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EN

***Case No COMP/M.3216-
ORACLE/PEOPLESOFT***

Only the English text is authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 8 (2)
Date: 26/10/2004



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26-10-2004

C(2004) 4217 final

PUBLIC VERSION

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)

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹, and in particular, Article 26(2) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings², and in particular Article 8(2) thereof,

¹ OJ L 24, 29.1.2004, p.1.

Having regard to the Commission's decision of 17 November 2003 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

After consulting the Advisory Committee on Concentrations³,

Having regard to the final report of the Hearing Officer in this case⁴,

WHEREAS:

I. INTRODUCTION

- (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) After examination of the notification, the Commission concluded on 17 November 2003 that the notified operation fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the EEA Agreement. The Commission therefore initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation.
- (3) In order to carry out an in-depth appraisal of the notified operation the Commission sent Oracle a request for information pursuant to Article 11(5) of the Merger Regulation on 19 December 2003. As Oracle did not provide a reply in the timeframe set by the request for information, on 8 January 2004, the Commission adopted a decision under Article 11(5) of the Merger Regulation requesting the information necessary for the assessment of this transaction. Oracle did not comply within the time limit set by that decision. The periods set by Article 10(1) and 10(3) of the Merger Regulation were therefore suspended, for the first time in this procedure. Upon compliance by Oracle, the timetable resumed as of 12 February 2004.
- (4) 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

2 OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

3 OJ C200. , p....

4 OJ C200. , p....

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.

- (5) An Oral Hearing was held in Brussels on 31 March and 1 April 2004.
- (6) On 7 April 2004, following to 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 requested this information in a decision adopted under Article 11(5) of the Merger Regulation on 14 April 2004. Oracle did not comply within the time limit set in the decision and the periods laid down in Article 10(1) and Article 10(3) of the Merger Regulation were therefore suspended, for the second time, as from 14 April 2004.
- (7) Following Oracle’s submission in response to the Commission’s request for information, the timetable in this procedure resumed again on 7 October 2004.
- (8) The Advisory Committee discussed the draft of this Decision on 19 October 2004.
- (9) 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 “District Court of Northern California” and the trial as “US trial”), having commenced on 7 June 2004. The District Court of Northern California refused to grant an injunction regarding the transaction by judgment 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.

II. THE PARTIES

- (10) 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.
- (11) 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 CONCENTRATION

- (12) On 9 June 2003, Oracle launched a public bid to purchase all of the outstanding shares of common stock of PeopleSoft. On May 14, 2004, Oracle revised its cash tender offer to USD21 per share (the total consideration for PeopleSoft amounts to USD 7,7 billion. The offer also includes the outstanding shares which have been issued by PeopleSoft as 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.

- (13) The notified operation consists of a public bid for all outstanding shares of PeopleSoft and therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation by which Oracle acquires control over PeopleSoft.

III. COMMUNITY DIMENSION

- (14) The concentration meets the thresholds of Article 1(2) of the Merger Regulation. The parties' combined aggregate world-wide turnover exceeds EUR 5 000 million; Oracle and PeopleSoft each have a Community-wide turnover of more than EUR 250 million. The parties do not achieve more than two-thirds of their turnover in one and the same Member State. The proposed operation therefore has a Community dimension pursuant to Article 1(2) of the Merger Regulation.

IV. ASSESSMENT UNDER ARTICLE 2 OF THE MERGER REGULATION

A. THE RELEVANT MARKETS

- (15) The transaction has an impact on the business software market (distinguished from consumer software). Business software can be broadly categorised into “infrastructure software” and “application software”. Business application software comprises software programs that address some aspect of planning, execution or collaboration in a business, government or other organisation. These applications can in general be divided into (i) personal productivity applications (word processing, spreadsheets and client-side collaborative applications), and (ii) enterprise application software (“EAS”).
- (16) Oracle and PeopleSoft both provide solutions based on EAS. These comprise (i) enterprise applications and (ii) services related to the implementation and use of such software (these may include integration services, support and maintenance services, training services and/or hosting services).

(1) Introduction to EAS software

- (17) EAS is software that supports the 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” through sale, lease, rental, or as a service is referred to as “packaged” software, in order to distinguish it from customised software that fulfils the same functions as packaged applications, but that is developed in-house and/or with the help of outside consultants.
- (18) The industry, in particular industry analysts, generally distinguishes various categories of EAS, grouping EAS into categories having functionality with broadly similar purposes. Oracle, for example, identifies the following categorizations or “pillars” in its notification: (1) Enterprise Resource Planning (“ERP”), which encompasses applications that manage the optimal use of enterprise resources such as employees, assets and finances. This category would include the pillars Financial Management Systems

(“FMS”)⁵, Enterprise Project Management (“EPM”)⁶ and Human Resources (“HR”)⁷. (2) Customer Relationship Management (“CRM”) encompasses applications that automate customer-facing business functions (that is to say, sales, marketing, customer service and support, call centers and all the processes related to the automation of sales: order processing, contact management, information sharing, inventory monitoring and control, order tracking, sales forecast and analysis etc.). (3) Supply Chain Management (“SCM”) encompasses applications that automate the process of planning, producing and delivering a good or service to market (supply planning, manufacturing, order fulfillment, distribution and logistics, sourcing and procurement).

- (19) Acronyms and labels used by different suppliers and industry analysts do not always match and vendors may sometimes include similar functionalities into different categories or sub-categories of their offerings⁸.
- (20) Bearing in mind the above, software packages combining the software required to serve some or each of these purposes are offered on the market in “suites” or, even if not packaged as a suite, are integrated to serve the entire requirements of customers for a specific pillar. However, software can also be divided and sold according to the sub-functions they incorporate (that is to say, the individual functionalities). In particular FMS and HR include various components. The FMS suite typically includes software for accounting, planning and budgeting, reporting, time & expense management and the financial supply chain, the HR suite combines software for personnel data, payroll management and benefits. Similarly, other pillars (CRM, SCM, etc.) include various components reflecting different feature functions related thereto.
- (21) In past decisions, the Commission left open whether an overall market for EAS solutions exists or whether distinct markets within the area of overall EAS solutions have to be defined⁹. A very thorough market investigation and analysis was carried out in this case through various steps: detailed questionnaires to EAS customers and vendors, extensive analysis of bid data on EAS software (especially as regards HR and FMS

⁵ FMS applications allow companies and other organisations to maintain their general ledger, track expenses, payments, collections and receivables, balance and periodically close books, perform analytics, prepare reports, provide costing, cash management, internal audit controls, treasury and risk management capabilities.

⁶ EPM allows companies and other organisations to manage the resources (employees, equipment, cash) associated with a project, collaborate among internal resources and external partners assigned to a project and track project contracts, costing and billing information.

⁷ HR applications are applications that automate one or more human resources functions of an enterprise, such as personnel management, benefits administration, payroll, recruiting, employee development (*e.g.*, training, succession planning) and performance analysis and review. Depending on the industry analyst or the vendor, different ranges of HR functions are included in the HR category, and sometimes applications providing these functions are also labelled as “Human Resource Management Systems” (“HRMS”), “Human Capital Management” (“HCM”) or “Employee Relationship Management” (“ERM”) applications.

⁸ By way of example, regarding various ranges of similar functionalities, other acronyms can be found in industry surveys or are used by vendors such as Project Management (“PM”), Collaboration and Communication Management, Sales Management, Sales Force Automation, Product Lifecycle Management, Partner Relationship Management, etc. These categorisations may correspond, to various degrees, to those referred to above.

⁹ Commission decision of 23.11.1998, Case IV/M.1114 - SAP / Heidelberger.

applications), and a huge body of evidence stemming from the US trial in front of the District Court of Northern California. In this decision, the Commission will also take account of the evidence which only became available after it issued the statement of objections.

(2) Industry characteristics of the EAS software

- (22) The entities that buy EAS solutions are highly diverse and include all but the smallest organisations. The early adopters among customers of EAS solutions have traditionally been the larger enterprises. Larger organizations with multiple establishments and business groups may represent more than one customer for the same or for various types of solution.
- (23) EAS vendors include various suppliers. Among these, essentially SAP, Oracle and PeopleSoft are also referred to as “suite” suppliers, while a multitude of vendors is represented by “best of breed” or “point solution” providers. This terminology generally identifies, respectively, vendors who aim at providing a range of applications addressing different EAS functions (“suite” suppliers), as opposed to vendors who generally focus on selling one or a few “best of breed” applications that focus on addressing particular automation functions in the best possible way (reflecting an emphasis on “depth” rather than “breadth”), sometimes limited to a particular niche (“point solution” providers).

2.1 The EAS software purchasing process

- (24) A customer’s decision to purchase a new EAS solution (for example, a new HR system, as opposed to adding new users for existing solutions) is normally a bidding process and involves several steps. First, potential customers identify a possible advantage from automating one or more specific business processes, or from enhancing the automation thereof by replacing an incumbent system with a new application. Depending on the structure and decision-making culture of the entity involved, the decision to purchase a new EAS solution can be made at various levels of the organization (centrally by headquarters for all units of the organization or sometimes independently by divisions or units of the organization). Often, the different local branches and divisions of the same company organize their own EAS solutions provider selection processes.
- (25) Oracle states that potential customers have several choices when making a purchasing decision, once a decision to consider purchasing a new solution has been made: (1) buy a standard EAS package to run in-house or on an outsourced basis, (2) custom-design with the help of an external consultant a bespoke system or (3) contract for the functionality to be provided as a service from a “pure” outsourcer. The choice between these options will be based on analysis of the various costs and benefits of each of the solutions from the customer’s perspective.
- (26) Once the decision to purchase has been made, the customer initiates contacts with several potential EAS suppliers by providing a description of the project, the needs of the customer, and the preliminary information requested from the supplier. This takes the form of a Request for Information or a Request for Proposal (RFP), which is then possibly followed by an Invitation to Tender (ITT). If the RFP does not generate an

adequate response, individual vendors are contacted. In general, large organizations seek to use a competitive bid process for the procurement of EAS software. The tender process usually incorporates all aspects of the evaluation including product functionality, strategic fit, references, costs, financials and even a formal team matrix evaluation.

- (27) Some companies may prefer to address a direct inquiry to specific vendors which already have been pre-selected on a short list as “preferred suppliers”. It is important to note that in special cases concerning functional extensions of suites, the procurement is organized in a more informal way. Certain EAS components may be preferred if a matching suite is already in place. In case of a public body, relevant procurement rules become applicable.

2.2 *Durability of EAS software*

- (28) EAS solutions are durable products, for which customers pay a fee upfront giving the right to a perpetual license. This is true also for HR and FMS solutions. In this respect, the replies of customers contacted by the Commission would indicate that an HR and FMS product will have a life-span of around 10 years, and that the investment can be recouped over a slightly shorter period. Because of the durability of the software, vendors chose an income model according to which they derive most of their EAS revenue stream from fixed *annuities* (20-25% of the license fee per year) paid by the installed customer base in connection with maintenance and upgrades of the products.
- (29) According to Oracle, “durability is the reason why the large enterprise space is currently saturated, generating intense competition on the small number of occasions when a large enterprise seeks a new EAS installation”, together with the spending boom of the late 1990s and the efforts among large enterprises to adapt the software used to cope with the year 2000 and to the introduction of the Euro as a single currency instead of the various national currencies¹⁰. Furthermore, Oracle states that customers may also chose to defer a possible decision to make EAS purchases even after having initiated the process of choosing new EAS.
- (30) However, it appears that durability is not such an obstacle to the existence of new opportunities in the largest enterprises’ space. Firstly, not all opportunities have been saturated by the past IT spending boom. According to consulting firms, over the next three to five years, most companies that use EAS will have to upgrade and/or expand their use of EAS¹¹. Customers often plan to replace many of their “legacy solutions” on a rolling basis in order to cope with and take advantage of the technological advancements which have taken place and to facilitate the necessary adaptation of their business process. In addition, particularly in some industries (such as in the financial sector) customers largely used to having home-grown/in-house EAS systems which are (already) becoming obsolete and are due to be replaced shortly.

¹⁰ Cf. See Submission on Market Definition and Competitive Assessment regarding EAS for Large Enterprises, Oracle Corporation, Case M-3216, 5 November 2003, paras. 97 and 104.

¹¹ See *inter alia* [Company name: CONFIDENTIAL] reply to question n° 13a) of the Commission’s questionnaire to Consulting companies (phase I).

2.3 *Distribution of EAS software*

- (31) EAS product sales are not standardized. The largest vendors generally organize their sales forces geographically in different regions with dedicated sales forces in those regions. These dedicated sales forces may also tend to specialize in specific customers, industries and/or solutions. It is not uncommon for sales forces also to be structured in each region/country to serve large enterprise customers separately from mid-market customers.
- (32) EAS sales in general occur in two ways: i) direct sales by the EAS solutions supplier (most often with the help of a mobile sales force but to some extent also through telesales and e-commerce via the Internet), and ii) sales through partners of the EAS supplier (these may be retailers but more commonly, given the implementation work often required for EAS, they are IT consultants/integrators). These partners range from large consultants/integrators like Deloitte, Cap Gemini, Accenture and Bearing Point to a number of smaller organisations that perform more of a distribution role.
- (33) Regardless of the specific modalities inherent to each supplier, the most important EAS vendors devote specific sales effort and special treatment to commercially more interesting accounts (e.g., in particular those customers who are considered “strategic accounts” because of their current or future commercial potential for the vendors). The importance of a particular customer may depend on the number of licences sold, the turnover generated with that customer and the geographic presence (global, regional, local) of the customer. This has led vendors to apply different sales structures to different customers depending on the revenue opportunity and resources needed to capture it.
- (34) Indeed, the largest EAS vendors appear to qualify “sales leads” before the start of the sales cycle. Sometimes this happens in order to determine, on the basis of organizational size, whether the sale is for the up-market (large complex enterprise) or the mid-market, and this may in turn involve an appropriate different sales team. In some cases, specific sales forces exist for the selling to new prospective customers distinct from sale forces which up-sell new modules/functionalities to the existing installed customer base.
- (35) At Oracle, key accounts are generally served through direct sales, while smaller accounts are generally targeted by Oracle partners. Oracle allocates a specific account manager to the accounts that are viewed as capable of generating significant revenue. These are identified by Oracle as “named accounts.” The selection of “named accounts” is based on their commercial potential. Oracle country managers are then generally assigned to customers in a particular industry in order to build up “vertical” or industry expertise.

2.4 *EAS pricing and competition drivers*

- (36) Pricing of EAS solutions appears to be a deal-and-customer-driven process. The cost of EAS solutions to the customer includes the following components: licensing costs; maintenance and support; and implementation cost (the cost of configuring, integrating and customizing the applications). Not all of these elements necessarily result in accrual

of revenue for the packaged EAS provider, depending on who undertakes the implementation work.

- (37) The market investigation has revealed that price is not necessarily the most important factor in the choice of a customer; a more important role is played by the breadth and depth of the functionality offerings, the proven track record of the supplier, the capability to offer EAS solutions to complex organizations and the scalability of those solutions.
- (38) However as regards price and price-related elements, it can be considered that the principal “price” criterion is Total Cost of Ownership (“TCO”). TCO covers all elements of cost associated with the purchase and running of an IT solution¹². It has been submitted that largest customers put more emphasis on the return on investment (“ROI”) that would stem from a purchase of an EAS packaged solution. This would be the consequence of viewing the purchase as an “investment” (as a large enterprise normally does) rather than as a “cost” to be minimized (as a mid-market player would normally do).
- (39) EAS pricing is generally based on the number of named or concurrent or professional users (according to the pricing model of the respective vendor) and the number of units licensed. Vendors sometimes also price on the basis of the size of the organization and number of module or properties administered by the software¹³, or the number of employees¹⁴. For some significant vendors, pricing is “created manually based on several factors, including: existing product pricing, competitor product pricing, current market conditions and level of functionality offered in the product”¹⁵. Often, especially for the EAS “suites” a “minimum license requirement” also applies (i.e. a minimum percentage of the employee base needs to be licensed).
- (40) Some vendors, however, have also developed a pricing model which is less dependent on the number of software users (‘seats’). In that case, the pricing model allows a customer to optimize the use of the software by permitting access to the software by any type of user: employee, supplier, vendor, etc., subject to the terms of the license.
- (41) Under that pricing model, the license fee is calculated according to a method based on the size of the customer. This method calculates size according to different parameters depending on the functionality at stake (HR, FMS, CRM, SCM etc.) and the customer characteristics (manufacturing company, financial institution, government agency, etc.). In this way the “unit cost” of the software license becomes, to some extent, a function of the customer size.
- (42) Apart from the quality of the EAS vendor and the breadth and depth of the functionality offered, a major driver of competition in the course of the bidding process is represented

12 TOC includes the following elements: Hardware, software, database; Office systems, communication equipment, network; Change management; In-house/Out-side resources (training, data re-keying); Re-engineering of business processes; Customizing; and Integration of back office/legacy systems.

