Anticipated acquisition by Thermo Fisher Scientific Inc. of Werner Reifferscheidt Verwaltungs GmbH

No. ME/3350/07

The OFT's decision on reference under section 33(1) given on 5 December 2007. Full text of decision published 10 December 2007.

Please note that square brackets indicate figures which have been deleted or replaced with a range for reasons of commercial confidentiality.

PARTIES

1. **Thermo Fisher Scientific Inc.** (Thermo Fisher) is a US publicly-listed company active in the manufacture, supply and distribution of a range of laboratory products, including the supply of laboratory vials and related accessories. In 2006 its turnover was around £4.8 billion, £[ ] million of which was attributable to UK sales. Thermo Fisher's activities in the UK can be summarised as follows:
    - Manufacturing of disposable glass products, including vials, through a joint venture (in which the parties state they only have a minority interest) with a US-based company, Gerresheimer, under the name **Kimble/Chase. In the UK, Kimble/Chase only supplies Chromacol**.
    - Resale of vials and consumables under the brand names **Sun International**, **National Scientific** and **Chromacol**. Of these brands, only Chromacol is supplied by Kimble/Chase in the UK.
    - Distribution of its own and third party laboratory equipment under the brand name, **Fisher Distribution**.
2. **Werner Reifferscheidt Verwaltungs GmbH** (Werner) is a holding company for **La-Pha-Pack Werner Reifferscheidt GmbH** (La-Pha-Pack), **Sealtec Werner Reifferscheidt GmbH** (Sealtec) and **LabChrom Pack LCC** (LabChrom), which

are together referred to as the **LPP Group** (LPP). La-Pha-Pack is involved in the resale of laboratory vials, closures and related accessories used principally for chromatography applications to distributors. Sealtec manufactures rubber vial seals which it sells primarily to La-Pha-Pack. LabChrom is a US distributor of laboratory equipment. LPP's turnover in 2006 was £10.8 million, of which approximately £[ ] was achieved in the UK.

TRANSACTION

3. Thermo Fisher has entered into a binding share purchase agreement to acquire, through its subsidiary Thermo Fisher Scientific (Bremen) GmbH, the entire issued share capital of Werner. The parties notified the transaction on 8 October 2007 and the administrative deadline expires on 5 December 2007.

JURISDICTION

4. As a result of this transaction Thermo Fisher and Werner will cease to be distinct. The parties have a combined share of the supply for resale of laboratory vials and closures specifically for chromatography applications in the UK greater than 25 per cent and thus, the share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

FRAME OF REFERENCE

5. The parties overlap in the resale of laboratory vials, closures and related accessories. In addition, Thermo Fisher is also active in the manufacture and distribution of these products.

6. Laboratory vials are relatively small vessels (or bottles) usually made from glass (but may also be plastic) used for storing and analysing samples. They can have a tubular shape or a bottle-like shape with a neck, varying slightly in shape dependent on the type of seal to be used. They also can differ in glass thickness or colour depending on their use – which particular experiment or analysis is being carried out. They are generally considered to be disposable products to ensure experimental integrity.

7. Laboratory closures are the caps and septa (rubber seals) used to seal a laboratory vial. There are different types of closures systems dependent on the vial used. The closure may be made of plastic, aluminium or rubber and may act, for example, as a screw cap, snap ring cap or crimp cap. The cap may also be made in conjunction with a rubber septum, allowing withdrawal of liquid while the vial remains sealed.

8. Related accessories include i) crimpers, a tool used to fit a crimp cap to a vial; ii) syringe filters, used to pour samples into vials; and iii) vial racks to hold vials in place.

9. The parties submitted that laboratory vials (and related consumables) are part of a wider market not limited to those products used for laboratory purposes, particularly given these products are extensively used by pharmaceutical companies. Nonetheless, for the purposes of notification, the parties took a conservative approach and provided their analysis on the basis of the narrower laboratory segment.

Product market

Manufacturing, resale and distribution

10. While the only direct overlap between the parties' activities is at the resale level, the OFT considered whether supply or demand side substitution between the different stages in the supply chain warranted taking a wider view of the market.

