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(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 October 2004

declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement

(Case No COMP/M.3216 — Oracle/PeopleSoft)

(notified under document number C(2004) 4217)

(Only the English text is authentic)

(Text with EEA relevance)

(2005/621/EC)

On 26 October 2004 the Commission adopted a Decision in a merger case under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽¹⁾, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: http://europa.eu.int/comm/competition/index_en.html

- (1) On 14 October 2003 the Commission received a notification, pursuant to Article 4 of Regulation (EEC) No 4064/89 (the Merger Regulation), of a proposed concentration by which the undertaking Oracle Corporation (Oracle, United States) acquires, within the meaning of Article 3(1)(b) of the Merger Regulation, sole control of the undertaking PeopleSoft Inc. (PeopleSoft, United States) by way of a public bid.
- (2) On 17 November 2003, the Commission initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation. Following a thorough investigation of the concentration and of its likely impact in the relevant markets for customers, competitors and other players, on 12 March 2003 the Commission sent its objections to Oracle, under Article 18 of the Merger Regulation. According to those objections the transaction was deemed likely to create a dominant position as a result of which effective competition in the common market and in the area covered by the EEA Agreement would be significantly impeded. An oral hearing was held in Brussels on 31 March and 1 April 2004.
- (3) On 7 April 2004, following the oral hearing, the Commission issued a request for information under Article 11 of the Merger Regulation inviting Oracle to submit further information in order to enable the Commission to take a decision on a 'broader factual basis'. In the absence of a reply from Oracle, the Commission adopted a decision under Article 11(5) of the Merger Regulation on 14 April 2004 so that the periods laid down in Articles 10(1) and 10(3) of the Merger Regulation were suspended as of this date. Following Oracle's submission in response to the Commission's request for information, the timetable in this procedure resumed again on 7 October 2004.
- (4) The operation was reviewed by the US authorities in parallel with the Commission procedure. In the US a trial has been held in front of the US District Court for the Northern District of California in San Francisco (hereinafter referred to as the District Court of Northern California and the trial as the US trial), having commenced on 7 June 2004. The District Court of

⁽¹⁾ OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

Northern California refused to grant an injunction regarding the transaction by judgement of 9 September 2004. In the course of the trial, numerous documents from enterprises concerning the transaction became public and were (partly) put on the website of the US Department of Justice. Also transcripts of the statements made by around 30 witnesses in the trial have become public. The Commission included parts of the evidence from the US trial in this decision.

I. THE PARTIES

- (5) Oracle is a publicly listed company whose common stock is traded on the Nasdaq and which is active in the design, development, manufacture and distribution of enterprise application software, database and application server software and related services.
- (6) PeopleSoft is a publicly listed company whose shares are traded on the Nasdaq and which is active in the design, development, manufacture and distribution of enterprise application software and related services. In July 2003, PeopleSoft acquired control of J.D. Edwards (JD Edwards), a US company also active in the application software business.

II. THE TRANSACTION

- (7) The notified operation consists of a public bid for all outstanding shares of PeopleSoft. Oracle launched the public bid on 9 June 2003. The expiration date of the offer has often been extended by Oracle. The offer also includes the outstanding shares which have been issued by PeopleSoft as a contribution for the acquisition of JD Edwards. The bid is contested by PeopleSoft and does not have the support of the Board of Directors of PeopleSoft.

III. THE RELEVANT MARKETS

High-function HR and FMS solutions or software

- (8) Oracle and PeopleSoft are vendors of enterprise application software (EAS). EAS is software that supports major business functions needed to manage a business effectively at a corporate or branch level, such as managing corporate finances, automating the sales and marketing functions of a company, or managing the resources involved in corporate projects. EAS that is commercially available 'off the shelf' is referred to as 'packaged' software, in order to distinguish it from

customised software that fulfils the same functions as packaged applications, but is developed in-house or with the help of outside consultants.