13 See Capita reply to question n°6 of the Commission’s questionnaire to competitors (phase II).

14 See [Company name CONFIDENTIAL] reply to question n°6 of the Commission’s questionnaire to competitors (phase II).

15 See [Company name CONFIDENTIAL] reply to question n°6 of the Commission’s questionnaire to competitors (phase II).

by discounts offered by bidders on list prices. Normally discounts are based on the volume of software bought in a single transaction, but they may also take into account previous customer purchases and previous links or relationships with the vendor. On top of these “normal discounts”, very significant “discretionary discounts” may be applied, based on a variety of criteria, such as the competitive pressure and the relative importance of a customer in the marketing strategy of the EAS vendor, the existence of partnership agreements, etc. Discounts above certain thresholds of the initial license price require authorization by the vendor’s senior managers or, possibly even by the Board of directors or by the chief executives.

- (43) Discount levels are generally very high in the EAS industry and can be as much as 80-90% of the initial license list price. Sometimes, this level of discounting appears to be necessary in order to outbid a competitor’s offer, especially in the final round of the sales process. This happens quite regularly when bids are sought for large project value by large organizations with complex functional needs, which are also likely to benefit from the highest discount levels compared to mid-size and smaller businesses.
- (44) EAS maintenance fees (which apart from bug-fixing sometimes include product updates and upgrades) are priced separately from the license cost (in the form of *annuities*). These fees are normally in the order of 15-20% of the “net” (i.e. discounted) license price. Product support (telephone assistance, etc.) is also priced separately (in the order of magnitude of less than 10% of the “net” license price).

2.5 *EAS Vendors*

- (45) Industry surveys track numerous suppliers of packaged EAS in their reports in each of the major EAS categories identified (ERP, CRM, SCM, etc.). EAS solutions vendors include suppliers of various sizes: from large multinationals, such as SAP, Oracle, PeopleSoft, Siebel, Microsoft, to companies of a certain focus such as SSA Global/Baan, Lawson, to smaller vendors. Some vendors, including SAP and Oracle, PeopleSoft are also examples of “suite” suppliers, as opposed to “point solution” providers. A typical “point solutions” provider is a vendor specialized in a specific niche product or segment. Point solution vendors do not necessarily compete head-on with large EAS vendors with respect to all pillars, but rather offer customers complementary solutions (add-ons) allowing them to cope with their punctual requirements with respect to modules/functionalities needed in particular industries and/or specific processes to be automated. For example, the functionality “time and labour” (or similar) within the HR pillar is often catered by Kronos (a point solution provider) to customers of various sizes.
- (46) Another distinction that can be encountered in various industry and vendor’s reports and in various EAS-related documents is that between up-market and mid-market vendors. Mid-market suppliers are normally defined by way of difference compared to up-market vendors, depending on their major customer focus being on so called mid-size customers or on the accounts of large enterprises as well.
- (47) Moreover, product configurations from mid-market players are typically simpler and often pre-packaged in a way permitting certain but not full scalability in scope. Since mid-market type customers are price sensitive, they prefer the purchase of a “ready-to-run” solution which is less costly to acquire but also less costly to run in their

organisation. Nevertheless, mid-market products might occasionally fit into up-market customer requirements if those customers are less demanding with respect to product function.

- (48) Hence, the criteria that would delineate this two-fold differentiation of vendors/customers are not obvious and vary according to the respective companies and consultancy reports.

2.6. Outsourcers

- (49) EAS solutions traditionally have been based on software installed at customers' premises. Customers sometimes also consider outsourcing to address their EAS solution needs, as a means to achieve cost savings, reduce capital expenditures, enhance integration and focus on the company's core business.
- (50) Outsourcing may involve only the hosting of the software licensed by the customer on someone else's hardware. This type of outsourcing is typically provided by application service providers as well as by integrators/consultants such as Accenture, IBM Business Consulting Services and CapGemini Ernst & Young. In this case, outsourcing is sometimes referred to as "IT outsourcing" or "application service provision".
- (51) Outsourcing may also involve a comprehensive transfer of most or all of the responsibility for the management, administration, staffing and support of one or more automation functions (e.g. payroll functionality within HR) to an outsourcer, in which case the outsourcing is often known as "Business Process Outsourcing" ("BPO"). BPO outsourcing normally relies on software that the outsourcing supplier licenses from a third party EAS provider; in exceptional cases, that software may be developed by the outsourcer itself (as it is the case for ADP and Ceridian).
- (52) The outsourced EAS functionality may then be delivered to customers on the basis of a license to use software together with outsourcing services or sometimes as an integral service where the functionality is delivered (usually over the Internet) by "rental" of the software subject to periodic payments (i.e., "software as a service").

2.7 Consultants/System integrators

- (53) Consultants (including IT integrators) can play an important role in any EAS solution transaction, and may also have considerable influence over the EAS purchasing process. This role varies significantly. Some clients ask consultants to advise on Informatics Systems strategy, including software selection. On other occasions they may even jointly tender a solution with one of the vendors in response to a request for proposal. On other occasions they may bid for implementation services, following the selection of software. These companies do not generally receive any incentives from EAS vendors for proposing their products¹⁶.

¹⁶ See Deloitte reply to question n° 6d) of the Commission's questionnaire to Consulting companies (phase II).

(54) In essence, they may advise the customer on the EAS solutions to consider, advise the supplier on how best to supply the customer and provide implementation (including integration) services for the customer's new EAS solutions. To a lesser extent they may also custom design and develop an EAS solution that is customized to an EAS customer's particular needs and/or effectively act as a "reseller" of EAS solutions (in view of possible "partnership agreements with vendors"). The largest consultants active in the field of EAS include Accenture, CapGemini, Ernst & Young, Deloitte, IBM Global Services and Bearing Point. Integrators often have partnership arrangements with one or more suppliers of packaged EAS and sometimes also with database vendors.

(3) Relevant markets for the assessment of this transaction

3.1 *The Commission's investigation*

(55) The Commission carried out a very extensive investigation as regards the market definition in this case. On the basis of the results of the market investigation, before the statements of objections, the Commission reached the opinion that separate markets exist as far as HR and FMS high-function solutions for large organisations with complex functional needs are concerned. Evidence came from reasoned replies of respondents to the Commission's questionnaires, from factual descriptions and lists of EAS features functions of HR and FMS solutions across the spectrum of different customer groups, as submitted and/or commented on by respondents to the market investigation, from the examination of demand patterns of large organisations with complex functional needs compared to mid-market customers and from the actual supply offerings of important EAS vendors. That conclusion was also based on the fact that software designed for the mid-market cannot be upgraded for the up-market in a relatively short time frame. Due to the characteristics of their product offerings, three vendors were identified as established suppliers of the upmarket, SAP, Oracle and PeopleSoft.

(56) At the Oral Hearing and in its written defence, Oracle strongly contested the market definition on which the Commission had based its objections vis-à-vis the transaction claiming, *inter alia*, in the light of the fact that a parallel investigation was being conducted in the US into the same transaction, that a "broader factual basis" was needed before any conclusion could be reached by the Commission concerning the impact of the merger on competition.

(57) Bearing in mind the above, the Commission decided to extend the scope of the determination of the facts in this case. After gathering further information stemming from new bid data provided by Oracle following the Commission decision of 14 April 2004 pursuant to Article 11(5) of the Merger Regulation, and from evidence used in the US trial, the Commission has concluded that the view expressed in its statement of objections, namely that there are distinct markets for HR and FMS high-function applications in which only Oracle, PeopleSoft and SAP are active, can no longer be upheld. For the purposes of the assessment of the proposed transaction, the Commission considers that the relevant markets are the markets for HR and FMS "high-function" solutions typically purchased by "large enterprises or undertakings or customers with complex functional needs" or by "large organizations with complex functional needs" ("LCEs"). However, for the purposes of the assessment of the proposed transaction, other vendors beside Oracle, PeopleSoft and SAP are also to be treated as present in these markets.

(58) The Commission’s reasoning is set out in the following recitals.

3.1.1 HR and FMS high-function solutions or software

- (59) The market investigation has shown that, within complex EAS solutions, a delineation according to EAS “pillars” or groups of functionalities is necessary. This segmentation would in particular single out “high-function” solutions in the field of FMS and of HR, as opposed to other specific pillars (or group of functionalities) such as CRM, SCM or PM. Apart from the fact that each pillar, i.e. HR, FMS, SCM, CRM, is intrinsically linked to specific business functions and therefore is hardly substitutable from both a demand and (to a lesser extent) supply side viewpoint, it is important to note that, in contrast with other business application software, FMS and HR solutions are the administrative and financial backbone of an entire organisation and represent the key application software in an undertaking (their “back office” functions), regardless of the industry sector in which the company may be active.
- (60) For these two groups of functionalities (HR and FMS), customers having high level functional needs (such as large organisations with complex functional needs) require software and accompanying services with performance characteristics of a particularly high standard. The FMS and HR software solutions concerned by this transaction are those that can be integrated into suites of associated functions and are usually accompanied by a high level of service and support. These solutions normally exhibit the specific characteristics of complexity and performance that satisfy the high-standard requirements and are therefore typically purchased and used by large customers having complex needs (hereinafter these EAS solutions are also referred to as “high-function” solutions or software).
- (61) In reply to the Commission’s statement of objections, Oracle submitted that the Commission used vague concepts such as large enterprise with complex functional needs (LCE) and “High-function HR and FMS solutions” which are not defined, except for “circular” references, nor do they have a recognised meaning in the industry¹⁷.
- (62) In this respect, at the outset, it has to be stated that the investigation allowed a progressively refined understanding of the market. Within HR and FMS software, product pricing, characteristics and intended use make it possible to distinguish - from an antitrust analysis perspective - software having particularly high standards of performance, suitable for organisations having the highest functional requirements, from simpler software performing at a lower rate of throughput and suitable for less complex, or simpler organisations. This software having the capability of executing a wide array of business processes at a superior level of performance has been identified in the Commission’s statement of objections as “high-function”. This high-function software has certain characteristics in terms of, *inter alia*, scalability, configurability, sophistication, pricing, of the software and of reliability, quality and brand recognition of the vendor¹⁸. In the industry, this software is referred to in different ways, using various

¹⁷ See Oracle’s reply to the Commission’s statement of objections, paragraphs 31.

¹⁸ As regards the meaning of the terms “scalability” see further footnote 26. Quality and reliability correspond to the need that EAS products avoid failures (minimisation of bugs) and quickly resume when failures occur (re-startability).

terminologies (“upmarket software”, “tier-one software”, “enterprise software”)¹⁹. The sales process of this “high-function” or “enterprise” software is lengthy and involves extensive sharing of information between candidate vendors and the customer.

- (63) The lower-rate performing kind of software is known also as mid-market software. Mid-market software is a product with different characteristics and a set of pre-packaged functions.
- (64) In reply to the Commission’s statement of objections, Oracle stated that the product’s characteristics identified by the Commission are not uniquely relevant to a specific group of customers, while some of the highlighted criteria are more relevant for EAS other than HR and FMS. Scalability is a function of the IT infrastructure rather than of the application software. Reliability and quality are also a crucial characteristic in the mid-market. The same goes for product support and brand recognition. The Commission did not explain why, as regards functionality, “high-function” should relate to “large enterprises with complex functional needs” (however defined).

3.1.1.1 Product characteristics of HR and FMS high-function software

- (65) The market investigation did give indications that characteristics of HR and FMS high-function software are different from those of mid-market products. In general, high-function software is more complex, offers greater functionality, supports more users (in total as well as in concurrent-use numbers), is much more expensive (from 2x to 5x or more) and has higher implementation costs compared to software for mid-market customers²⁰. In addition, “in a small to medium sized business some processes remain essentially manual (with possible simple support tools such as spreadsheets, etc.). In a larger enterprise, automation is justified for a greater proportion of processes which are more likely to be standardised and formalised”²¹.

3.1.1.2 Functionality required in HR and FMS software

- (66) High-function HR and FMS software has a broader scope than the corresponding mid-market solutions; that is, high-function solutions have a greater breadth of horizontal functionality (i.e. the number of distinct modules offering various functionalities) and

¹⁹ See Richard Berquist and Marco Iansiti’s testimony in front of the US District Court of Northern California.

²⁰ In this respect, it is highly indicative Shell reply to question n° 2) of Questionnaire to customers (phase II): “A large customer like Shell typically has to use EAS solutions to deal with a highly diverse range of fiscal, legal and functional requirements in countries around the world. In our larger affiliates the diversity of requirements can even be found within that single affiliate. The distinguishing feature of EAS solutions for large customers is that they can cater for a large part of this diversity within the range of functionality built into the solutions. While there might be several solutions suitable for mid-size and small customers in a particular environment, there are few which could be deployed across many different environments, especially if deploying a single system to span multiple environments.” See also Siemens reply to questions n°2), 3) and 8) of Questionnaire to customers (phase II) and EDF reply to questions n°3), 7) and 8) of Questionnaire to customers (phase II).

²¹ See Nestlé reply to question n° 3) of Questionnaire to customers (phase II).

greater depth of vertical functionality (*i.e.*, existing modules that offer a full range of capabilities for a specific functionality)²². For example, the PeopleSoft's upmarket suite solution Enterprise (formerly PeopleSoft8) contains between four and ten times more pages, records (tables/views) and lines of codes compared to EnterpriseOne (designed for the mid-market and formerly a JD Edwards software)²³.

- (67) In addition, high-function solutions will tend to be more configurable and flexible (e.g. will have more configuration options)²⁴. This tends to lead to more customisation of packages in larger companies than in smaller organisations. In contrast, mid-market EAS systems typically serve the needs of smaller companies or divisions of large enterprises²⁵.

3.1.1.3 Product performance

Transaction volume

- (68) High-function software has to support very high volumes of users (e.g. 30 000 employees simultaneously using employee self-service portals) and high volumes of transactions. The performance of the software in both respects is called "scalability"²⁶. Mid-market products are typically limited to several hundreds users. High scalability is therefore one of the differentiating elements between high-function and mid-market applications software²⁷.

²² Specific examples of the breadth and depth of horizontal modules not in mid-market suppliers, but commonly found in most enterprise solutions, include: treasury management; activity based costing management; depth of user-defined workflow; and multi-tiered amortizations and accruals.

²³ As mentioned, functionality has essentially two sub-dimensions: Breadth concerns the number of applications, *i.e.* the various pillars HR, FMS, SCM, CRM, etc. Depth concerns the number of different features/modules for each pillar, for instance the number of tables regarding languages, volume of business, etc. HR may have approximately 70 modules (e. g. payroll for US, payroll for Canada, etc.), FMS has approximately 50 modules, and SCM around 30. Upmarket customers usually require a large number of modules. The number of database tables and the number of pages are good indicators for both breadth and depth and thus good proxies for the general complexity of the software. The number of tables and pages are also suitable indicators for the complexity of a business. Both numbers are used by companies in due diligence procedures by companies evaluating the possibility of a merger/acquisition.

²⁴ See Shell reply to question n° 3) of Questionnaire to customers (phase II): "A large EAS solution such as one from SAP or PeopleSoft, as used by Shell, has literally thousands of options for ways in which the solution can be configured and used, and in any one implementation only a subset of those options would actually be used. As explained above, this variety is found especially in those areas where it is dictated by external circumstances and therefore outside the ability of the customer to control, in particular FMS, HR, CRM and Sales Management."

²⁵ See for instance [Company name CONFIDENTIAL] reply to question n° 2a)j of the Commission's questionnaire to competitors (phase II). See also [Company name CONFIDENTIAL] reply to question n° 2 of the Commission's questionnaire to competitors (phase II).

