belgium, France and Germany.

### **VI. PROPOSED REMEDIES**

152. In order to address the Commission's preliminary concerns the parties offered, 23 March 2012, Linde offered to divest its [...] in Portugal. This would

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<sup>127</sup> Linde's response to Commission's request for information of 29 March 2012.

<sup>128</sup> Linde's response to Commission's request for information of 29 March 2012.

have eliminated the overlap between the parties' activities in this country. The proposed commitments were market tested.

153. However Linde submitted further evidence on 26 and 29 March 2012 showing, *inter alia*, that the smaller competitors have achieved a significant market position through recent tenders and the supply to selected patients. The Commission meanwhile carried out further investigation seeking for clarifications from competitors and customers as to the envisaged national tender and to the strength and possibilities for expansion of homecare providers already present in Portugal.

154. As a result, and for the reasons set out in more detail in paragraphs 125-134 above, the Commission concluded that these remedies were not necessary as there is a sufficient number of competitors to dispel any competition concerns if the current competitive situation remains and also in case a nation-wide tender is organised.

## VII. CONCLUSION

155. For the above reasons, the Commission has decided to declare the transaction compatible with the internal market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission*  
*(signed)*  
*Neelie KROES*  
*Vice-President*