- (9) The industry generally groups EAS into categories having functionality with broadly similar purposes. The relevant categories for the present transaction are financial management systems (FMS) and human resources (HR), together often called enterprise resource planning (ERP). The FMS suite typically includes software for accounting (accounts receivable, accounts payable, general ledger), planning and budgeting, reporting, time and expense management and the financial supply chain. The HR suite combines software for personnel data, payroll management and benefits. Other EAS pillars are customer relationship management (CRM) and supply chain management (SCM).
- (10) The Commission found that the relevant product markets for the assessment of the present transaction are the markets for high-function FMS and HR software applications. As HR and FMS applications are not substitutable for buyers, the Commission considers these as two distinct markets. The high-function FMS and HR software applications are intended to serve the needs of large and complex enterprises (LCEs) which require software and accompanying services with a particularly high standard in terms of, *inter alia*, scalability, configurability, sophistication, pricing, reliability and quality of the software and brand recognition of the vendor.
- (11) The market investigation showed that characteristics of high-function HR and FMS software are different from those of mid-market products. In general, high-function software solutions are more complex, offer greater functionality, support more users (in total as well as in concurrent-use numbers), are much more expensive (from two to five times or more) and have higher implementation costs compared to mid-market software. High-function HR and FMS software have a greater breadth of horizontal functionality and more depth of vertical functionality. High-function software has to support very high volumes of users (e.g. 30 000 employees simultaneously using online employee self-service portals) and high volumes of transactions and therefore has to have a very high degree of scalability. Mid-market products typically have their limits at several hundreds users. High-function HR and FMS software can cope with large companies' complex organisational designs. In carrying out their activity, large and complex organisations usually involve several departments whereas in mid-size and small companies functions are carried out by one/a few persons.

(12) High-function HR and FMS software has to offer compliance with the legal requirements and accounting rules of the main economic zones and legal jurisdictions (e.g. US-GAAP, IAS and other national systems); in this context, large and complex company solutions will tend to support multiple regions and different currencies simultaneously or almost in real-time. At a minimum, these solutions must provide mechanisms for large enterprises to manage these differences with a minimum effort. In addition, large enterprises' applications must simultaneously support multiple languages even within a single location, including sometimes Japanese and Chinese languages. Mid-market solutions typically have been optimised for use in a specific economic region, and as a result typically provide far less language and geographic support options.

(13) A very high level of product maintenance and support drives LCEs' choice of EAS products and is an inherent characteristic of high-function HR and FMS solutions, compared to mid-market solutions and to the support needs of a mid-market customer. Complex enterprise systems must consider the impact of 24-hour/seven-day coverage required for the challenges of the global company. For mid-market companies, usually a primary location in the US or Europe is linked to smaller sales offices or distributors overseas.

(14) The underlying architecture of high-function solutions is fundamentally different from the one of mid-market products. Often, only a multi-tier architecture can achieve the level of throughput that is required from high-function EAS solutions.

(15) Mid-market solutions normally have simpler interfaces, or simpler APIs (application programming interfaces), making them easier to integrate in a simple way with other mid-market software and other smaller-scale solutions, but allowing little scope for adding directly to the functionality of the software. High-function software tends to have complex and proprietary APIs which allow full and complex integration with other large scale software solutions and additional functionality to be added to customise the solutions as well as supporting multiple popular programming languages.

(16) The Commission's investigation further showed that 'best-of-breed' or point solution software, HR software outsourcing services, system integration services and incumbent software (already installed at customers) do not represent competitive constraints vis-à-vis a small but non transitory increase in price of high-function software, and therefore all these products/services are not in the relevant markets.

Large and complex enterprises as customers

(17) High-function HR and FMS solutions are software that is typically purchased by complex organisations/companies which have a very high level of functional needs, expect high standards in product performance and require short time and continuous availability of accompanying services.

(18) The Commission has therefore come to the conclusion that there are distinct product markets for FMS and HR high-function solutions for large and complex enterprises.

Vendors of high-function HR and FMS software

(19) The Commission further established who the vendors of FMS and HR high-function software are. Those suppliers form the competitive constraints for a combined Oracle/-PeopleSoft in the markets at stake.

(20) The Commission established the suppliers in the market by looking at the bids made by suppliers for such customers, i.e. for large and complex enterprises needing complex functionality in the field of HR and FMS applications. However, it appears difficult to draw a clear-cut line between the customers on the basis of the complexity of their needs and therefore between customers of application software which is able to cater for the needs of such large and complex enterprises and those applications adapted for mid-market customers. In order to be able to carry out its investigation, the Commission used proxies to describe those customers and the transactions for such software applications.

(21) As a first suitable proxy for the 'complexity' of the requirements of such large organisations, the Commission considered a net licence value of EUR 1 million to be appropriate. This value appeared to be an appropriate first indication that such bids are made for high-function solutions purchased by large and complex enterprises even though it does not mean that bids in individual cases below this value may not involve high-function FMS and HR solutions. However, for a licence of a value in excess of EUR 1 million it can be safely assumed that anyone winning a bid above this threshold for applications in the field of HR and FMS may be considered as a supplier of high-function FMS and HR solutions. The Commission further complemented this threshold by a delineation of large and complex enterprises as customers. The market investigation showed that thresholds of 10 000 employees or of revenues exceeding EUR 1 billion might be an appropriate proxy for a rough qualification of large and complex undertakings. The Commission concludes that the complementary set of proxies can be used for a first qualification of the bids to assess whether the bids are for high-function software for large and complex enterprises.