²⁶ Scalability is essentially the capability of processing data. This depends on both hardware and software and on the volume of data being processed. A good proxy for scalability is the *number of data rows* which can be processed concurrently. Scalability is also perceived as the ability of an application to adapt and perform in the event of introduction of new technologies without material cost increases, as enterprise data requirements grow over time.

²⁷ See Shell reply to question n°8 viii) of Questionnaire to customers (phase II). "[...] in Shell's context the highest volumes of EAS transactions are driven primarily by the sales and distribution operations, but these

Workflow and segregation of functions

- (69) High-function HR and FMS software are products that can cope with large companies' complex organizational designs. In carrying out their activities, large organizations with complex functional needs usually involve several departments whereas in mid-size and small companies, there is less specialization in job function. Typically, in large undertakings with complex functional needs the HR functions may involve several departments whereas in mid-market companies it could be carried out by one/a few persons. In such cases in large enterprises functions like 'self service', concurrent users, report performance, etc. become more important. High-function solutions therefore comprise highly sophisticated workflow systems and take account of the typical "segregation" of functions which occur in large organisations. Mid-market enterprises prefer minimal workflow processes and are better able to manage the department flows without sophisticated software.
- (70) Furthermore, in a large enterprise with complex functional needs workflow is often connected to "security access" issues (for example, a complex system of authorisation levels for payroll changes). In fact, where there are many hierarchy roles and distributed locations, security of data becomes important; large organisations with complex functional needs need to define many types of HR and finance roles which have differing levels of authority and data access rights. This is something which needs to be integrated into the application software in order to support business processes.

Compliance with multiple legal/accounting regimes and language coverage

- (71) High-function FMS and HR software must provide adequate mechanisms for treatment and reconciliation of financial results across multiple operating companies and subsidiaries in several economic areas (account consolidations, auditability, finance and risk management functions) and has to offer compliance with the legal requirements and accounting rules of the main economic zones and legal jurisdictions (for example US-GAAP, IAS and other national systems). In this context, solutions for large enterprises with complex functional needs will tend to support multiple regions and different codes simultaneously or almost in real-time. At a minimum, these solutions must provide mechanisms for large enterprises to manage these differences with a minimum of effort.
- (72) In addition, high-function software must simultaneously support multiple languages (the languages of the main economic zones) even within a single location, including sometimes Japanese and Chinese languages (including Unicode²⁸ support).
- (73) Mid-market solutions typically have been optimized for use in a specific economic region, and as a result typically provide far less language and geographic support options. While both mid-market and enterprise EAS solutions typically offer multi-currency functionality, EAS solutions designed for large enterprises generally have far

are closely integrated with some of the FMS processes. In our larger systems there is an inherent need to handle volumes of data that require more sophisticated approaches to the architecture than are supported by small-customer systems."

²⁸ Unicode is the capability to support Eastern languages.

greater capabilities and allow users to view transactions on a global, transaction and legal currency basis.

3.1.1.4 Product Support

- (74) A very high level of product 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 customer²⁹. Complex enterprise systems must consider the impact of "24 hours a day/ 7 days a week" coverage required for the challenges of the global company. Large enterprises with complex functional needs risk substantial damage to their reputation if they are unable to conduct their financial affairs efficiently and meet market expectations for financial reporting; their critical business operations take place around the globe. Deployment of systems can impact on system response times. Large enterprises with complex functional needs are unlikely to invest in systems not offering "24 hours a day/ 7 days a week" coverage or some similar high-support standard. In the case of a mid-market company, the scenario is more likely that a single primary location in the US or Europe market is linked to smaller sales offices overseas.

3.1.1.5 Underlying architecture

- (75) The market investigation did give indications that HR and FMS high-function software, if designed for the mid-market, cannot be successfully upgraded to become products that attract large organizations with complex functional needs³⁰.

Multi-tier vs. simpler architecture

- (76) The underlying architecture of high-function solutions is fundamentally different from that of mid-market products. Often, only a multi-tier architecture can achieve the level of throughput that is required from high-function solutions³¹.

²⁹ See British Airways reply to question n° 8 x) of Questionnaire to customers (phase II). our service model is that we would provide in house support for the computing environment and 1st/2nd level support for the EAS applications. However, given the critical nature of our HRMS and FMS systems, we would require 4 hour response and local in country support escalation in event of major problems with the applications. Mid-market customers may not have an in house IT capability and therefore may be even more reliant on the EAS supplier. The number of incidents for a large enterprise would be higher and therefore requires more resource to maintain which gives us economies of scale for the in-house support function."

³⁰ See *inter alia* Unilever reply to question n°12) of Questionnaire to customers (phase II). See also Siemens reply to questions n° 11) and 12) of Questionnaire to customers (phase II), Canal Plus reply to question n° 12) of Questionnaire to customers (phase II), ATT reply to questions n° 11) and 12) of Questionnaire to customers (phase II).

³¹ "EAS solutions must be able of handling 500 or more simultaneous users and large volume batch jobs. This can only be achieved by a multi-tier architecture with potential parallel processing especially in the middle tiers. Mid-size software does not have multi-tier architecture (DB-Applicationserver-Webserver/Browser or Client) where the middle tier can be easily parallelised for scaling reasons."[...] "Typically a large system has more than 2000 registered professional users and a number of self-service users. The latter could be as high as 100,000 registered and 5,000 simultaneous users which typically will peak in the morning and after

- (77) PeopleSoft’s HR solution for large and internationally dispersed customers contains several times more database tables than JD Edward’s product which is targeted at mid-market companies. System architecture for large enterprises must be scalable: i.e. have the ability to deliver acceptable transaction rates for large numbers of users. The market investigation confirmed that software for mid-market companies does not require the same degree of scalability and/or performance with large data volumes.

Interfaces and/or API

- (78) Mid-market solutions tend to have simple (i.e. batch export/import) interfaces, or simple application programming interfaces (“APIs”) making them easy 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 customize the solutions. The number of data interfaces needed in order to integrate all major external data sources in HR and FMS solutions are also fewer and simpler for mid-market solutions than for large enterprises with complex functional needs.

3.1.2 Demand for high-function HR and FMS software

- (79) High-function HR and FMS solutions are software applications that are typically purchased by complex organisations/companies which have a very high level of functional needs, expect high standards in product performance, and require fast and continuous availability of accompanying services.
- (80) Large enterprises with complex functional needs require HR and FMS solutions with “high-function” standards. This requirement is reflected in a particularly high degree of complexity of the software solution. Typically, for a large undertaking, the design of a data model for such a software solution would be much more complex than the solution that would fit the needs of mid-tier customers. In addition, large customer suites tend to operate on more resilient and scaleable platforms and database solutions. This is as a result of the need for their online and offline performance needs to support higher concurrent transaction levels and batch volumes.
- (81) The complexity of the system represents a difference between the mid-market and large customers with complex functional needs. This is due to the general level of functionality required by a larger company, where generally the operations are more complex and have more variety in the processes. In addition, a large company with complex functional needs looks for a solution with all the functionality required integrated to lower the total cost of ownership. Typically a mid-market company requires less functionality and will purchase additional components to ‘bolt on’ as needed.
- (82) As an example of the meaning, from a demand-side perspective, of “high-function” solution responding to complex needs, it is useful to quote what some respondents have

the lunch break”. See DaimlerCrysler reply to questions n°8 viii) and 8 vi) of Questionnaire to customers (phase II).

stated in the course of the Commission's inquiry: FMS functionalities for large enterprises have to "comply with statutory accounting in all countries operated in, provide GAAP accounting views for international consolidation, handle multiple calendars, plan differently by product / service category, open interfaces to other systems, eBanking, currency handling, planning scenarios by exchange rate assumptions, cash-flow / cash on-hand projections, ease of integrating new acquisitions"; midsize business have lower requirements i.e. "guaranteed statutory upgrade in home environment, adequacy for relevant product / service category, good time & expense management where customers are billed on this basis, full functionality in a single package, support on a low-cost / low-maintenance technical platform"³².

- (83) As regards HR high-function solutions, large enterprises with complex functional needs require "international consistency of data while legislation is respected in all countries" while midsize customers sometimes have the HR "Personnel data" functionality integrated with "Payroll" functionality³³. HR solutions, in particular, must address the complexities of global relocations, expatriate compensation packages and salary differentials. These solutions must also manage differences across borders related to differences in taxation and pension schemes.
- (84) In its reply to the Commission's statement of objections, Oracle stated that the Commission had disregarded the stringent requirements for market definition that must be met where a product market is defined by reference to a distinct customer group (namely, large enterprises with complex functional needs), that is to say, that it must be (i) possible to identify clearly to which group the individual customer belongs, (ii) trade among customers and arbitrage by third parties (through system integrators and consultants) must not be feasible and (iii) competitive conditions for the clearly identified customer group must be appreciably different when compared to other customer groups³⁴.
- (85) The Commission defines the markets for high-function FMS and HR software as markets involving distinct products intended to serve the needs of a group of customers, i.e. the specific needs of large enterprises with complex functional needs. On these grounds, Oracle's claim has to be rejected. The competitive conditions for the customer group which is formed by large enterprises with complex functional needs are appreciably different when compared to other customer groups already as a consequence of their needs for different products, i.e. high-function FMS and HR solutions. The higher-level requirements for software solutions emanating from large enterprises with complex functional needs are in turn reflected in the high-standard features that EAS vendors must have in order to be selected as provider of high-function software. In particular, in order to be acknowledged by customers as credible suppliers capable of facing the complexity of requirements of large enterprises with complex functional needs, EAS vendors must be successful at the highest possible level as regards the following dimensions: (i) functionality (breadth and depth); (ii) scalability, reliability

³² See Kraft Europe reply to question n° 4 of Questionnaire to customers (phase II)

³³ Ibidem Kraft Europe reply to question n° 4 of Questionnaire to customers (phase II)

³⁴ See Oracle's reply to the Commission's statement of objections, paragraphs 35-37.

and quality; (iii) technology; (iv) industry coverage; (v) international scope; (vi) brand reputation, sale and service.³⁵

3.1.3 *The SSNIP test*

- (86) In its reply to the statement of objections, Oracle stated that the Commission’s market definition restricts the market to “customers whose initial supply options might be reduced by the merger” and in so doing it disregards the SSNIP test and fails to provide evidence typically relied upon in the application of the “hypothetical monopolist test”. In this context, Oracle contested that supply and demand patterns permit the conclusion that separate antitrust markets exist for the “putative” high-function HR and FMS solutions. On the contrary, Oracle stated that evidence in the file supports the view that the market is in fact a multi-dimensional continuum of customer needs and vendor solutions. No set of criteria would be suitable to separate out from the continuum of needs and solutions discrete markets for high-function solutions, as opposed to mid-market solutions.³⁶ The reasons why Oracle’s claims cannot be accepted are dealt with in the following recitals.
- (87) The Commission’s investigation as well as evidence stemming from the US trial in front of the District Court of Northern California demonstrated that HR and FMS high-function software is not interchangeable with simpler software (mid-market), nor with best-of-breed or outsourcing options. Neither would a possible substantial non-transitory increase in price of this high-function software make mid-market HR and FMS applications, outsourcing, best-of-breed solutions, or software in-house development a suitable alternative, rendering the price increase unprofitable.

a) Mid-market HR and FMS software

- (88) HR and FMS mid-market software is a distinct product, relying on a simpler architecture, having simpler interfaces and limited scope of function. As such, mid-market software is simply no substitute for “high-function” software, as it is unsuitable for performing the wide array of business processes at a superior level of performance, as “high-function” applications do.
- (89) Oracle claimed in the reply to the statement of objections that the Commission’s assertions that technological differences exist between mid-market solutions and solutions for LCEs are unsupported by facts. Oracle stated that the argument’s underlying dichotomy between multi-tier vs single-tier architecture reflected an outdated understanding of the design and development of business application software. Web-based applications, standard-based development environment and extensive API availability would render today’s multi-tier packaged software upgradeable without fundamental design changes.
- (90) However, the market investigation confirmed that in order to upgrade a mid-market solution to meet the demands of large-scale and complex organisations, it would be necessary in the first instance to re-engineer the underlying software architecture of the

³⁵ It has to be noted that there may be a certain overlap between the different criteria, so between breadth and depth of functionality and international scope as well as reliability and quality and brand reputation.

³⁶ See Oracle’s reply to the Commission’s statement of objections, paragraphs 31-45.

solution prior to attempting to extend the functional scope and flexibility of the solution. It would be necessary to upgrade the mid-market software along several dimensions: i.e. the software has to be made much more scalable in terms of number of users and transaction volume, a greater breadth and a depth of functionality must be added in order for it to cope with the organisational requirements of large enterprises with complex functional needs, it has to be adapted to the compliance with multiple legal/accounting regimes, it has to cover the simultaneous use of multiple currencies and multiple languages (including Eastern languages) and it has to offer 24hours a day/7days a week service with support centres in the main economic zones.

- (91) In order to be able to achieve this technically, system architecture needs to enable horizontal and vertical scaling at the various computing platform tiers. This would imply a system migration with changes of data structures, aligned with company coding and data standards. Accordingly, the whole data model in FMS (account and cost centre structure, etc.) and HR (allowing for many more employees, self-service, many departments involved in HR matters, etc.) would have to be extended in order to scale-up for the needs of a large organisation with complex functional needs. The software therefore has to be implemented on a different architecture.
- (92) Since this would essentially require the development of new software, the investment in the mid-market product would be largely sunk cost and the process would take a time-to-market well beyond the time-horizon of the assessment under the Merger Regulation. It has therefore been emphasized in the market investigation that “while most large products can move down-market, the smaller or mid-market products cannot easily move up due to application architecture and process limitations”³⁷.

b) Best-of-breed software

- (93) In response to the Commission’s statement of objections, Oracle stated that the Commission’s investigation would prove that LCEs are as likely to buy best-of-breed software as they are likely to buy “suites”. In particular, the responses to the market investigation suggest that many LCEs mix and match suites and best of breed in HR and FMS functionalities, thereby showing that demand is extremely heterogeneous. Oracle CEO Larry Ellison’s own prediction that best-of-breed would lose sales to the advantage of suites finally proved to be wrong.
- (94) Oracle’s claim is incorrect insofar as it would allegedly demonstrate that best-of-breed software is a competitive constraint to “high-function” software. Customers do not consider best-of-breed software as an alternative to high-function HR and FMS solutions. In the market investigation, the majority of the customers stated that they do not at all consider best-of-breed providers as a suitable alternative, even in response to an adverse change in the market conditions for high-function HR and FMS “core functionalities”³⁸ resulting from the proposed merger. The main reasons are that the

³⁷ See HP reply to question n° 12) of Questionnaire to customers (phase II).

³⁸ “Core functionalities” can be considered: i) general ledger, ii) account receivables, iii) account payables, iv) asset management as regards FMS software, and i) personnel data/administration, ii) payroll, iii) benefits as regards HR software.

implementation of a large number of small packages would lead to disparate applications and a disparate technical architecture with the consequence that the applications would not be well integrated with each other³⁹. In any case, such an approach of integrating different best-of-breed solutions would result in high integration costs⁴⁰ (which already for the implementation of integrated EAS suites may exceed the licence costs by up to 10 times as the EAS software has to be adapted to the needs of the individual enterprise and the IT used outside the scope of EAS solutions). Respondents further pointed to the fact that the very purpose of packaged software is to eliminate the integration problems and costs which were associated with such a best-of-breed approach and that an assembling of best-of-breed solutions would mean a return to the situation in which most companies found themselves before implementing EAS suites⁴¹.