11. It should be noted that several third parties considered Chromacol, Sun International and National Scientific (Thermo Fisher brands) to be manufacturers, not resellers. One third party also asserted that LPP, through its La-Pha-Pack brand, was a manufacturer. However, the parties have confirmed that none of the above subsidiaries are active in manufacturing and are only active at the resale level of the supply chain.

12. Based on third party responses, it would appear that the supply of vials and closures is obscured by competitive interactions between different parts of the supply chain. Manufacturers use resellers to market the products to distributors who then sell the vials and closures as part of a wide offer of laboratory equipment to end-users, primarily pharmaceutical companies. Some manufacturers sell direct to distributors, omitting resellers and some resellers sell direct to end-users, omitting distributors. The parties asserted

that resellers offer only their own branded products; do not sell competitors' brands; have a smaller product range than distributors; and can source their products from any manufacturer.

13. The parties argued that from the end-user's perspective all three categories of supplier could be considered to form a single product market, as end-users can purchase identical products directly from manufacturers, resellers and distributors. However, the parties did note that the proportion of sales accounted for by supplies to end users diminished as one ascended the supply chain with the majority of end-users purchasing from distributors.

14. As noted above, the overlap between the parties activities exists only at one level of the supply chain - resale. Third parties have not indicated that specific skills, resources or investment are required to resell and/or distribute laboratory consumables. However, there was limited evidence to either support or dismiss the proposition that supply side substitution from either manufacturers or distributors into the resale segment was sufficiently timely or likely.

15. Overall, the OFT considers that a cautious approach is warranted and, in this case, the different levels of the supply chain - manufacturing, resale and distribution - should be treated as separate frames of reference. Therefore, a direct horizontal overlap arises between the parties in relation to the resale of vials, closures and related accessories. The potential impact of the merger across all three levels of the supply chain will be examined further in the section on vertical issues.

Vials and closures

16. The parties suggested that vials and closures may form part of a single product market, particularly given they are the two key components necessary to assemble a complete laboratory vial.

17. Third party manufacturers generally submitted that the vast majority of the products are bought together and emphasised the importance of this. They stated that in the majority of cases the products are not interchangeable and guarantees are not provided on products not sourced together. Evidence from distributors and end-users supported this view. In particular, end-users stated that unless both the vial and closure were sourced from the same supplier/manufacturer they could not ensure the integrity of the seal. Distributors also indicated a preference for the same manufacturer or

brand. Estimates provided by third parties suggested that at least 80 per cent of vials and closures are sourced together.

18. One distributor stated that as a rule, vials are interchangeable and can be sourced from different companies. Another distributor stated that vials and closures can be sourced separately and are interchangeable, but that in reality they are usually bundled together. In addition, the OFT found that there were a number of separate manufacturers of vials or closures.

19. However, based on the balance of third party comments in this case, it would appear that vials and closures form a single product frame. However, it is not necessary to reach a definitive conclusion on whether to treat vials and closures together or separately in this case, as the merger does not give rise to competition concerns on either basis.

Vials and closures for chromatography applications

20. The parties' submission indicated that it may be possible to further segment the market for the resale of vials and closures to the specialised sale of laboratory vials and closures for chromatography applications. The parties submitted information specifically on the chromatography market, taking a cautious approach but did not assert this narrower definition was the appropriate product frame.

21. Chromatography is a laboratory technique used for separating mixtures into their component substances or to extract single components from a mixture. This is achieved by passing the mixture through another (non-reactive) substance. Around four-fifths of both parties' turnover is accounted for by vials and consumables specific to chromatography applications.

22. On the demand side, evidence from third parties, and in particular end-users, indicated that standard vials cannot be used for chromatography purposes and vice versa.

23. At the manufacturing level, the parties argued that switching between standard laboratory vial and closure manufacturing and that specific for chromatography applications was relatively easy. They stated that it would be straightforward for a producer of laboratory vials and consumables not currently supplying chromatography products to expand the breadth of their offering and manufacture vials for chromatography applications on the

basis that there are no differences in the physical characteristic of vials used for chromatography applications other than their precise dimensions.

24. Third party responses, however, have indicated that it is difficult for a manufacturer of standard vials or other glass products to switch to manufacture for chromatography applications. Third parties submitted that there were significant differences in production; special custom-built machinery is required to manufacture efficiently; and the small vials require special attention to packing and sometimes require printing.