(22) With the help of these proxies, the Commission analysed the bids in which EAS vendors participated in 2001 and 2002 as well as the bids submitted by Oracle in response to the Commission's information request after the Oral Hearing. The Commission further analysed documents relating to bids resulting from the US trial in order to establish who the suppliers of such software applications are.

(23) On the basis of this evidence, the Commission concluded that in the markets for high-function FMS and HR for large and complex enterprises Oracle, PeopleSoft and SAP are the main players. Each of these players identified at least 50 to 100 bids within a two-year period falling under the proxies and therefore concerning high-function software for large and complex enterprises (i.e. companies with more than 10 000 employees and revenues exceeding EUR 1 billion). However, the Commission's data and the submissions by Oracle show that occasionally other players win bids for high-function FMS and HR software to serve the needs of large and complex enterprises. Other such vendors of HR and/or FMS high-function software are: Lawson, Intenia, IFS, QAD and Microsoft. Although these vendors won only a limited number of bids, they were either runner-ups for high-function FMS and HR software or they participated in bids with a license value exceeding EUR 1 million in a larger number of bids.

(24) Using Oracle's dataset containing bid data, as well as two other datasets obtained from the US trial proceedings, the Commission further undertook an econometric analysis in order to investigate whether the data revealed a difference in Oracle's bidding behaviour depending on the identity of the competitors in the final bidding round. A finding that Oracle was relatively more likely to provide aggressive discounts when either SAP or PeopleSoft were present in the final bidding round rather than when competing against other competitors would suggest indirect evidence that competition is mainly between the big three software providers and that only Oracle, SAP and PeopleSoft are vendors of high-function FMS and HR software to serve the needs of large and complex enterprises. The main finding was that no significant distinction could be identified between the behaviour of Oracle when competing against SAP and PeopleSoft compared to the behaviour against other bidders. This was true even when restricting attention to large deals.

(25) The Commission further analysed the capabilities and reach of the FMS and HR software of the other vendors, Lawson, Intenia, IFS, QAD and Microsoft. Particularly on the basis of the evidence that has come out of

the US trial in San Francisco, the Commission concluded that, despite limitations in the product offerings of each of these vendors as opposed to Oracle, PeopleSoft and SAP regarding HR and FMS high-function software, each of them has several customers in the field of HR and FMS which may qualify as large and complex enterprises. These vendors may be able to serve their needs at least in the verticals in which the respective vendor specializes.

(26) The relevant product markets are therefore, respectively, high-function FMS and HR solutions for large and complex enterprises. The main players in these markets are SAP, Oracle and PeopleSoft. However, the Commission has come to the conclusion that several other vendors could represent a competitive constraint vis-à-vis Oracle, PeopleSoft and SAP at least in the verticals in which they are active and cannot be excluded as vendors from the markets for high-function FMS and HR applications. For the purposes of the present transaction, Lawson, Intenia, IFS and Microsoft are to be treated as vendors for FMS and HR high-function applications and QAD is to be treated only as vendor for FMS high-function solutions.

Mid-market HR and FMS solutions or software

(27) The Commission found indications that the market for software applications for mid-size enterprises (having approximately annual revenues of between EUR 30 million and EUR 1 billion) is a separate market from the markets for high-function FMS and HR solutions, and possibly also from the markets for applications for small enterprises (i.e. those with revenues below EUR 30 million). Applications adapted to the needs of mid-size enterprises are usually out-of-the box solutions which provide a limited scope of functionalities and can only to a limited extent be configured to the individual needs of the enterprise. Separate markets for FMS and HR solutions can be distinguished also within the mid-market software as FMS and HR functionalities for mid-size companies are not substitutable from a demand side perspective either between themselves, or with any other functionalities related to other pillars (CRM, SCM etc.). Furthermore, the Commission found indications that applications software for small businesses only cover the basic needs of an enterprise with a uniform organisational structure.

(28) In any case, the exact delineation of the product markets for mid-market HR and FMS solutions and the small business software can be left open as the transaction does not lead to competition concerns on the basis of any of these possible market definitions.