- (95) Other respondents pointed out that they consider best-of-breed applications only as complementary solutions to FMS and HR suites (or FMS core functionalities). This results from the fact that best-of-breed vendors are niche market providers with a very specific focus⁴². Also those respondents, therefore, do not consider best-of-breed solutions as an alternative to high-function FMS and HR core functionalities, but only as complements if the functionality is not available from the EAS provider.
- (96) This is further confirmed by the market investigation as regards the applications already in use by customers (installed base). In particular, between 0% and 6% of respondents use only best-of-breed software for core FMS functionalities (general ledger, account payable, account receivable, asset management) and between 8% and 20% use only best-of-breed solutions for core HR functionalities (personnel data, payroll, benefits). As the installed base of applications at customers includes software which was installed before those companies usually purchased suites, the installed base may even be deemed to overstate the importance of best-of-breed solutions for core FMS and HR functionalities.
- (97) Given the above, best-of-breed solutions do not provide a competitive constraint on providers of HR and FMS high-function core functionality. They may be used – in any case alongside HR and FMS suites – to complement the functionalities offered by such suites or to serve very specific needs which are not covered by the suites. In such circumstances bids may occur in which best-of-breed providers compete only for a certain functionality with providers typically offering suites, such as SAP, PeopleSoft or Oracle. However, this does not mean that best-of-breed providers can replace HR and FMS core functionalities packaged in suites or that they have a constraining effect on the providers of HR and FMS high-function suites in this respect.
- (98) Furthermore, the market investigation, in particular the analysis of the data sets for bids collected by the Commission and provided by Oracle, has not revealed any indication that customers choose between suite vendors, on the one hand, and suite vendors

³⁹ See Banque Européenne d'investissement reply to question n° 16) of Questionnaire to customers (phase II).

⁴⁰ See questions n° 15 and 16 of questionnaires to customers (Phase II) and replies from many customers to those questions: Telefonica SA, Vodafone, BEI, L'Oréal, Peugeot, Barclays, Disney, Sainsbury, HP, British Airways, Novartis, Shell, Pfizer, Ericsson, Degussa, Unilever, Siemens, Barclays.

⁴¹ See, e.g., Banque Européenne d'Investissement reply to question n° 16) of Questionnaire to customers (phase II).

⁴² See e.g. Novartis and British Airways replies to question n° 16) of Questionnaire to customers (phase II).

teaming up with best-of-breed suppliers, on the other hand, in a particular bid. Theoretically, such an approach could be conceivable in order to partially subject suite vendors to competition with best-of-breed providers in a particular bid. However, this approach would run counter to the very idea of the sale of suites in the form of packaged software and would entail high integration costs and risks for applications which are mission critical for the customers.

- (99) Best-of-breed solutions providers are therefore not part of the markets for high-function FMS and HR solutions.

c) HR and FMS software outsourcing

- (100) In reply to the Commission's statement of objections, Oracle claimed that outsourcers are too easily dismissed by the Commission as providing no relevant competitive constraints on EAS suppliers. Oracle claimed that the Commission is wrong in asserting that outsourcers having their own HR or FMS license from third party EAS vendors do not provide competitive constraints, since, in this way, it misunderstands the outsourcers' role of "arbitrage" (similar to that of system integrators) vis-à-vis the EAS vendors (offsetting any attempt of possible price discrimination by EAS vendors).
- (101) According to Oracle, outsourcers do compete head-on with HR and FMS vendors and the Commission's assertion to the contrary would not be based on any customer response (apart from one by Deutsche Telekom, who, according to Oracle, misunderstood the Commission's question⁴³). Overwhelming evidence represented by surveys and analyst' reports would instead show an incontrovertible reality: the importance of outsourcing in both HR and FMS, including for large customers. Moreover, outsourcing would not be limited to regions of the world, HR or FMS functionalities, or industry verticals, as important BPO outsourcers like ADP, Ceridian, Exult are expanding their scope of activity beyond core HR to also include tasks such as recruiting, employees effectiveness, and compensation. All the above would demonstrate that outsourcers do form a significant competitive constraint vis-à-vis EAS software providers.
- (102) The Commission does not contest the fact that EAS outsourcing takes place on a large-scale basis in the industry and that it is a very significant phenomenon. However, the Commission's investigation, as well as evidence stemming from the US trial, demonstrated that customers would not outsource in response to a SSNIP of high-function HR software. First, outsourcing only involves HR functionalities, not FMS⁴⁴. Therefore, Oracle's claim about competitive constraints stemming from outsourcing, theoretically, could have a standing only as regards HR software. Second, it could only be valid as regards Business Process Outsourcing, that is to say, outsourcing performed on the basis of proprietary software of the outsourcer. If the customers are to provide the software licences to the outsourcer, they face the consequences of the proposed transaction in the same way as if no outsourcer is would be involved. If the outsourcer uses software licences from one of the software vendors, the outsourcer is faced with the consequences of the present transaction as any other customer. Even if an outsourcer were purchasing a global licence for its business (and therefore for several customers), such a purchase may involve high discounts as in the case of other large customers, but it

⁴³ Oracle's reply to the Commission's statement of objections, paragraph 155.

⁴⁴ See Dr. Elzinga's testimony, US trial transcript of 18 June 2004, page 2142.

would not enable the outsourcer to avoid any adverse consequences which may arise from the present transaction. In any case, outsourcers provide a service which goes far beyond the provision of the necessary software as done by EAS providers. In the US trial, a representative of Fidelity, a major outsourcer, stated that the cost of the license fee paid by Fidelity for use of Oracle human resources management software is probably less than 1 or 2 percent of the total cost of human resources outsourcing⁴⁵. A price increase of the software licenses for customers may therefore be considered to be nearly negligible compared to the total costs of outsourcing. The decision on outsourcing is usually , driven by other factors (for example, the cost of HR personnel) rather than by a price increase of the application software.

- (103) In this respect, Mr Larry Ellison (Oracle's CEO), in his deposition of 20 January 2004 in front of the US Department of Justice, stated that the choice to outsource a particular function is a corporate decision and is not driven by the prices of software license or maintenance.⁴⁶ He also added that the reason why outsourcers can be in the business is that they have a uniform process and benefit from economies of scale⁴⁷. This means that Mr Ellison himself acknowledges that outsourcers have less flexibility to customize the process of each customer.
- (104) Moreover, evidence shows that outsourcing vendors targeting larger and most complex organisations will support those customers using an HR software licensed from Oracle, PeopleSoft and SAP, which makes them a complement of high-function HR software rather than a substitute for them⁴⁸. In this context BearingPoint's representative, Mr Keating, testified in the course of the US trial that outsourcers like ADP and Ceridian provide only some HR functionality, while he was not aware of any BearingPoint client having outsourced the entire HR functionality⁴⁹. Business Process Outsourcers (such as ADP, HP, Ceridian; etc.) market their proprietary software primarily to smaller or mid-market organisations⁵⁰, while the largest global clients who might request outsourcing

⁴⁵ Witness statement by Michael Sternklar, Fidelity Employer Services Company, in the US trial on 24 June 2004, p. 3135.

⁴⁶ See Larry Ellison (CEO Oracle) deposition of 20 January 2004, pages 185, 186, US-trial exhibit P3171.

⁴⁷ See Larry Ellison (CEO Oracle) deposition of 20 January 2004, US-trial exhibit P3171.

⁴⁸ Testimony of Prof. Elzinga, US trial transcript of 18 June 2004, page 2142

⁴⁹ Testimony of Perry Keating, Senior Vice President of Bearing Point, US trial transcript of 10 June 2004, page 857.

⁵⁰ See also Prof. Iansiti's testimony, US transcript of 17 June 2004, page 2018. In the same context, the 2003 Form 10-K of ADP states the following: "Employer Services' approach to the market [Employer service being the package of HR and payroll solutions that ADP offers to its customers] is to match a client's needs with the product that will best meet expectations. To facilitate this approach, in North America, Employer Services is comprised of the following groups: Small Business Services [...] (primarily companies with fewer than 50 employees); Major Accounts (primarily companies with between 50 and 999 employees); and National Accounts Services (primarily companies with 1 000 or more employees). See: <http://www.investquest.com/iq/a/aud/fin/10k/adpk03.pdf>. As regards revenues, ADP's "Employer Services" were around 4,4 billion USD, i.e. 62% of ADP total 2003 revenue. Employer Services' revenues were achieved in North America (90%, i.e. around US-\$ 4 billion), Europe (9%), Australia, Asia and Brazil (1%)⁵⁰. See: <http://www.investquest.com/iq/a/aud/fin/annual/03/adp03ar.pdf> Ceridian 2003 Form 10-K states : "We generally classify customers in the human resource solutions market by employer size into three categories, each of which represents a distinct market opportunity for us" This classification include : Small (Fewer than 350 employees), Medium (350 to 5 000 employees) Large (Over 5,000 employees) with an increasing level of requirements and complexity for each of them." See http://media.corporate-ir.net/media_files/NYS/CEN/reports/10k02_032703.pdf. Ceridian has a scope of

services would be served on the basis of Oracle, PeopleSoft and SAP HR and payroll software⁵¹.

- (105) For example, HP (a Business Process Outsourcer) replied to a request for information from the Commission that all of its outsourcing customers would have less than EUR 1 billion revenue and less than 2500 employees. In addition, in reply to the question whether it directly competed with large EAS vendors such as Oracle, PeopleSoft and SAP, HP replied that “we usually partner with the vendors for Application management”⁵².
- (106) Concerning the position of Automatic Data Processing (“ADP”), another world-known BPO outsourcer, Jay Rising stated in front of the US District Court of Northern California that ADP does not offer outsourcing services for financial management functions. Currently, ADP’s HR product (“Enterprise HR”) offering – which interfaces with the payroll product - is limited to the US; shortly it may be expanded to the United Kingdom. However, the first envisaged client will not have functionality simultaneously in the United Kingdom and the US. ADP’s HR product does not have multiple language capabilities and this is not envisaged in the future. ADP only intends to sell its human resources outsourcing offering to customers that also purchase ADP’s payroll; ADP has no interest in outsourcing HR software as a stand-alone product. ADP has 12 salespeople throughout the US who focus exclusively on firms with more than 2 000 employees. About 20 developers are dedicated to creating and maintaining the codes for ADP’s enterprise product and the number is not expected to increase. In order to be able to provide one payroll solution across the globe to customers, ADP entered into an alliance with SAP. The offering of this service in the US will take a further 18 – 24 months. Ultimately, in 2003, all ADP wins for large enterprise HR clients resulted from final bidding rounds against other outsourcers hosting Oracle, PeopleSoft and SAP, but not against ERP vendors⁵³.
- (107) Furthermore, in reply to a questionnaire sent by the Commission during phase I of the investigation (as early as 18 September 2003), ADP replied with a letter dated 26 September 2003 where it declared *inter alia* that: “Question 8, asking for details of every occasion on which ADP offered its Enterprise product to a large company, would take several weeks to compile. [...]. *In the course of that research, however, I did learn what*

activity covering only North America (USA and Canada) - where more than 90% of its revenue comes from - and, in Europe, the UK. Ceridian, confirmed that its client base is represented for around 70% (68% in the US only) by customers having less than 5,000 employees, see Ceridian reply to questions n° 3 and 4 of questionnaires to outsourcers (Phase II).

⁵¹ See [Name confidential] reply to question n° 1, Questionnaire to outsourcers (phase II). It indicates that “ [Name confidential] does not purchase products to run outsource services. The product is provided by the customer. [Name confidential] also provides services for other products, not mentioned above, which are individual solutions especially customised for the customer”. It emerges from the tables attached to the reply that all software used by [Name confidential] to run its outsource services are Oracle’s, SAP’s and PeopleSoft’s (this one only for HR). From table 3-1-b of the questionnaire, it also emerges that 60% of [Name confidential]’s clients have more than 10.000 employees.

⁵² See HP reply to questions n° 3 and 4 of questionnaires to outsourcers (Phase II).

⁵³ See Jay Rising, President of National Accounts Division, ADP US trial transcript of 30 June 2004 pages 4089, 4108, 4109, 4111, 4112, 4106, 4125, 4128, 4129 in the US trial.

*may be a critical fact. Although ADP does offer an Enterprise product in the US, that product is not sold outside of the US. Indeed, it is so tailored to the laws of the United States that it would be of doubtful use to any non-US client [emphasis added]. ADP, then, does not participate in the EEA market for enterprise application software, and has no relevant insight into the operation of that market*⁵⁴.

- (108) As regards other outsourcers, in the course of the US trial, Michael Sternklar of Fidelity Employer Services (one of the most important worldwide outsourcer) testified that Fidelity has an Oracle license and, currently, all of the HR outsource transactions for customers are processed through Oracle applications. Furthermore, Fidelity currently only provides HR outsourcing services to employees in the US. The witness also added that none of the outsourcers Exult, Aon, Mellon, IBM Global Services and Accenture use a proprietary platform but use either PeopleSoft as the standard platform or a platform which was licensed by the client. Hewitt historically used PeopleSoft and may in the future use the software of Cyborg which Hewitt recently acquired⁵⁵.
- (109) The above demonstrates that BPO outsourcers and other outsourcers do not represent competitive constraints vis-à-vis high-function HR and FMS software, while no reliable element suggests that this will change in the foreseeable future.

d) Consultants and System Integrators

- (110) In reply to the Commission's statement of objections, Oracle stated that the Commission did not understand the central role played by consultants and system integrators in the EAS market and , in particular, misunderstood the massive competitive constraint that they play vis-à-vis EAS vendors as regards the following aspects. (1) They provide customers with an asymmetrical information advantage over vendors (this in itself offsets any possible attempt by EAS vendors to price discriminate). (2) They have the incentive to use their bargaining power in order to squeeze EAS's vendor license fee as much as possible in order to gain a higher share of integration/consultancy fees⁵⁶. (3) They have an incentive and an interest in maintaining a diversified supply structure and will even sponsor a niche vendor through strategic alliances if they feel that there are not sufficient numbers of competitive alternatives on the supply side.
- (111) The Commission cannot reach a conclusion on the basis of Oracle's unsupported contentions. Based on the information in the file, it can be stated, in general terms, that consultants and system integrators "[...] offer a solution that [is] consider[ed] to be the best for the client. On occasions this may include upgrading legacy solutions in preference to implementing an EAS solution such as SAP, Oracle, or PeopleSoft. This will be determined by factors such as the projected costs and benefits of different

⁵⁴ See letter dated 26 September 2003 from ADP in reply to the Commission's questionnaire (phase I).

⁵⁵ Testimony of Michael Sternklar of Fidelity Employer Services Company, US trial transcript of 24 June 2004, pages 3134, 3143, 3167, 3158,3159

⁵⁶ Given that companies often have a fixed IT budget for new installations and that system integrators propose solutions on a fixed-fee basis. See Oracle's reply to the Commission's statement of objections, paragraph 161.

solutions, and the risks associated with enhancing legacy systems versus implementing an EAS”⁵⁷.

- (112) Consultants/system integrators work with clients to define their requirements and help them to meet those requirements through standard software, the modification thereof being a last resort. Sometimes, when modifications are necessary, they may well recommend that these are done outside the core software in order to facilitate upgrading (using API’s, for example). In this respect they view themselves as providing customers with a kind of service that is nearly at odds with any possible competitive constraint vis-à-vis EAS vendors⁵⁸. As regards the cost of integration services, it appears that these integration services may range from one time to six times the product’s license cost. The costs of after sales services vary substantially depending on the company’s applications support sourcing approach⁵⁹.
- (113) These companies are not “product companies”, they are selling a service. That is the reason why they generally claim to offer clients the most genuine and independent advice on all areas of IT, also with a view to providing IT outsourcing services to them. In order to achieve this, they generally enter into strategic partnerships with various EAS suppliers and are able to supply clients with “best of breed” and tailor-made solutions in respect of their requirements across the EAS “pillars”. They also offer both set-up and implementation. That is also one reason why, generally, consultants/integrators do not necessarily regard themselves as direct competitors of EAS suppliers, but rather as complementary partners. In providing their services, they may also act as “resellers” of EAS solutions which they might have previously licensed from EAS suppliers. To a much lower extent, consultants/integrators choose to provide clients with EAS functionality based on software they developed themselves.
- (114) Their potential for further scope of activities is limited by the almost prohibitive cost that further development of large-scale EAS operations would entail, in terms of financial expenditures, R&D, timing, and full international coverage of services (also bearing in mind the need to cope with multiple local specific requirements). The experience of PricewaterhouseCoopers Consulting (PwCC, now part of IBM) is worth noting in this respect. Prior to its acquisition by IBM in October 2002, PwCC sold off its Product Revenue Accounting software to SAP and its Cost Management Software System (called Active) to Oracle. In autumn 2003, IBM also sold HR Access, a vendor of HR applications, to Fidelity. This shows that – contrary to Oracle’s claims - consultants leave the applications market due to the high costs of maintaining the software and developing enhancements.

e) Incumbent software

- (115) Customers would not develop FMS or HR solutions in-house, in response to a SSNIP of high-function HR and FMS solutions, due to the tremendous costs of in-house, custom

⁵⁷ See Deloitte reply to question n° 6b) of the Commission’s questionnaire to Consulting companies (phase II).

