

Kluwer Competition Law Blog

First Second Phase Proceedings under the Transaction Value Threshold in Germany

Fabian Badtke, Lorenz Jarass (Noerr) · Monday, July 8th, 2024

In its decision of 17 June 2024, the German Federal Cartel Office (FCO) has cleared the takeover of Olink Holding AB (publ), Sweden (“**Olink**”) by Thermo Fisher Scientific Inc., USA (“**Thermo Fisher**”) after an extensive review period exceeding five months ([press release](#)).

This case marks a significant milestone as it is the first time that the FCO has initiated second phase proceedings for a concentration notified under the transaction value threshold. This development also brings the transaction value threshold further into the spotlight in terms of the intensity of the material reviews conducted and comes in the wake of a significant increase in the number of notifications under the transaction value threshold since its introduction through the 9th Amendment to the German Act against Restraints of Competition (ARC) in 2017. Specifically, the number of such notifications rose from 14 in the 2019/2020 reporting period to 61 in the 2021/2022 reporting period.

Innovative biotechnology company as a prime example of the transaction value threshold

Thermo Fisher is a provider of research equipment in the scientific services sector, specialising in the manufacture and development of “High Resolution Accurate Mass” mass spectrometers (HRAM). Olink is a global biotechnology company that utilises its proprietary Proximity Extension Assay (PEA) technology to analyse proteins from human body fluid. While PEA is a newer method compared to analysis using HRAM mass spectrometers, it is based on a completely different technology.

Although Thermo Fisher and Olink did not reach the turnover thresholds required for German merger control, the concentration was notifiable due to the high purchase price of EUR 2.8 billion and substantial operations in Germany identified by the FCO. In this respect, it is a prime example of a concentration under the transaction value threshold, which covers concentrations where the target company’s turnover does not sufficiently reflect its economic power. This is demonstrated, not least, by the high purchase price and Olink’s innovative strength.

In-depth examination even without horizontal overlaps ...

The FCO examined the concentration in-depth, although Thermo Fisher and Olink are currently only active in neighbouring markets, rather than overlapping ones. The FCO also examined whether these currently adjacent markets could converge into a single market within the forecast period of five years. In other words, the FCO anticipated a possible future market definition that may differ from the current one. This approach is hardly surprising because concentrations under the transaction value threshold usually involve very innovative and dynamic markets in which any substitution relationships between products and services are constantly evolving.

... due to possible conglomerate effects

The FCO therefore paid particular attention to what are known as conglomerate effects, such as the future bundling of the products and services offered by the parties involved in the concentration (see [Guidance on Substantive Merger Control](#), pp. 65 et seq.). Ultimately, the FCO ruled out such conglomerate effects due to the technical differences between the products (technical reasons) and the different procurement cycles and prices (commercial reasons), both of which made bundling unlikely. Furthermore, according to the FCO, the parties to the concentration would still be exposed to significant competition even after the concentration was completed.

Clearance without conditions and obligations

Despite an intensive examination in the second phase proceedings, the FCO cleared the concentration without imposing any conditions or obligations. This is by no means an isolated case: since 2019, around 25% of notified concentrations in second phase proceedings have been cleared without conditions or obligations. In other words, even after the initiation of second phase proceedings, there is still a realistic possibility that the parties to the concentration will be able to implement their project as originally planned.

More clarity through the reasons given for the decision?

We can look forward to the reasons for the decision, which are yet to be published by the Federal Cartel Office. It would be very helpful if these reasons contained guidance on the transaction value threshold that go beyond the Federal Cartel Office's 2022 [Guidelines](#). Such guidance could potentially reduce the need for informal and confidential enquiries or, alternatively, precautionary notifications to the Federal Cartel Office, which are often common practice today.

The blog was first published on Noerr's [website](#).

To make sure you do not miss out on regular updates from the *Kluwer Competition Law Blog*, please subscribe [here](#).

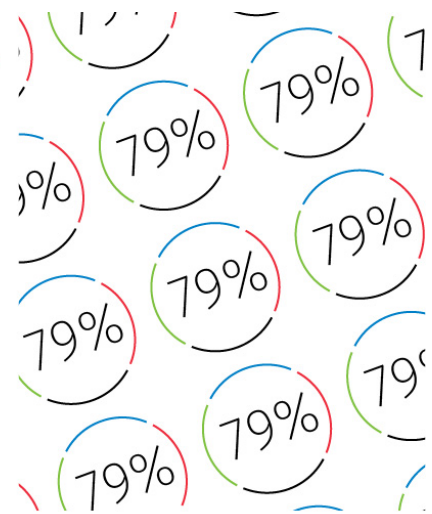
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Monday, July 8th, 2024 at 10:00 am and is filed under [Germany](#), [Merger control](#), [Merger Thresholds](#), [Transaction Value Threshold](#)
You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.