Geographic Scope of the relevant markets

- (29) The market investigation gave clear indications that the geographic scope of the markets for high-function HR and FMS solutions for large and complex enterprises is world-wide. Most of these customers consider offers for EAS solutions from vendors located in the EEA, the United States and other parts of the world without consideration of the geographic region where the company originates. The Commission also used the bidding data submitted by Oracle after the oral hearing to investigate whether Oracle's behaviour differed depending on the location of the bid. The data did not suggest that the average discount offered in the EEA differed from that offered in the US or in the rest of the world. The Commission has therefore come to the conclusion that the markets for high-function HR and FMS solutions are worldwide in scope.
- (30) As regards the mid-market FMS and HR solutions, the geographic scope of these markets may not be wider than EEA-wide. However, the exact delimitation can be left open.

IV. ASSESSMENT

A. Market Shares

- (31) The calculation of market shares has proven to be particularly difficult for the relevant markets, as neither publicly available industry studies nor the parties have provided a segmentation of vendors revenues according to the segmentation of the market (upmarket and mid-market) and vendors do not normally classify their customers according to their volume of revenue or their number of employees. Therefore the Commission sought to establish the strength of the vendors on the basis of their total revenues as reported in industry reports, independently of whether these are achieved in the upmarket or the mid-market. The shares would be as in the following table:

(%)

Total licences revenues worldwide 2002	FMS	HR
Oracle	16	13,5
PeopleSoft	9	30
JD Edwards	3	2,5
Oracle/PeopleSoft/JD Edwards combined	28	46
SAP	51	40
Lawson	4	9
Intentia	1,5	1,5
IFS	0,5	1
QAD	1	—
Microsoft MBS	14	2,5

Source: Gartner, ERP Market Experiences Further Decline: Market Statistics, 2002, published 2003.

- (32) Given their limited meaning for the markets at stake, the Commission used the shares only as an indication of the relative strength of the different vendors in the markets. The shares show that Oracle, PeopleSoft (including JD Edwards) and SAP are the main players in both the FMS and the HR market and that the share of other players may be estimated at between 10 % and 15 %. SAP would still lead the market over a combined Oracle/PeopleSoft in FMS whereas a combined Oracle/PeopleSoft would take the lead in HR.

B. Creation of a dominant position, as a result of which effective competition will be significantly impeded

High-function HR and FMS solutions or software

1. Non-coordinated effects

- (33) In the Statement of Objections the Commission had based its concerns in part on the finding there would be a significant group of customers for whom there would essentially be only one supplier left after the transaction. This concern was based on a definition of the market which after the merger would consist of only Oracle and SAP. The group with a limited choice after the merger consist, *inter alia*, of those customers who do not find one of the two products suitable for their needs; those customers who prefer to run their software on a non-Oracle database ⁽¹⁾; those customers who would like to terminate its relationship with one of the two; those customers who, in order to avoid being dependent on one supplier, would prefer to purchase their FMS and HR software from two different suppliers and those customers who would prefer not to license both the software and the database from the same supplier.
- (34) In light of the conclusions regarding the market definition, it is not possible for the Commission to uphold its preliminary conclusion that this group of customers will be confronted with a *de facto* absence of choice after the merger.
- (35) In order to assess whether or not the notified concentration would lead to non-coordinated effects, the Commission ran a number of regressions on each of four datasets: one data set from PeopleSoft, one Oracle data set compiled for the European Commission and two of the Oracle datasets from the US Court proceedings. The purpose was to investigate to what extent the competitive situation of a particular bid (measured by the number of final round bidders) had an impact on the discounting offered by the seller in question (i.e. PeopleSoft in PeopleSoft's dataset and Oracle in Oracle's datasets).

⁽¹⁾ Oracle's EAS software only runs on Oracle's database, while PeopleSoft and SAP's software run on other databases besides Oracle's.