⁵⁸ See *inter alia* [Company name CONFIDENTIAL] reply to question n° 6c) of the Commission’s questionnaire to Consulting companies (phase II).

⁵⁹ See *inter alia* Accenture reply to question n° 6a) of the Commission’s questionnaire to Consulting companies (phase II).

development⁶⁰. Neither would the “do-nothing” option have any price-disciplining effect in the case of a SSNIP of high-function software, as organisations must constantly adapt to changing business and legal requirements, which in turn requires updates to the software to meet the organization’s changing needs⁶¹. They therefore cannot stay with their legacy system without incurring significant costs of support and maintenance⁶².

3.1.4 Vendors in the relevant markets

3.1.4.1 Introduction and proxies used

- (116) On the basis of the above, it is concluded that there are separate products aimed at satisfying the needs of large enterprises with complex functional needs for HR and FMS application software which also constitute distinct product markets. The Commission further established who the suppliers of such products are. Those suppliers form the competitive constraints for a combined Oracle/PeopleSoft in the markets at stake.
- (117) The high-function HR and FMS solutions are applications to serve complex organisations/companies which have a very high level of functional needs. The Commission established the suppliers in the market by looking at the bids made by suppliers for such customers, thus for large 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 high-function software and customers on the one hand, and mid-market software and customers on the other hand. In order to be able to carry out an investigation in this respect, the Commission used proxies to describe those customers and the transactions for such software applications.
- (118) As a first suitable proxy for the “complexity” of the requirements for large organisations, the Commission considered the net licence value of the sale to be appropriate. It appeared that a net licence value of EUR 1 million would be an appropriate benchmark for EAS solutions responding to a high standard of complexity. Considering the results of the market investigation in terms of the value of bids launched by typical large enterprises with complex functional needs, the value of EUR 1 million can be considered as a significant proxy for the value of a deal being launched by such a customer for a set of HR and/or FMS functionalities. Nevertheless, it is apparent from the analysis of the latest bid data provided by Oracle on 27 September 2004 (in reply to the Commission’s request for information adopted by decision pursuant to Article 11(5) of the Merger Regulation on 14 April 2004 after the Oral Hearing) that this value may be considered appropriate, but that bids falling short of this licence value need not necessarily be excluded from the markets for high-function HR and FMS solutions for this reason alone.

⁶⁰ See Larry Ellison (CEO Oracle) deposition of 20 January 2004, US-trial exhibit P3171. See Cichanowicz, Vice President of Nextel for Business Systems Integration, US trial transcript of 14 June 2004, page 1051.

⁶¹ See testimony of Prof. Elzinga, US trial transcript of 18 June 2004, page 2142.

⁶² See testimony of Michael Gorriz, Vice President of DaimlerChrysler IT Business Systems, US trial transcript of 15 June 2004, page 1367.

- (119) This may be true even though Oracle's data do not appear to be representative of the FMS and HR high-function markets. Oracle submitted data for 728 bids between 2001 and 2003 with an average licence value of EUR 708 851. These data contain a number of bids for niche products and best-of breed solutions not falling into the product market and having a much lower licence value (for example, 235 bids with licence values between EUR 2 000 and EUR 100 000). As Oracle was not able to specify the modules contained in these bids, the Commission could not verify whether or not they fell within the markets for high-function FMS and HR solutions. Furthermore, in his testimony in the US trial, Professor Elzinga used a threshold of EUR 500 000 in order to define an appropriate sample of bids belonging to the markets for high function FMS and HR applications⁶³.
- (120) On the basis of the market investigation and the bid data submitted by Oracle, the Commission used the value of EUR 1 million for the net licence fee as one proxy for the value of bids containing high-function FMS and HR software. Given the considerations set out in the preceding recital, 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.
- (121) The Commission further complemented this proxy by a delineation of "large enterprises with complex functional needs" as customers of such software solutions that cope with the complexity of their overall needs. The great majority of the respondents in the market investigation confirmed that thresholds of 10 000 employees or of revenues exceeding EUR 1 billion might be an appropriate proxy for a rough qualification of large undertakings with complex functional needs. The 10 000 employees threshold is also mentioned in industry reports, for example, by the Gartner Group⁶⁴. The differentiation between the mid-market and the upmarket customers is also used by other analysts. Giga defines the mid-market as consisting of organisations with 100 to 5 000 employees⁶⁵. Nevertheless, it remains difficult to identify the exact scope of these undertakings as vendors do not specifically track customers according to any criteria reflecting this complexity, such as the number of employees or the turnover size.
- (122) Further, it has to be borne in mind that the reason why such a market for high-function software exists is the complexity of the EAS requirements of the specific customer. This is also demonstrated by the sheer size of the "business occasion" or "project" that vendors would have to service. In this context, also undertakings with less revenues and a lower number of employees than those mentioned in the above proxy may also have

⁶³ See Prof. Elzinga's US trial transcript of 18 June 2004, pages 2174, 2175.

⁶⁴ Gartner Group, Large-Enterprise HRMS Magic Quadrant, 2002, dated 10 October 2002. Oracle claims that the Gartner uses a threshold for defining large enterprises at 2 500 employees or more in another report with the same date. In particular, Oracle states that in this report Gartner sets out its evaluation criteria for vendors in the "Large-Enterprise HRMS Magic Quadrant". Indeed, it is true that Gartner adopts some broad evaluation criteria for its analysis of vendors. Nevertheless, it remains that in the report quoted by the Commission, Gartner states the following: "We group large enterprises into two distinct segments: enterprises with 2 500 to 10 000 employees and enterprises with more than 10 000 employees". This is in no contradiction with the Commission adopting the second of the two segments considered by Gartner as a relevant proxy for LCEs. .

⁶⁵ See e.g. Giga, Paul Hamerman, Market Overview 2002: Human Resources Management Systems – Breaking Away From the Back Office, published 30 August 2002, page 4.

the multiple business units, complex processes and global requirements that require such complex EAS solutions (and therefore may qualify as LCEs).

- (123) In the light of the above, it is concluded that these proxies can be used for a first qualification of the bids. However, the reservations expressed have to be taken into account in the assessment of the bid data and it has to be verified, in respect of the individual bids, whether or not they contain high-function FMS and HR software. This is, in particular, the case for bids meeting only the proxies for the delineation of large enterprises with complex functional needs, that is to say, the sale to an enterprise with more than 10 000 employees and revenues exceeding EUR 1 billion. In such cases where the licence value does not exceed EUR 1 million it may be established whether those bids contain high-function FMS and HR software, therefore whether the bids include HR and/or FMS software for the entire company or divisions displaying the features of large enterprises with complex functional needs. This may be particularly relevant for those vendors for which it cannot be assumed from the sheer number of bids with a large value that they are providing HR and FMS high-function applications. This rather cautious approach, taking into account bids on the basis of a complementary set of proxies and the individual circumstances of the bid, leaves Oracle's criticism void that the threshold of EUR 1 million for the licence value is arbitrary and the thresholds of EUR 1 billion of revenues and 10 000 employees as proxies for the delineation of large enterprises with complex functional needs were not supported by all respondents in the market investigation.⁶⁶ The Commission also does not attempt "to define away other EAS vendors by setting a minimum bid value of EUR 1 million", but uses the figure of a licence value of EUR 1 million only as an indicative proxy for the first assessment of the bids.
- (124) On the basis of these proxies the Commission analysed the bids in which EAS vendors participated in the years 2001 and 2002 and the bids submitted by Oracle on 27 September 2004 after the Oral Hearing in response to the Commission's information request. The Commission further analysed documents on bids resulting from the US Northern California District Court proceedings in order to establish the identity of the suppliers of such software applications.

3.1.4.2 Vendors of HR and FMS high-function solutions

- (125) In the statement of objections the Commission reached the preliminary finding that in the world-wide market for high-function solutions in the field of HR and FMS typically purchased by large undertakings with complex functional needs, essentially only three players are active, these being Oracle, PeopleSoft and SAP. These three players were identified by 90% or more of the respondents as possible suppliers of FMS or HR high-function solutions. As a further provider of EAS solutions adapted to the requirements of large undertakings with complex functional needs, respondents identified JD Edwards.

⁶⁶ Lawson describe the tiered market when they unconditionally recognised the existence of a "specific market for supplying EAS to large companies...". See Lawson's non-confidential response to a Questionnaire to Competitors received by the Commission 07.Dec.2003, where they state that there is a specific market for supplying EAS to large companies and also elaborated: "...We would define large companies as those with over 10,000 employees and/or revenues in excess of \$1Billion...".

JD Edwards, however, has in the meantime been eliminated as an independent player having been merged with PeopleSoft.

- (126) This appeared to be confirmed by the analysis of the bid data for 2001 and 2002. In total, SAP identified [50-100] bids, PeopleSoft [>150] bids and Oracle [>150] bids as bids for relevant for large enterprises with complex functional needs with more than 10 000 employees and revenues exceeding EUR 1 billion partly involving also EAS modules other than FMS and HR. These bids had an average value ranging from EUR 1 million (Oracle) to [more than EUR 2 million] (SAP), PeopleSoft being in the middle with [EUR 1 to 2 million]. SAP won [35-50] of the respective bidding contests, PeopleSoft [100-150] and Oracle [100-150]. In Oracle's latest submission, Oracle submitted data for 728 bids with an average licence value of EUR 708 851. However, as set out above, Oracle's data set submitted on 27 September 2004 cannot be considered entirely reliable.
- (127) However, Oracle provided the Commission with examples of vendors other than SAP, Oracle and PeopleSoft currently supplying core FMS and HR functionalities to large enterprises with complex functional needs, which - it claims - represent credible, established and actual alternatives in the upmarket vis-à-vis the big three vendors. According to Oracle, those competitors are *inter alia* Microsoft, Kronos, Sage, Lawson, SSA/Baan, Meta4, Ramco, Geac, IFS, Intenia, Tesseract, QAD, Ultimate Software⁶⁷. In particular, some specific undertakings (considered large) were suggested by Oracle as being clients of these EAS vendors. Oracle stressed this argument in the reply to the statement of objections and argued that a number of other EAS vendors supply companies that would qualify as LCEs and/or could easily "reposition" themselves in the upmarket as a reaction to the merger. These vendors include SSA Global/Baan, Lawson, Meta4, RebusHR, Intenia, System Union, QAD and, already today, Microsoft who, together with Oracle, PeopleSoft and SAP are active in the "enterprise space".

3.1.4.3 Bid data from the Commission's market investigation

- (128) The Commission has sought to verify this contention in its market investigation and also on the basis of the data submitted by Oracle in its response to the Commission's information request after the Oral Hearing. Therefore, it has examined the relevant bids in which those vendors participated during 2001 and 2002 both as regards HR and FMS functionalities and also for other EAS pillars concerning large undertakings with complex functional needs. In this context, the Commission has asked those vendors to provide data on the bids in which they had participated and that they had possibly won.
- (129) The market investigation showed that four other vendors, besides Oracle, PeopleSoft, and SAP, have occasionally won bids with a licence value exceeding EUR 1 million, these are IFS, QAD, Lawson and Microsoft. However, these were only 6 bids in total with one further bid of just below EUR 1 million of licence value, compared to the much greater number of bids exceeding a licence value of EUR 1 million won by each of Oracle, PeopleSoft and SAP. The investigation further revealed that those vendors and

⁶⁷ Cf. Submission on Market Definition and Competitive Assessment regarding EAS for Large Enterprises, Oracle Corporation, Case M-3216, 5 November 2003, paras. 75-83.

Rebus participated in total in 16 bids relevant to HR and FMS pillars having a licence value exceeding EUR 1 million⁶⁸.

3.1.4.4 Oracle's bid data

- (130) The data submitted by Oracle on 27 September 2004 confirm the above results although, as mentioned, the data set does not appear to be representative of the relevant markets. It includes a number of bids involving only niche products (for example, a bid for employee incentive management for JP Morgan or for employee benefit management for British Telecom), bids which were won by suppliers not offering HR and/or FMS solutions (such as Siebel) or a number of bids for licence values between EUR 2 000 and EUR 100 000. Those bids do not appear to fall into the relevant markets. However, for those bids as well as for a number of other bids, the Commission could not verify whether or not they fell in the market for HR and FMS high-function applications since Oracle was not able to state exactly which modules were part of the respective bids. It is therefore not appropriate to draw conclusions from the entire data set, as it is not possible, in particular, to calculate in a reliable way how many times vendors other than Oracle, PeopleSoft and SAP have participated in bids together with Oracle for HR and FMS high-function solutions or how many times such vendors have won compared to Oracle, SAP and PeopleSoft.
- (131) Nevertheless, the data provide anecdotal evidence about individual bids, showing that other suppliers, besides Oracle, PeopleSoft and SAP, were able to win bids for LCEs for HR and FMS applications, including bids with a licence value of more than EUR 1 million. These are Lawson, which won a bid with a licence value of EUR 2 million for the French company Schlumberger (having annual revenues of around EUR 15 billion) for FMS applications; Intentia, which won a bid with a licence value of EUR 2,8 million for the Singapore company Flextronics (having annual revenues of around EUR 15 billion) for an entire ERP suite; IFS, which won a bid with a licence value of EUR 630 000 for the Norwegian Vinmonopolet (having annual revenues of EUR 1,1 billion) for, *inter alia*, FMS and HR applications. From the information submitted by Oracle it can be assumed that the software contained in those bids was software falling within the field of HR and FMS applications intended to be used for the whole enterprise, having the characteristics of high-function software.
- (132) Furthermore according to the data, those companies were also the runners-up in some of the bids in which Oracle participated. Lawson was qualified by Oracle as runner-up in 1 case and participated in the final round in a further 11 cases (with three bids exceeding a licence value of EUR 1 million and with a maximum licence value of EUR 1,8 million) for FMS, HR applications or entire ERP suites. IFS was qualified by Oracle as the runner-up in 5 cases for FMS applications and the entire ERP suites with net licence

⁶⁸ Another vendor who won bids in the respective years with a licence value exceeding € 1 million was IBM HR Access. However, HR Access has been acquired by the outsourcing company Fidelity in autumn 2003. Fidelity wishes to use HR Access as a platform upon which Fidelity will provide its human resources outsourcing offering in the future, but no longer built to service individual corporations, testimony of Michael Sternklar, Executive Vice President of Fidelity Employer Services Company, transcripts US trial p. 3153. In any case, HR Access did not have international coverage for its HR applications, it was in particular not suited for US operations.

values of up to EUR 2,5 million; it participated in the final round in further 6 bids for LCEs (in total with five bids exceeding a licence value of EUR 1 million). Intenia participated in the final round in two cases, with a licence value in one case of EUR 2,65 million. Microsoft did not win a bid according to the Oracle bidding data, but participated in the final round of 12 bids, with licence values of normally less than EUR 500 000, but in two cases also with licence values of more than EUR 1 million up to a licence value of EUR 7,7 million.

- (133) According to Oracle's data, outsourcers on the other hand, won only 2 of the bids with licence values of EUR 32 000 and EUR 62 000, respectively.

3.1.4.5 Evidence from the US District Court of Northern California trial

- (134) Oracle further submitted to the Commission an internal PeopleSoft document from July 2003, which was part of the evidence in the US trial (exhibit no D 6236 and D 6236 A). The document lists different US bids in which PeopleSoft participated and the competitors PeopleSoft encountered in those bids, split between "enterprise market" and "mid-market". According to the summary of the data, PeopleSoft confronted Lawson as a competitor in around 8% of the bids for the "enterprise market" (27 bids out of a total of 353 bids) and confronted Microsoft in 1% of the bids for the "enterprise market" (3 bids out of a total of 353 bids). However, no precise conclusions can be drawn from that document. In his testimony, the PeopleSoft executive in the US could not remember further information on the underlying bids⁶⁹.