25. At the resale and distribution level, the parties pointed to several resellers who sell a wider range of vials and closures that are not limited to chromatography applications. They further submitted that it would be relatively easy for a reseller of laboratory vials and consumables, not currently supplying those products for chromatography applications, to expand the breadth of their offering. In particular, they noted that these products are often bought-in from third party manufacturers and resold under the reseller's brand.

26. On the basis of the information available, it would appear that barriers to switching at the manufacturing level are present, and that any vertical effects should be considered in the context of this narrower product frame. It is less clear whether such barriers exist at the resale and distribution level. On a cautious approach the OFT considers it may be appropriate to examine the resale of chromatography vials and closures separately. However, it has not been necessary to reach a firm conclusion on this issue, given that competition concerns do not arise on either basis.

Glass and plastic

27. The parties noted that vials may also be plastic. Around 95 per cent of general laboratory vials sold by the parties are made of glass, while the remaining five per cent are plastic. The potential to switch between glass and plastic was rejected immediately by end-users. From their perspective, plastic cannot be used for chromatography applications. Chromatography uses volatile solvents that can dissolve plastic and so glass is required to retain liquids. This is for both the physical aspects of the experiment and health and safety. Furthermore, there is limited evidence of supply-side substitution. Therefore, on the basis of the evidence available, the OFT does not consider it appropriate to widen the product frame of reference to include plastic vials.

Quality

28. A few third parties suggested that there is a difference between high quality (branded) and low quality (non-branded or distributor branded) vials and closures, which is partly driven by issues of interchangeability. However, it is clear that supply side substitution may be possible between low and high quality as the machinery required would be the same, with only additional expenditure on inputs and marketing/brand development being required. Furthermore, end users consider barriers to switching to be relatively low.

29. In this case, it is not necessary to conclude on whether branded or non-branded/ own-branded products constitute separate frames of reference as the merger does not give rise to competition concerns on either basis. In particular, segmentation by quality would result in there being no overlap between the parties' products.

Conclusion

30. The OFT considers that the appropriate product frame, in this case, is the resale of glass vials and closures for use in chromatography applications. For completeness, the effects of the merger within the wider product frame of all glass laboratory vials and closures will also be examined. Given the parties relatively stronger presence in the chromatography segment, it would be expected that a detailed analysis of this segment would be capable of identifying any issues which could arise in respect of any remaining overlaps in the wider product frame.

Related accessories

31. The main accessories are crimpers, syringe filters and vial racks and together they represent a relatively small proportion of both parties UK sales.

32. The parties argued that it is possible that accessories are part of the same market as that for vials and closures. However, based on evidence from both the parties and third parties, it appears that some accessories are sourced alongside vials and closures but not in all cases, due to the different volumes required. Third parties' responses tended to suggest that there is less cross-selling and less sourcing from the same company than for vials and closures, with one third party indicating that as little as 10 per

cent of customers source vials, closures and accessories together. Several third parties also considered that accessories are wholly interchangeable (for example, a rack or crimper is designed to work with any product, as long as it is the right size).

33. No third party concerns were raised in relation to the supply of accessories, with several indicating that there are a number of different manufacturers and resellers from whom customer could obtain accessories. As a result, no competition concerns are considered to arise in relation to the supply of related accessories, and this segment will not be considered further.

Geographic market

34. The parties submitted that the relevant geographic market is at least UK-wide, and arguably EEA-wide. In particular, they note that distributors can be served and supported on a cross-border basis without the need for local sales forces.

35. Vials and closures are sold from manufacturers to resellers and on to distributors, which offer a wide range of products and competing brands to the end-user. It is highlighted by both the parties and third parties that vials, as with all glass containers, are bulky, expensive to transport and relatively low value items. Therefore, as concluded in previous cases,[1] transport costs represent a relatively high proportion of value and may limit the competitive constraint provided by importers.