- (36) The Commission generally found that there was a very strong relationship between the size of the deal and the discount offered. Deals that tended to produce very high list prices were overall likely to also attract very large discounts. The Commission also found that in a number of regressions in which this relationship between the deal size and the discount was not properly taken into account, there appeared to be an effect on the competitors on the discounting behaviour. The initial finding mentioned in the Statement of Objections was indeed based on such a regression. Once the size of the deal was taken into account, the number of final bidders did no longer lead to such effects.
- (37) A finding, as in this case, that the number and identity of competitors in a given bid appear not to have an effect on a firm's behaviour does not in itself prove that there will not be harmful effect of the merger on customers. There may be a variety of reasons why such an effect is absent from the bidding data. Based on the information available, it does not appear possible to reach a final conclusion about which of the different reasons is the most pertinent. It is not necessary, though, for the Commission to reach a conclusion on this issue since it is clear that the absence of an appreciable effect of competition on Oracle's behaviour makes the bidding data unsuitable to rely on as determinative proof of an anticompetitive effect of the merger.
- (40) In a market in which — in addition to Oracle, PeopleSoft and SAP — Lawson, Intenia, IFS, QAD and Microsoft are also present as vendors of high-function FMS and HR applications, it appears difficult to argue that these players would reach a common understanding as regards the parameters outlined above. In particular, an allocation of customers will not be possible due to the larger group of possible vendors of such software. The larger number of vendors also reduces the transparency in the market and would make retaliatory actions more difficult. Furthermore, the players' market shares are not symmetrical. The vendors other than Oracle, PeopleSoft and SAP are significantly smaller in the relevant markets. They do not have similar structural links as SAP and Oracle in the area of databases. Lawson's resale of Oracle databases appears to be marginal compared to the sale of Oracle's databases by SAP, while Microsoft in any case uses its own databases for its ERP products.
- (41) Also, the Commission cannot conclude that the merger will lead to a coordination of only a combined Oracle/PeopleSoft and SAP. The other vendors mentioned in the section on market definition — Lawson, Intenia, IFS, QAD and Microsoft — appear to be suitable alternatives as the Commission's data and the dataset submitted by Oracle after the oral hearing (ultimately on 27 September 2004) show that those vendors have won bids for software in the relevant markets. A coordination of the competitive behaviour of a combined Oracle/PeopleSoft and SAP could therefore not be successfully sustained.

2. Coordinated effects

- (38) In the Statement of Objections the Commission had based its concerns further on the finding that, in addition to the non-coordinated effects, the two remaining players would be in a position to further soften competition by coordinating their competitive behaviour. The theory of coordination was based on a definition of the market which after the merger would consist of only Oracle and SAP and relied in particular on the symmetrical market shares of a combined Oracle/PeopleSoft and SAP and an alignment of incentives between them due to the fact that SAP is by far the largest reseller of Oracle databases. As parameters for adopting a common policy, the Commission identified the allocation of customers in a duopoly, a reduction in price competition and a common understanding to slow down the addition of further functionalities and the improvement of products.
- (39) In light of the conclusions regarding the market definition, it is not possible for the Commission to conclude that the merger would lead to a collective dominant position of a combined Oracle/PeopleSoft and SAP on the basis of coordinated effects.
- (42) As regards HR and FMS mid-market software markets, significantly more players are active than in the markets for high-function HR and FMS solutions. Suppliers to mid-size companies include, Oracle, PeopleSoft, SAP, Lawson, Intenia, IFS, QAD, Microsoft MBS, but also Sage, SSA Baan, Unit4 Agresso (both FMS and HR); Hyperion, Systems Union or 'Sun Systems' (FMS only); Kronos, Ultimate, Midland, Meta4 and Rebus (HR only). No specific market shares for the mid-market applications are available. Nevertheless, the overall revenues achieved for 2002 (on the basis of analyst reports) show that, on a worldwide basis, SAP would remain the strongest player in such an FMS market, followed by a combined Oracle/PeopleSoft. Other significant players would include Sage, Microsoft MBS, Hyperion, Systems Union and Lawson. For HR mid-market solutions, the combined Oracle and PeopleSoft would become the strongest player, closely followed by SAP. Other significant players in HR would include Kronos, Lawson, Sage and Microsoft MBS.

Mid-market HR and FMS solutions or software

- (43) On a European level, the impact of the transaction may give even less reason for concerns on the basis of overall revenues reported by analysts for 2002 for Europe. SAP's position would be stronger in Europe than on a worldwide basis in both FMS and HR whereas the position of a combined Oracle/PeopleSoft would be weaker. Numerous other vendors represent a competitive constraint to the merging parties in a Europe-wide market as well, both as regards HR and FMS mid-market software.
- (44) Given the limited strength of a combined Oracle/PeopleSoft in the markets for HR and FMS applications adapted to and typically purchased by mid-size companies and the numerous other players also active in these markets, it can be excluded that the transaction

would lead to competition concerns in the markets for mid-market HR and FMS applications, irrespective of the exact delineation of such markets.

V. CONCLUSION

- (45) The Commission concludes that the proposed concentration would not create or strengthen a single or collective dominant position in the markets for HR and FMS high-function solutions and as regards the mid-market HR and FMS software. Consequently, the Commission declares the concentration compatible with the Common Market and the EEA Agreement, in accordance with Articles 2(2) and 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.
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