3.1.4.6 Conclusion

- (135) On the basis of these factors and the market investigation, it can be concluded that in the markets for high-function FMS and HR for large enterprises with complex functional needs, Oracle, PeopleSoft and SAP are the main players. However, the Commission's data received from competitors along with Oracle's data in its submission of 27 September 2004 show that other players also occasionally win bids for high-function FMS and HR software to serve the needs of large enterprises with complex functional needs. Such other vendors of HR and/or FMS high-function software are Lawson, Intenia, IFS, QAD and Microsoft. Although those vendors won in only a limited number of bids, they qualified as runners-up in a larger number of bids for high-function FMS and HR software and participated in bids with a license value exceeding EUR 1 million. On the basis of that data and taking into account that the proxy of EUR 1 million for the net license fee was rather at the high end for being able to qualify a bid as containing high-function FMS and HR solutions, there are preliminary indications that Lawson, Intenia, IFS, QAD and Microsoft are vendors in the market for high-function FMS and HR software – beside Oracle, PeopleSoft and SAP.

⁶⁹ See Richard Berquist, SVP, PeopleSoft, US trial transcript of 8 June 2004, pages. 377, 378.

3.1.5 Impact analysis of identity of bidders

- (136) Apart from the analysis of who was present and who won particular bids, the Commission also undertook an econometric analysis to investigate whether there appeared to be 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 competing against either SAP or PeopleSoft in the final bidding round than when competing against other competitors would offer 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 enterprises with complex functional needs.
- (137) The main basis for this analysis was the response by Oracle to the Commission's request for information following the Oral Hearing. For each bid to sell software that fell into the pre-specified category outlined by the Commission (either the contract related to a very large purchase⁷⁰ or the purchasers were a very large entity⁷¹), Oracle provided detailed information about the circumstances regarding the bid. The information consisted, *inter alia*, of the list price of the bid, the number and identity of the competitors, the geographical location of the buyer, the components of the bid, the automatic volume discount offered, the additional discretionary discount, etc. The analysis consisted, *inter alia*, of investigating whether and how each of the different types of information about each bid on a general level could contribute to explaining the level of discount Oracle decided to offer in a bidding situation.
- (138) Following the US District Court of Northern California proceedings the Commission also obtained access to three different datasets relating to Oracle's bidding behaviour in US deals.
- (139) One dataset consisted of information extracted from Oracle's internal discount approval forms. The data-set consisted of 431 observations relating to bids involving HRM, FMS or E-business suite products⁷².
- (140) Another dataset was compiled based on the intersection between Oracle's discount approval forms and those bids where additional information was available from Oracle's North American Sales Representative Survey (NASRS)⁷³. This dataset contains only 122 observations, but contains relatively detailed information about each bid. The dataset is collected on the basis of different criteria from those imposed on Oracle for the dataset submitted to the Commission. The overlap between the two data-set is relatively modest (only 28 bids are present in both datasets).

⁷⁰ Licence fee in excess of 1 million € or US\$.

⁷¹ The company or relevant business entity either had a turnover in excess of €1 billion or more than 10 000 employees.

⁷² Extract from 040804_Hausmann_backuptable.doc

⁷³ The NSARS asks the sales representative for among other things, the names of Oracle's closest competitors in the deal. Cf. page 2 of Exhibit APP. II-1 of the white paper "Proposed Acquisition by Oracle of PeopleSoft: Analysis of Competitive Effects" submitted to the US department of Justice on 30 January 2004 (received by the Commission on 5 February 2004)

- (141) The US Department of Justice's economic expert also provided regressions runs on a different dataset that was compiled by Mr. Ciandrini Oracle's Vice President for Application sales in North America for internal purposes prior to the proposed merger. This dataset contains 126 observations. Due to insufficient information about the precise size of each deal, the Commission did not rely on those data.
- (142) For the purpose of estimating the effect of competition on the bidding behaviour it is necessary to decide whether the appropriate measure of discount should include or exclude automatic volume discounts that Oracle provide off the list price. The Commission notes that since the automatic discounts are given regardless of the competitive pressure, it can, in essence, be considered part of the list price. The purpose of the analysis is to identify the factors which have an impact on Oracle's competitive behaviour and, in that respect, the additional discount is likely to provide the clearest measure of the discretionary behaviour of Oracle.
- (143) Of particular interest for the purpose of identifying the relevant participants in the market, the Commission investigated whether the presence of a high number of tier one competitors (SAP and PeopleSoft) was more likely to lead Oracle to provide a high discount than the presence of a high number of other bidders. The Commission performed this analysis on the dataset provided by Oracle to the Commission and two of the datasets provided to the US District Court of Northern California . The main finding was that in all three datasets no significant distinction could be identified between the behaviour of Oracle when competing against SAP and PeopleSoft and when competing against other bidders.
- (144) Based on this analysis, notwithstanding the question of whether the dataset submitted to the Commission is truly representative of the relevant market, it is concluded that the bidding data cannot be relied on to justify a finding of a narrow market for large enterprises comprising only Oracle, PeopleSoft and SAP.

3.1.6 Profile of other relevant vendors

- (145) The Commission further analyzed whether the result of the assessment of the bid data was confirmed by the capabilities of the products of the vendors and therefore whether Lawson, Intenia, IFS, QAD and Microsoft would, in general, be able to serve the needs of large enterprises with complex functional needs in the field of FMS and HR applications. The Commission therefore sought new extensive information as to whether or not those vendors can be considered credible suppliers of high-function FMS and HR applications in terms of satisfying the needs of large enterprises with complex functional needs in terms of the following dimensions: (i) functionality (breadth and depth); (ii) scalability, reliability and quality; (iii) technology; (iv) international scope; and (vi) brand reputation, sales and service.

3.1.6.1 Lawson

- (146) Lawson is an American company which offers financial and human resource products and several software application products such as procurement, merchandising products

and enterprise performance management. It describes itself as serving large to mid-sized organisations in the healthcare, retail, public, professional services, and financial services sector. In the statement of objections, the Commission excluded Lawson from the players in the relevant market on a preliminary basis in particular due to the fact that Lawson has a limited regional focus (mostly North America and the United Kingdom), the Commission had doubts about the breadth and depth of the functionality offered and Lawson has a very limited presence in large enterprises with complex functional needs.

- (147) Oracle submitted evidence in the proceedings that Lawson had licensed HR and FMS applications to a large number of the world's biggest companies, listed in the Fortune 100 of US largest companies, in the Global 500 of the world's largest companies and in the Forbes 500 list of the largest privately-held companies. In replying to the Commission's statements of objections, Oracle also emphasized that there are at least three concrete cases where Oracle lost to Lawson in bids for HR solutions to large enterprises (Flying J, Mayo Clinic, TCF Bank⁷⁴). On that basis, Oracle contested the Commission's decision to exclude Lawson as vendor from the markets for high-function FMS and HR solutions.
- (148) According to Oracle, Lawson's products would be perfectly suitable in terms of breadth and depth of functionalities to serve the needs of LCEs. In the reply to the statement of objections, Oracle submitted a report from Accounting Software Advisors LLC (an independent assessor of EAS functionalities). Oracle claims that the ASA Key Features Report (a survey HR and FMS features across EAS applications from several vendors) demonstrates that Lawson's functionalities with respect to HR and FMS (to be provided out-of-the-box) are at least on a par with those of PeopleSoft, Oracle and SAP. However, that report cannot be accepted as persuasive evidence that Lawson's products provide equal functionality to those of PeopleSoft, Oracle and SAP. The standard, full report from Accounting Software Advisors contains 4 342 functions. In the report submitted by Oracle, in particular the 93 functions under the heading "Multinational" (covering such functions as Local Support, Data formatting, European VAT, Unlimited Currencies, Sorting and Reporting by Currency), the 276 functions under the heading "General Questions" (covering such questions as the various operating systems they run on, programming languages they support, online training, knowledge databases) and the 176 functions under the heading "General Technical Questions" (relating to scalability and system requirements) are omitted. The assessment of those functionalities appears to be particularly relevant for the question whether or not Lawson's applications can be considered as having similar functionalities to the software of Oracle, SAP and PeopleSoft in the dimensions of high-function software as set out above (in particular the global capabilities). On the basis of that fragmented report it can therefore not be concluded that Lawson's applications are equivalent to those of PeopleSoft, Oracle and SAP in the dimensions relevant for high-function FMS and HR global solutions.
- (149) According to its own description in the Commission's market investigation, Lawson is able to provide core functionalities in FMS and HR in the US and in the Community. Its product performance and levels of throughput would meet the needs of an undertakings with more than EUR 1 billion in revenues or with more than 10 000 employees in particular as regards processing large volumes of transactions. The architecture includes separate layers. The product supports the segregation of function common in large

⁷⁴ These are companies with overall revenue over 1 billion USD and employees over 10 000.

enterprises with complex functional needs and offers data and programming interfaces. Lawson's language capabilities cover English, French, German, Spanish and Dutch⁷⁵, but not Japanese and Chinese. Lawson's HR and FMS products comply with the local regulations in a number of countries and support an unlimited number of currencies. If purchasers wish so, they can purchase support 24 hours a day/7days a week.

- (150) Furthermore, new evidence about Lawson's customers' base has come out of the US District Court of Northern California trial. In the trial it was confirmed that PeopleSoft was one of the main competitors of Lawson and that Lawson competed with PeopleSoft in nearly every account and that Lawson also have large customers with complex functional needs with revenues in excess of USD 1 billion, with more than 10 000 employees, and also customers belonging to the Fortune 1000 list⁷⁶. In the trial, Lawson confirmed that their HR and FMS applications are being installed at Health Care America (HCA), a hospital operator with facilities in the United Kingdom and Switzerland, USD 20 billion in revenues and more than 250 000 employees and that its financial applications are installed at two other hospital groups with 40 000 and 70 000 employees respectively, and operating multiple sites. Lawson furthermore stated in the US trial that they had several retail chains as customers, such as Safeway and Walgreen, having revenues of USD 30 billion and more than 100 000 employees each. Furthermore, it was stated that Ralph Lauren, as a retailer with revenues of more than USD 10 billion, was running Lawson's financial and HR package and that McDonald's was running Lawson's entire HR suite in the US⁷⁷. It was further confirmed that Lawson's financial applications were running at several large financial institutions, such as the system of the US Federal reserve banks and the Canadian insurance company Manulife with revenues of USD 8,7 billion (although Manulife decided to use the software without any customisation, in contrast to the normal approach of large enterprises with complex functional needs)⁷⁸. Furthermore, Lawson confirmed that Johnson & Johnson, a multinational manufacturer of healthcare products with around 100 000 employees, was running Lawson's HR applications, although Johnson & Johnson may be in the process of migrating to SAP⁷⁹.
- (151) Moreover, some analysts, such as Meta Group regard Lawson as a possible challenger in the LCE space as regards HR and FMS functionalities.
- (152) Given the above, the capabilities of Lawson's HR and FMS software, despite some limitations in the product performance concerning the international dimension, may in general be sufficient to serve the needs of some large enterprises with complex functional needs, at least in the vertical sectors in which Lawson is mainly active. The evidence from the US trial as well as the dataset submitted by Oracle after the Oral

⁷⁵ See Jay Coughlan, CEO of Lawson, US trial transcript of 28 June 2004, trial transcripts page 3744.

⁷⁶ See Jay Coughlan, CEO of Lawson, US trial transcript of 28 June 2004, pages 3595, 3596. See also trial exhibit D6236, trial transcript page 1859.

⁷⁷ Testimony of Jay Coughlan, CEO of Lawson, US trial transcript of 28 June 2004, pages 3604 – 3608.

⁷⁸ Testimony of Jay Coughlan, CEO of Lawson, US trial transcript of 28 June 2004, pages 3617-3623.

⁷⁹ Testimony of Jay Coughlan, CEO of Lawson, US trial transcript of on 28 June 2004, pages 3630 – 3631; 3722 – 3723.

Hearing show that Lawson not only participated but also won bids concerning HR and FMS solutions with a licence value above EUR 1 million and sold its products to customers which may be qualified as large enterprises with complex functional needs, although these are mostly North-American customers. On this basis, Lawson cannot be excluded as a vendor from the market for high-function FMS and HR solutions. It is therefore concluded that, for the purposes of the assessment of the present case, Lawson could be a competitive constraint vis-à-vis Oracle, PeopleSoft and SAP at least in the vertical sectors in which it is more active and is to be treated as a vendor in the market for high-function FMS and HR solutions.

3.1.6.2 IFS

- (153) IFS is a Sweden-based vendor of EAS solutions. IFS' product offering is quite large, encompassing functionalities across diversified industry segments (such as Aerospace & Defence, Automotive, Commercial Aviation, Energy & Utilities, High-Tech, Industrial Manufacturing, Infrastructure, Life Sciences). Its products appear mainly to support the needs of the mid-market. According to its own description in the Commission's market investigations, the performance of its products may meet the requirements of large organisations with complex functional needs in terms comparable to Oracle, PeopleSoft and SAP as regards architectural design, breadth and depth of functionalities, and response-time. The architecture includes separate layers. The product supports the segregation of functions common in large enterprises with complex functional needs and offers data and programming interfaces. The FMS and HR products cover multiple languages, including Japanese and Chinese, and comply with the local rules of a large number of countries, including European countries and the US. They support any currency and up to three currencies simultaneously. However, their FMS and HR functionalities appear to have limitations as regards their international usage capabilities⁸⁰. If purchasers wish to do so, they can purchase a support 24 hours a day /7days a week. Indeed IFS appears to be a kind of "European Lawson" with an established presence in the mid-market, a good reputation in the European space, and the possibility of winning some upmarket customers, essentially with European companies.
- (154) In the light of the above description of the functionality offered by IFS' HR and FMS products, the capabilities of the solutions may, in general, be sufficient to serve the needs of some large enterprises with complex functional needs, at least in the industry segments in which IFS is mainly active. The evidence from the dataset submitted by Oracle after the Oral Hearing as well as from the Commission's market investigation show that IFS not only participated but also won bids concerning HR and FMS solutions with a licence value above EUR 1 million and sold its products to customers which may be qualified as large enterprises with complex functional needs. On that basis, IFS cannot be excluded as a vendor from the market for high-function FMS and HR solutions. It is therefore concluded that, for the purposes of the assessment of the present case, IFS could be a competitive constraint vis-à-vis Oracle, PeopleSoft and SAP at least in the industry segments in which it is more active and is to be treated as a vendor in the market for high-function FMS and HR solutions.

⁸⁰ See IFS's reply to the Commission questionnaire to competitors (phase II).

3.1.6.3 *Intentia*

- (155) Intentia is another Swedish EAS vendor active in the sale of FMS and HR software application. This vendor is mainly a mid-market provider with a mid-market customer base (including subsidiaries or divisions of multinational companies). According to its own description in the Commission's market investigations, the performance of its products may meet the requirements of large organisations with complex functional needs in terms equal to Oracle, PeopleSoft and SAP as regards architectural design, breadth and depth of functionalities, and processing large volume of transactions. The architecture includes separate layers. The product supports the segregation of functions common in large enterprises with complex functional needs and offers data and programming interfaces. The FMS and HR products cover a large number of languages, including Japanese and Chinese. The FMS and HR applications software complies with the regulatory requirement of 41 countries, including European countries, the US and Asian countries. The applications support any currency and up to three currencies simultaneously. Intentia offers product support 24 hours a day/7days a week⁸¹.
- (156) In the light of the above description of the functionality offered by Intentia's HR and FMS products, the capabilities of the solutions may, in general, be sufficient to serve the needs of some large enterprises with complex functional needs, although Intentia mainly serves the mid-market. The evidence from the dataset submitted by Oracle after the Oral Hearing shows that Intentia not only participated but also won bids concerning HR and FMS solutions with a licence value above EUR 1 million and sold its products to customers which may be qualified as large enterprises with complex functional needs. On that basis, Intentia cannot be excluded as a vendor from the market for high-function FMS and HR solutions. It is therefore concluded that, for the purposes of the assessment of the present case, Intentia could represent a competitive constraint vis-à-vis Oracle, PeopleSoft and SAP despite the limitations in its product offerings and is to be treated as a vendor in the market for high-function FMS and HR solutions.