Resale and distribution

36. The evidence from manufacturers suggests that distributors usually operated on a national basis. Many of the third party respondents considered themselves to be both resellers and distributors as there is some overlap between the services offered. Some of these third parties stated that they are national in scope and that European trade is too costly due to freight costs. One third party indicated even trade in higher value chromatography vials was impractical. End-users generally supported a UK-wide geographic scope. One third party provided a different view, stating that they were active in supply globally and that transportation costs were not a barrier. However, they did indicate a preference for sourcing from a

[1] Case No. IV/M. 1109)-I/BTR Packaging (21 April 1998); Case No IV/M 1539 CVC/Danone/Gerresheimer (5 July 1999); Case No. Comp/M. 3397 O-I/BSN Glasspack (6 June 2004)

manufacturer in the geography in which they will be resold, suggesting they still aimed to minimise transportation costs.

37. In this case, it is worth noting that for one of the parties, LPP, sales in the UK ([less than 10] per cent) are wholly supplied from its base in Germany, thereby lending support for a wider than national geographic frame. However, it has not been necessary to conclude on the geographic frame of reference as no competition concerns arise as a result of the merger on a UK or Europe-wide basis.

Manufacturing

38. Given the vertical aspects potentially arising from this transaction, it is necessary to also consider the geographic frame for the manufacturing of chromatography vials and closures.

39. Manufacturing third parties indicated that they supplied Europe from a single base using a network of distributors (that typically operated on a national basis). Transport costs were not considered prohibitive, as they were simply passed on to distributors.

40. Transatlantic trade was not considered feasible, with several US manufacturers maintaining a base in Europe in order to serve European customers. Third parties suggested that favourable exchange rate movements can allow trade one way but it often precludes trade the other way so that a weak dollar at the moment may begin to open up US manufacturers to European resellers and distributors. One customer, a distributor, also considered that manufacturing supply lead times from the US were too long.

41. Therefore, the appropriate frame of reference is considered to be the manufacture of glass chromatography vials and closures for supply in Europe.

HORIZONTAL ISSUES

Market shares and competitive constraints

Chromatography applications

42. Post-merger the parties will account for approximately [20-30] per cent (increment [less than 10] per cent)[2] of the share of supply for the resale of laboratory vials and closures for chromatography applications in the UK. On an EEA wide basis, the parties combined share of supply falls slightly to approximately [20-30] per cent (increment [less than 10] per cent). Some third parties suggested that the parties' actual shares might be higher than these figures. However, limited evidence was given to support this assertion.

43. Thermo Fisher is currently the largest reseller in the UK, but faces competition from several established competitors, such as Agilent, Waters and JG Finneran. There are also a large number of smaller resellers operating in the UK including Grace Discovery Sciences and Stratlab. One competitor stated that there are many alternative suppliers and the customer base is continually changing as customers search for better prices. Competitors' views on the likelihood of customer switching following a 5 to 10 per cent price increase were mixed. However the majority of distributors who responded suggested switching was viable and there were a number of alternative suppliers.

44. In addition, some manufacturers do not use resellers and are able to sell to distributors directly. If the price of resellers increases, distributors may find it profitable to go direct to manufacturers, which would further constrain the resale segment of the supply chain. Furthermore, the parties could be expected to face further constraints from European suppliers.

45. Of those third parties who expressed concerns regarding the merger, concerns appeared to be focussed on a perceived increase in concentration at the manufacturing level. As discussed above, the parties have confirmed that the merger does not give rise to an overlap at the manufacturing level. Therefore the concerns raised are either the result of a misunderstanding

[2] The parties' estimates for shares of supply for vials and closures separately does not vary significantly. For example, their combined share of supply in the UK for vials and closures was [20-30] per cent and [20-30] per cent respectively.

regarding LPP's position in the supply chain and/or relate to more general, non-merger specific, concerns regarding high levels of concentration at the manufacturing level.

46. Overall, evidence from third parties suggests that there are several other suppliers operating in the UK and that switching between resellers is possible. Furthermore resellers may be partly constrained by distributors, who in some cases are able to go direct to manufacturers. On this basis the OFT considers that sufficient competitive constraints remain post-merger and competition concerns do not arise in this segment.

All vials and closures

47. On the wider product frame of all glass vials and closures, the parties combined share of supply within the resale segment is [15-25] per cent (increment [less than 5] per cent) and [15-25] per cent (increment [less than 10] per cent) in the UK and EEA respectively. As with vials and closures for chromatography applications, there are a number of other competitors present and barriers to switching between resellers appear low. On this basis, no competition concerns are considered to arise within the wider market for all glass vials and closures.