3.1.6.4 *QAD*

- (157) QAD (an American company) provides FMS functionalities (no HR functionality) in manufacturing industries (in particular automotive, consumer products, foods and beverage, electronics, industrial products, medical). QAD typically targets mid-market companies or divisions of larger companies that would use QAD products in their manufacturing operations. Nevertheless, according to its own description in the Commission's market investigations, the architecture of the products does not have to be modified to achieve product performance and levels of throughput to meet the needs of undertakings with more than EUR 1 billion in revenues or with more than 10 000 employees. The architecture includes separate layers. The product supports the segregation of functions common in large enterprises with complex functional needs and offers data and programming interfaces. The FMS products cover 26 languages, including Japanese and Chinese. The FMS applications software complies with the

⁸¹ See Intentia's reply to the Commission questionnaire to competitors (phase II).

regulatory requirement of a number of countries, including European countries, the US and some Asian countries. The applications support 80 currencies and also the simultaneous use of currencies. QAD offers product support 24 hours a day/7days a week⁸². QAD solutions are designed for global business and maximum flexibility (spanning multiple sites, multiple currencies and multiple entities) and have been implemented in more than 80 countries. Accordingly, QAD also has a solid customer base of global Fortune 1000 manufacturers.

- (158) In the light of the above description of the functionality offered by QAD's FMS products, the capabilities of the solutions may, in general, be sufficient to serve the needs of some large enterprises with complex functional needs, at least in the manufacturing sector, although QAD mainly serves the mid-market. The evidence from the Commission's market investigation shows that QAD not only participated but also won bids concerning FMS solutions with a licence value above EUR 1 million and sold its products to customers which may be qualified as large enterprises with complex functional needs. On that basis, QAD cannot be excluded as a vendor from the market for high-function FMS solutions. It is therefore concluded that, for the purposes of the assessment of the present case, QAD could represent a competitive constraint vis-à-vis Oracle, PeopleSoft and SAP despite the limitations in its product offerings and is to be treated as a vendor in the market for high-function FMS and HR solutions.

3.1.6.5 Microsoft

- (159) Microsoft only recently entered into the sale of EAS solutions by the acquisition of the US enterprise software manufacturer Great Plains Software Inc. ("Great Plains") in 2000 and the Danish ERP solutions provider Navision a/s ("Navision") in 2002. Combining those undertakings, Microsoft formed the new division "Microsoft Business Solutions" ("MBS") in July 2002 and has expanded its offering significantly in recent years after the acquisitions and now has solutions covering Analytics, Business portals, financial management, HR management⁸³. Its main product lines are Great Plains and Solomon (stemming originally from Great Plains) and Navision and Axapta (coming originally from Navision).
- (160) The declared focus of MBS is to "*create applications and services for retailers, manufacturers, wholesale distributors, and service companies, doing business domestically or in multiple countries*". It offers "*integrated business applications for*

⁸² See QAD's reply to the Commission questionnaire to competitors (phase II).

⁸³ Analytics solutions: Microsoft Analytics–Axapta Microsoft Analytics–Great Plains Microsoft Business Solutions Analytics Enterprise Reporting Microsoft Business Solutions for Analytics–Navision Microsoft Business Solutions for Analytics–Solomon. Business portals solutions: Microsoft Axapta Enterprise Portal Microsoft Business Portal–Great Plains Microsoft Business Solutions Business Portal–Solomon Microsoft Business Solutions–Navision Portals. Financial management solutions: Microsoft Business Solutions for Financials–Navision Microsoft Business Solutions for Financials–Small Business Manager Microsoft Business Solutions for Financials–Solomon Microsoft Financial Management–Axapta Microsoft Financial Management–Great Plains. HR management solutions: Microsoft Business Solutions for HR Management–Navision Microsoft Business Solutions for Human Resource Management–Solomon Microsoft HR Management–Axapta Microsoft HR Management–Great Plains.

See http://www.microsoft.com/BusinessSolutions/Highlights/buyers_guide.msp.

*small and mid-sized organizations and divisions of large enterprises delivered through a worldwide network of channel partners”.*⁸⁴.

- (161) For the future development of its applications business, Microsoft initiated a research and development project called “Project Green” which is meant to create a solution which will replace Microsoft’s mid-market products in the future. Its first version, which will be a subset of the functionality contained in Microsoft’s current ERP lines Axapta, Solomon, Great Plains and Navision, is expected to come to the market in 2008. In the US trial, Microsoft confirmed that 70 developers will be working on project Green in 2004, out of 1 200 developers currently working for MBS⁸⁵.
- (162) In the statement of objections, the Commission had excluded Microsoft from the players in the relevant market on a preliminary basis, in particular due to Microsoft’s focus on the mid-market and its reply to the Commission ‘s market investigation that the technical characteristics of MBS products differ from those of vendors such as Oracle, PeopleSoft and Oracle” and that in terms of intended use, MBS products are optimized to meet the business requirements and level of functionality required to support small and medium sized business information.
- (163) In the US trial, Microsoft confirmed that Axapta was the product line among its four overlapping lines with the most robust architecture that made it possible to serve either divisions of large organisations or independent subsidiaries and the corporate account space, that is to say organisations up to 5 000 employees in the terminology of Microsoft. Axapta may be suitable for divisions and subsidiaries of large and very large organisations in terms of employees and revenues if they are organised as a holding company and have a decentralised approach to their divisions and subsidiaries⁸⁶. It conforms to the market, legal and language requirements of 37 countries and has been implemented in companies operating in multiple countries⁸⁷. In 2005, more than 200 developers will probably be working on Axapta⁸⁸. Axapta, like the other MBS products, is normally not sold directly by Microsoft, but by Microsoft partner organisations, although Microsoft has some direct salespeople responsible for corporate accounts in the US⁸⁹.
- (164) Microsoft stated that the Axapta line has around 4 000 customers and that its product lines Great Plains and Axapta may occasionally have been sold to customers outside the

⁸⁴ http://www.microsoft.com/BusinessSolutions/Highlights/buyers_guide.msp.

⁸⁵ Testimony of Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, page 3060.

⁸⁶ Testimony Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, pages 3002 – 3004.

⁸⁷ Testimony Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, pages. 3085-3086.

⁸⁸ Testimony Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, pages. 3084.

⁸⁹ Testimony Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, pages. 2989.

mid-market and corporate account space, as defined in the Microsoft terminology, that is to say, to organisations with more than 5 000 employees. The two biggest customers appear to be Esselte and Old Castle⁹⁰. The value of sales to Esselte is around USD 10 million (including licence value and implementation costs); the licence value alone is well above USD 1 million⁹¹. The value of the deal and the characteristics of the customer meet the proxies for a sale of high-function FMS and HR software to large enterprises with complex functional needs, although the software licensed encompass functionalities other than HR and FMS, and will not be installed at corporate level of Esselte, but will be deployed in a decentralised manner in at least five, probably more, subsidiaries of smaller size.

- (165) Microsoft further confirmed in the US trial that it was trying to sell the Axapta solution to a producer of clothing with revenues of more than USD 1 billion and more than 15 000 employees worldwide as well as to a “billion-dollar division” of manufacturer of oil filters and exhaust systems⁹².
- (166) In the light of the above, it is concluded that Microsoft is essentially a mid-market player, but that its products may also be suitable to serve the needs of some large enterprises with complex functional needs. Taking also into account that Microsoft won bids concerning HR and FMS solutions with a licence value above EUR 1 million and that the dataset submitted by Oracle after the Oral Hearing showed that Microsoft participated in a number of bids for large enterprises with complex functional needs, partly with a licence value exceeding EUR 1 million, Microsoft cannot be excluded as a vendor from the market for high-function FMS and HR solutions. It is therefore concluded that, for the purposes of the assessment of the present case, Microsoft could represent a competitive constraint vis-à-vis Oracle, PeopleSoft and SAP despite the limitations in its product offerings and is to be treated as a vendor in the market for high-function FMS and HR solutions.

3.1.7 Mid-market HR and FMS solutions or software

- (167) Oracle and PeopleSoft (including JD Edwards) are also established players in the market(s) for ERP applications typically adapted to and purchased by mid-size enterprises.
- (168) The Commission found indications that the market for software applications for mid-size enterprises (approximately having annual revenues between EUR 30 million and EUR 1 billion) may not only be distinct from the markets for high-function FMS and HR solutions, but also from the markets for applications for small enterprises (that is to say, those with revenues below EUR 30 million). With respect to the delineation of the mid-

⁹⁰ Testimony Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, pages. 3016, 3100.

⁹¹ Testimony Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, pages. 3100.

⁹² Testimony Doug Burgum, Senior Vice President of Microsoft, US trial transcript of 23 June 2004, pages. 3103.

market software as opposed to the high-function FMS and HR software, it should be borne in mind that the revenue figure of EUR1 billion relating to the typical size of the customer only serves as a proxy, while the essential criterion which separates the up-market from the mid-market is the complexity of the needs of the customers which are served by FMS and HR high-function software or solutions. Applications adapted to the needs of mid-size enterprises are usually out-of-the box solutions which are not necessarily in-depth configured for the structure and the needs of the individual enterprise. They typically provide a limited scope of functions, that is to say, the FMS and HR functions are limited in number as well as in their scope or breath and they are optimised to be easily adaptable for such organisations. As regards the delineation of a the mid-market from the lower end, the Commission found indications that applications software for small businesses only cover the basic needs of an enterprise with a uniform organisational structure.

- (169) The Commission further found indications that, within software applications typically adapted and purchased by mid-size companies, separate markets for FMS and HR solutions can be distinguished (respectively and as opposed to other EAS software). In fact, even though customers may buy out-of-the-box solutions which extend over several pillars, including FMS and HR, for mid-size companies FMS and HR functionalities are not substitutable from a demand side perspective either between themselves, or with any other functionalities related to other pillars (CRM, SCM etc.). Also, from a supply side perspective some of the vendors are only active in either FMS or HR.
- (170) In any case, the exact delineation of the product markets for mid-market HR and FMS solutions, in particular as regards the size of the companies concerned, can be left open as the transaction does not lead to competition concerns on the basis of any of these possible market definitions.

3.1.8 Conclusion on the relevant product markets

- (171) Based on the above, the relevant product markets are high-function FMS and HR solutions or software for large enterprises with complex functional needs. The main players in this market are SAP, Oracle and PeopleSoft. However, the Commission has come to the conclusion that several other vendors cannot be excluded as vendors from the markets for high-function FMS and HR applications. For the purposes of the assessment of the present case, 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 a vendor for FMS high-function solutions.
- (172) Furthermore, there are distinct markets for mid-market HR and FMS solutions.

3.1.9 Geographic Markets

3.1.9.1 Markets for HR and FMS high-function solutions or software

- (173) In the procedure in front of the Commission, Oracle suggested that the geographic scope of the market for EAS solutions is EEA-wide although Oracle argued in the US trial that the geographic market was global⁹³.
- (174) In past decisions, the Commission considered that the market for EAS was at least EEA-wide, but left the exact definition of the geographic scope of the market open⁹⁴.
- (175) The market investigation gave clear indications that the geographic scope of the market for high-function HR and FMS solutions for LCEs is world-wide. When launching a tender, most would-be customers which could be considered complex corporations would initially consider offers for EAS solutions from suppliers (or subsidiaries of vendors) located in the EEA, the United States and other parts of the world without consideration of the geographic region where the company originates. In addition, no specific barriers or other technical hurdles exist that in principle restrict EAS suppliers from actually responding to bids originating from large corporations regardless of their geographical location around the world. This does not exclude that, when looked at from a regional or country perspective, vendors' position and relative strength or share of sales may also vary to a significant extent. However, this is not an element that would suggest a narrower delineation of the relevant geographic scope as regards the relevant product market at stake.
- (176) 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. It is thus concluded that the finding of a world market is in line with the bidding data submitted to the Commission by Oracle and with Oracle's assertion that the scope of the geographic market in this case was "so clear [global in scope] that reasonable people ought not be debating it"⁹⁵.

3.1.9.2 Markets for mid-market HR and FMS solutions or software

- (177) The Commission found indications that the markets for HR and FMS solutions adapted to the needs and purchased by mid-size companies may be more restricted in geographic scope than the markets for high-function FMS and HR solutions. The customers are not world-wide active corporations, but are more likely to be smaller companies, usually focussing on a limited geographical area in which they also procure their software needs. Also, vendors of FMS and HR mid-market solutions have a more regional focus: they do not usually sell their applications directly via a direct sales force, as the suppliers of high-function HR and FMS solutions do, but via partners and resellers with a limited

⁹³ Oracle's Post Trial Brief, pages 22 – 24.

⁹⁴ Commission decision of 23.11.1998, Case IV/M.1114 - SAP / Heidelberg.

⁹⁵ Oracle, US Post Trial Brief, page 22.

geographic coverage, with the result that the strength of the vendors in a certain territory depends considerably on the respective resellers chosen in that territory.

- (178) Consequently, the Commission found indications that the markets for mid-market HR and FMS solutions may not be wider than EEA-wide in scope. However, the geographic scope of the market can be left open as the transaction does not raise competition concerns irrespective of the exact delineation.

3.2 Conclusion on relevant markets

- (179) The relevant markets for the assessment of the transaction are the markets for high-function FMS and HR solutions to serve the needs of large enterprises with complex functional needs. The main players in these markets are SAP, Oracle and PeopleSoft. However, several other vendors cannot be excluded as vendors from the markets for high-function HR and FMS applications. For the purposes of the assessment of the proposed transaction, Lawson, Intentia, IFS and Microsoft are to be treated as vendors of HR and FMS high-function applications and QAD is to be treated only as a vendor for FMS high-function solutions. The geographic scope for both product markets is world-wide.
- (180) Further relevant markets for the assessment of the transaction are the markets for mid-market FMS and HR solutions. The geographic scope of these markets can be left open.

B. EFFECTS OF THE CONCENTRATION

(1) Market size and market shares

- (181) The calculation of the market size of the relevant markets has proven to be particularly difficult, as neither publicly available industry studies, nor the parties provide a segmentation of vendors' revenues according to the segmentation of the market (upmarket, mid-market and small businesses market)⁹⁶. Only one industry study⁹⁷ reports total ERP license revenue split by customer size. Revenues stemming from large companies (identified in this report as companies having revenues over USD 1 billion) represented 28% of the total ERP license revenues achieved in 2002 (USD 6,1 billion), that is to say, around USD 1,7 billion.
- (182) Applying a similar split (28%) to the FMS and HR values given in Form CO would lead to world-wide revenue levels of about USD 0,5-0,6 billion for FMS (Gartner 2002) and about USD 0,3 billion for HR (Gartner 2002). These figures must be taken with some caution, as they take put more emphasis on "large customers" than on products sold.

⁹⁶ In addition, estimates of the total size of the EAS market differ widely among various industry reports (Gartner, IDC).

⁹⁷ AMR Research, The Enterprise Resource Planning Report, 2002 – 2007, see table 7.

- (183) The difficulties in the context of market delineation also exist as regards the calculation of exact market shares, given the above described issue of defining exactly what a large undertaking with complex functional needs is and, in addition, due to the lack of direct information available at the vendors of EAS solutions, as regards high-function software sales.
- (184) 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 specified in the section on market definition on the basis of their total revenues, independent of whether these are achieved in the upmarket or in the mid-market. The (rounded) shares indicated in Table 1 below are based on figures produced by Gartner for 2002 on a worldwide basis:

Table 1

Total Licences Revenues 2002 Worldwide	FMS	HR
Oracle	16%	13,5%
PeopleSoft	9%	30%
JD Edwards	3%	2,5%
Oracle/PeopleSoft/JD Edw. 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

- (185) The Commission furthermore assessed the relative strength of Oracle, PeopleSoft, JD Edwards and SAP for FMS and HR solutions (individually and combined) on the basis of data obtained from Oracle, PeopleSoft/JD Edwards and SAP in reply to Commission's questionnaires⁹⁸. These data include revenues obtained from all licences sold (therefore including licences sold to mid-market companies), excluding maintenance or installation fees. These shares, which do not constitute market shares since the other players in the market are not taken into account, are indicated in Table 2 below:

Table 2

Total Licences Revenues 2002 Worldwide	FMS	HR
Oracle	19%	18%
PeopleSoft	12%	33%

⁹⁸ The market shares therefore add up to 100%.