VERTICAL ISSUES

Input foreclosure

48. The OFT considered whether, post-merger, the parties could credibly seek to restrict supply of vials and closures to its downstream competitors in the resale and distribution levels of the supply chain. In order for such a strategy to be effective, supply would need to be restricted from Thermo Fisher's manufacturing arm to resellers and distributors and/or the merged entity would need to restrict sales from its resale arm to distributors.

49. The parties submitted that the merged entity's share of supply at the manufacturing level is small, and they do not possess market power. As a result, resellers and distributors would be able to source products from a number of other manufacturers in the sector. Furthermore, the parties confirmed that Thermo Fisher's UK manufacturing interests were limited to that of Kimble/Chase, in which it only holds a minority interest, combined with minority board representation and veto rights only over high-level strategic decisions. It was therefore submitted that Thermo Fisher had no

ability to control the day-to-day commercial decisions of the manufacturer. The parties also identified a number of alternative manufacturers present in the sector, capable of supplying third party resellers.

50. Foreclosure at the resale level would appear equally difficult. As discussed earlier, the OFT considers that there are a number of alternative resellers from whom distributors could source their requirements. In addition, distributors may also be able to purchase vials and closures directly from manufacturers. While the merger leads to an increase in concentration at the resale level, third party concerns focussed on the concentration at the manufacturing level.

51. Given that the merger does not result in any increase in concentration at the manufacturing level, and there are a number of alternative manufacturers and resellers present in the sector, the OFT does not consider that the merger is likely to enhance the parties ability to foreclose supply to downstream competitors.

Foreclosure to distribution and resale channels

52. One third party raised concerns that if the merged entity chose to internalise their vertical interests and only produce, resell and distribute their own products, that manufacturers may not be able to find alternative sales routes to end-users. However, as discussed above, there are a number of alternative resale suppliers available for manufacturers to sell their products through.

53. In addition, manufacturers may be capable of supporting new entry and expansion by an existing player. Third parties generally indicated that, with the possible exception of branding, barriers to entry were not significant.

54. As a result, the merger is not considered to increase any potential ability for the parties to foreclose manufacturers' access to end-users.

THIRD PARTY VIEWS

55. The OFT received a number of responses from third parties. These responses highlighted two main areas of concerns. First, there was a concentration in upstream manufacturing that was limiting choice. Given there is no increase in concentration at the manufacturing level as a result of the transaction, this concern would appear to be pre-existing and non-merger specific.

56. Second, there were competition concerns relating to customer and input foreclosure. However, as discussed above, the OFT considers that the merger does not enhance the ability of the parties to foreclose either downstream or upstream competitors given the presence of a number of alternative resellers and distributors in the sector.

ASSESSMENT

57. The parties overlap in the resale of laboratory vials, closures and related accessories, used principally for chromatography applications.

58. Post-merger the parties will account for approximately [20-30] per cent (increment [less than 10] per cent) of the share of supply for the resale of laboratory vials and closures for chromatography applications in the UK. On a wider EEA basis, the parties combined share is approximately [20-30] per cent (increment [less than 10] per cent). Evidence from third parties indicates that there are several other suppliers operating in the UK and Europe, and that switching resellers is feasible. Furthermore, resellers may be constrained by distributors, who in some cases are able to go direct to manufacturers. As a result, sufficient competitive constraints on the parties' behaviour are considered to remain post-merger.

59. A number of third parties expressed concerns that the merger would result in an increase in concentration at the manufacturing level for vials and closures. However, these concerns appear to relate to more general, non-merger specific, concerns regarding high levels of concentration at the manufacturing level and may have arisen due to confusion regarding the position of LPP within the supply chain. The parties have confirmed that the merger does not give rise to an overlap at the manufacturing level.

60. The OFT also considered whether the merger might give rise to an increased risk of foreclosure. However, given the parties shares of supply at the manufacturing level is low and not increased by merger, together with the presence of a number of alternative manufacturers and resellers in the sector, the OFT does not consider that the merger is likely to enhance the parties ability to foreclose supply to downstream competitors or routes to market for upstream suppliers.

61. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

62. This merger will therefore not be referred to the Competition Commission under section 33(1) of the Act.