JD Edwards	4%	2%
Oracle/PeopleSoft/JD Edw. Combined	35%	53%
SAP	65%	47%

Source: Reply to Commission's Questionnaires: 2002 Total licence revenues received from Oracle, PeopleSoft, JD Edwards and SAP (all customers)

- (186) It should be noted that the shares in both tables do not necessarily reflect the respective market shares of the vendors in the markets for high-function FMS and HR applications; the shares in both tables are used by the Commission as a first indication of the relative strength of the different vendors in the market. The tables 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.

(2) Creation of a dominant position, as a result of which effective competition will be significantly impeded

A. High-function HR and FMS solutions or software

2.1 Non-coordinated effects

- (187) In the statement of objections the Commission based its concerns in part on the finding that significant non-coordinated effects would arise from the transaction. In the reply to the statement of objections, Oracle contested the Commission's competence to assess such effects under the dominance test incorporated in Regulation (EEC) No 4064/89. It is not necessary to address Oracle's submission on the lack of competence as, on the basis of the new evidence obtained after the Oral Hearing, it has been concluded that no such anticompetitive effects are likely to result from the merger.
- (188) The Commission based its concerns in the statement of objections partly on the finding that 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.
- (189) The group with particularly limited choice after the merger consists *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 database⁹⁹, those customers who would like to terminate their 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 have software and database provided by the same supplier.

⁹⁹ Oracle's software only runs on Oracle's database, while PeopleSoft and SAP's software also run on other databases.

- (190) 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.

2.1.1 Simulation of the effect

- (191) Prior issuing the statement of objections, the Commission had constructed a model with a view to simulating the impact of the transaction on prices and, more broadly, the economic benefit to customers from participating in the market. These simulations indicated that insofar as the merger would lead to a reduction in the number of viable contenders in a bidding contest from three to two, it was likely to lead to significant harm to customers due to a combination of reduced choice and increased prices.
- (192) In the reply to the statement of objections, Oracle raised a number of objections to the use of simulation models in general and the relevance of the proposed model in this case in particular.
- (193) As a general matter Oracle submits that the use of simulation models is controversial due to the unavoidable need to make simplifying assumptions. In this respect simulation models can at best be seen as a crude indicator rather than solid evidence¹⁰⁰. The Commission agrees that the use of simulation models depends critically on the ability of the model to adequately capture the fundamental mechanisms that drive the behaviour of the different market participants and that, in principle, the assessment as to whether that is the case in any particular case may be a subject of debate. For models to be mathematically tractable it is necessary to make simplifying assumptions and in this process it is important to ensure that the essential mechanisms that are left in the model adequately reflect the reality.
- (194) But the debate over which simplifications to accept in the model should not obscure the fact that any prospective analysis of the effect of a merger will inherently be based on assumptions. A prediction of the effect of a merger made within the framework of a model is based on a high degree of transparency regarding the logical consistency of the prediction as well as its underlying assumptions. A prospective analysis made outside the framework of an economic model based on qualitative assessment is equally, though in a less transparent and implicit way, based on a number of assumptions and may therefore equally be subject to the same kinds of criticisms.
- (195) The Commission therefore maintains as a general point that this kind of simulation model can be a useful tool in assisting the Commission in making the economic assessment of the likely impact of a merger.
- (196) In this particular case, it is clear that the simulation model was based on the assumption of only three bidders being present in the market. In the light of the findings with regards to the market definition, this assumption cannot be upheld. The Commission has found that it would not be appropriate to rely on the results of the model in order to demonstrate the harmful effects of the merger on a more broadly defined market. As a

¹⁰⁰ Oracle's reply to the Commission's statement of objections, pages 215-216.

result, it is not necessary to make a detailed assessment of the particular criticisms of the model submitted by Oracle in the reply to the statement of objections.

2.1.2 *Bidding data*

- (197) In the statement of objections, the Commission partially relied on an econometric analysis of a dataset containing information about PeopleSoft's discounting in 101 competitive bidding situations. These data appeared to suggest a relationship between the number of bidders in a given contest and the discount that was offered by PeopleSoft¹⁰¹. The Commission noted that the method of analysis on which this finding was based appeared to be rather crude and simplified and that it was based on a somewhat limited number of bids.
- (198) After the Oral Hearing, Oracle undertook to produce a similar dataset based on its historical participation in bidding contests. Oracle produced information regarding bids for EAS suites concerning HR and FMS functionality for the period 2001-2003 where the company or its relevant division had more than 10 000 employees or where the turnover of the company or the relevant business division was in excess of USD 1billion.
- (199) The Commission ran a number of regressions on the dataset provided directly by Oracle, the two Oracle datasets from the US Court proceeding referred to in the section on market definition as well as the PeopleSoft dataset referred to in the statement of objections. The purpose was to investigate the extent to which the competitive situation of a particular bid (measured by the number and identity of final round bidders) had an impact on the discounting offered by the seller in question (that is to say, PeopleSoft in PeopleSoft's dataset and Oracle in Oracle's datasets).
- (200) 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 deal size and discount was not properly taken into account, the discounting behaviour appeared to be affected by the number of competitors. The initial finding referred to in the statement of objections was indeed such a regression.
- (201) Once the size of the deal was taken into account in the analysis¹⁰² the number of final bidders no longer provided any additional explanatory element over the discount offered and no general pattern emerged regarding the presence of a particular competitor prompting particularly high discounts¹⁰³.
- (202) 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 conclusively

¹⁰¹ PeopleSoft regression analysis submitted 10.03.2004.

¹⁰² Measured as the logarithm of the size of the gross licence value.

¹⁰³ There appeared some indications in one dataset that the presence of JD Edwards did lead Oracle to offer higher discounts.

that the merger will have no harmful effects on customers. There may be a variety of reasons why such an effect is absent from the bidding data, not all of them due to absence of competitive harm.

- (203) One reason for the absence of any effects in the data could be that the quality of the data is low or that it suffers from a bias in selection. Another could be that Oracle (and its competitors), when deciding what to bid, does not consider the information about actual competitors sufficiently reliable to want to base its behaviour on it. A third reason could be that the identity of bidders in the final round is an incomplete picture of the actual competitive process¹⁰⁴.
- (204) It is not necessary for the Commission to reach a conclusion on this issue since it is clear that the absence of an appreciable effect of the number or identity of final round competitors on Oracle's behaviour makes the bidding data unsuitable to rely on as proof of an anticompetitive effect of the merger.
- (205) From the above conclusion and in the light of the Commission's findings that buyers are very sophisticated when acquiring software, that they can structure the competitive bidding process as they prefer in order to exert competitive pressure on the bidders, including re-inviting bidders previously excluded from the contest, that they are in control of the flow of information to the bidders about who else is bidding, that the market after the merger will still contain more bidders than buyers usually invite to the final round and that SAP remains a very strong competitor, it cannot be concluded that Oracle is likely to be in a position to profitably increase prices after the merger.

2.2 Coordinated effects

- (206) In the statement of objections the Commission also based its concerns 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 which 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.

¹⁰⁴ Sometimes the competitive pressure does affect the price that a customer can obtain even when it does not result in a direct bidding contest. Mr. Wesson, the CIO from the largest owner and operator of apartment buildings in the US, AIMCO, explained in the US Court proceedings how AIMCO had obtained a very substantial discount from PeopleSoft (70%) in return for closing the deal very fast (PeopleSoft wanted to close the deal fast in order to be able to include the deal in the sales for that particular quarter). Such a deal would appear to be one with no competitors, but it is unlikely that AIMCO could have obtained a similar discount absent a significant competitive pressure on PeopleSoft. Furthermore, the elimination of one bidder before the final round cannot always be considered a final decision. So bidders in the final round may be more compelled to offer an attractive price if they perceive a risk that too high a price offer may lead the customer to reconsider previously eliminated options. Mr. Chianowicz testified that Nextel did not invite SAP into the final round. Yet he stipulated: "we felt, though, that the fact that there were three viable alternatives out there still gave us an opportunity to look at SAP, if, in fact, negotiations would fall apart with PeopleSoft or Oracle" (transcript of the US trial 061404.txt 1068:13-17).

- (207) In the light of the conclusions regarding the market definition it is not possible to conclude that the merger will lead to a collective dominant position of a combined Oracle/PeopleSoft and SAP on the basis of coordinated effects.
- (208) According to the judgment of the Court of First Instance in *Airtours v Commission*¹⁰⁵, a collective dominant position requires that the companies reach a common understanding about the terms of coordination and that the following three conditions are met as necessary for co-ordination to be sustainable. First, the coordinating firms must be able to monitor whether the terms of coordination are adhered to. Second, discipline requires that there is some form of deterrent mechanism in case of deviations. Third, the reaction of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination¹⁰⁶.
- (209) 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 may reach a common understanding as regards the parameters outlined above. In particular, an allocation of customers according to geography or sector will not be possible due to the larger group of possible vendors of such software. Also, among seven credible bidders a common understanding as regards a softening of price competition and a slow-down of product improvements appears difficult to reach and to sustain. The difficulty in reaching a common understanding lies in particular in the fact that HR and FMS high-function software are differentiated products. These products do not only differ between the various vendors, but also between the products sold by one vendor to different customers due to the adaptation of the products to the needs of the respective customer. The larger number of vendors also reduces the transparency in the market and would make retaliatory actions more difficult.
- (210) Furthermore, the players are no longer symmetrical in market shares, but the vendors beside Oracle, PeopleSoft and SAP are significantly smaller in the relevant markets. They do not have similar structural links to those of SAP and Oracle in the area of databases. Lawson's re-sale of Oracle databases appears to be marginal compared to the sale by SAP, while Microsoft uses its own databases for its ERP products.
- (211) The Commission therefore concludes that the transaction is not likely to lead to coordinated effects among all the vendors of high-function FMS and HR applications.
- (212) Also, the Commission cannot conclude that the merger will lead to a coordination of the competitive behaviour of only a combined Oracle/PeopleSoft and SAP. The characteristics of the markets for high-function FMS and HR solutions make a coordination of the competitive behaviour of the vendors difficult. The products offered are very heterogeneous and differ even between products sold by the same vendor to different customers. This reduces the transparency in the market considerably. The product differentiation also develops over time due to the improvement of products and the adding of functionality to the applications. A common understanding as regards a

¹⁰⁵ Court of First Instance, Case T-342/99, *Airtours v. Commission*, ECR 2002, II-2585, paragraph 59.

¹⁰⁶ Case T-342/99, *Airtours v. Commission*, para. 61.

softening of price competition is further complicated by the existence of huge discounts in the market, which reduces the market transparency as regards price.

- (213) In such a market in which the transparency is reduced, in particular, by the very heterogeneous products, a coordination of the competitive behaviour of vendors would be difficult to achieve. Nevertheless, the Commission does not exclude that coordination could be conceivable in such a market if there were only two players and no outsiders could destabilize such a duopoly. However, it is not necessary to develop this point further because, in this case, the Commission has found that the other vendors mentioned in the section on market definition – Lawson, Intenia, IFS, QAD and Microsoft - appear to be suitable alternatives to a combined Oracle/PeopleSoft and SAP and credible bidders. The Commission data and the dataset submitted by Oracle on 27 September 2004 show that these vendors have won bids for software in the relevant markets in competition to SAP, Oracle and PeopleSoft and that they were invited to a larger number of final rounds even though their respective share appears to be quite small.
- (214) It is therefore concluded that a coordination of the competitive behaviour - be it by the allocation of customers in a duopoly, a reduction in price competition or a common understanding to slow-down the addition of further functionalities and the improvement of products - of a combined Oracle/PeopleSoft and SAP in the markets for high-function FMS and HR solutions could not be successfully sustained.

B. Mid-market HR and FMS solutions or software

- (215) Oracle and PeopleSoft (including JD Edwards) are further established players in the markets for HR and FMS solutions adapted to the needs and typically purchased by mid-size companies.
- (216) In the markets for HR and FMS mid-market software solutions, significantly more players are active than in the markets for high-function FMS and HR solutions. Suppliers to mid-size companies include those described in detail above, namely. 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). Whereas no specific market shares for the mid-market applications are available, the overall revenues achieved for 2002 (on the basis of analyst reports¹⁰⁷) show that, on a world-wide basis, SAP would remain the strongest player on 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.
- (217) 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 Europe¹⁰⁸. SAP’s position would be stronger in Europe than on a world-wide basis in both FMS and

¹⁰⁷ Gartner, ERP Market Experiences Further Decline: Market Statistics 2002, published on 2 July 2003.

¹⁰⁸ Gartner, Enterprise Resource Planning Software Market: Europe 2002, published in 2003.

HR whereas the position of a combined Oracle/PeopleSoft would be weaker. For FMS, a combined Oracle/PeopleSoft would only be the fourth player after SAP, Sage and Microsoft MBS. Other competitors in FMS would include Hyperion, Systems Union, Unit4, Agresso, SSA Baan and Intentia. In HR, a combined Oracle/PeopleSoft would take the second position, having less than half the revenues of SAP. The combined Oracle/PeopleSoft would be followed by Sage, Microsoft MBS, Midland, Meta4, Intentia, Unit4, Agresso and Rebus.

- (218) 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

- (219) For the reasons set out above, it is concluded that the proposed concentration does not create nor strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. The concentration is therefore to be declared compatible with the common market pursuant to Article 8(2) of the Merger Regulation and with the EEA Agreement pursuant to Article 57 thereof.

HAS ADOPTED THIS DECISION:

Article 1

The notified operation whereby Oracle Corporation acquires control, within the meaning of Article 3(1)(b) of Regulation (EEC) No 4064/89, of PeopleSoft Corporation is hereby declared compatible with the common market and the functioning of the EEA Agreement.

Article 2

This Decision is addressed to:

Oracle Corporation
500 Oracle Parkway
USA-94065 Redwood Shores, CA
United States of America

Done at Brussels, 26.10.2004

For the Commission

Mario MONTI
Member of the Commission

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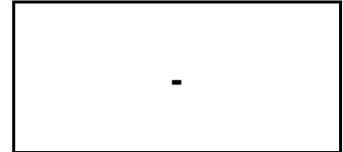
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EUROPEAN COMMISSION

The Hearing Officer



FINAL REPORT OF THE HEARING OFFICER
IN CASE COMP/M.3216 – ORACLE/PEOPLESOFT

**(pursuant to Article 15 of Commission Decision (2001/462/EC, ECSC)
of 23 May 2001 on the terms of reference of Hearing Officers
in certain competition proceedings – OJ L162, 19.06.2001, p.21)**

On 14 October 2003, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/69, as amended by Regulation (EC) No 1310/97 (“Merger Regulation”), by which the undertaking Oracle Corporation United States (“Oracle”) acquires within the meaning of Article 3(1)(b) of the Merger Regulation, sole control of the undertaking PeopleSoft Inc. United States (“PeopleSoft”) by way of a public bid.

On 17 November 2003 the Commission decided to initiate proceedings in this case pursuant to Article 6(1) (c) of the Merger Regulation and Article 57 of the EEA Agreement.

On 6 January 2004 the procedure was suspended when Oracle failed to supply information requested by a formal Commission decision within the time limit specified therein. Upon receipt of the information the procedure was resumed 12 February 2004.

In the course of the Commission’s in-depth investigation, Oracle requested a number of documents on the basis of the Commission’s Best Practices on the conduct of EC merger control proceedings. Oracle did not receive all the documents it had requested. However, considerable efforts were made to ensure that key documents were made available including, in particular, non-confidential submissions provided by PeopleSoft.

A Statement of Objections (“SO”) was sent to Oracle on 12 March 2004. Upon request, an extension of the time limit to reply was granted until 29 March 2004.

Access to the file was made available to Oracle by way of CD-Rom on 12 March 2004.

Confidential data on Bids and Deals was deleted from the responses submitted by competitors but instead was made available to Oracle in a non-confidential format on a spreadsheet. Bid data obtained from customers was provided in the form of a Word document analysing the customer replies, together with a spreadsheet with data compiled from replies, expressed in a non-confidential manner.

A data room was set up to enable Oracle’s economists to verify PeopleSoft bidding information that had been used for the regression analysis submitted to the Commission. This was made possible due to a confidentiality agreement signed by Oracle’s economists in agreement with PeopleSoft. In addition, on 22 March 2004, Oracle’s economists were given

access to more precise figures on bid data in replies from competitors and customers. Names of competitors and customers, however, were not disclosed.

Oracle's view was that these measures were not sufficient to provide them with the appropriate degree of access. In particular, Oracle wanted to verify the accuracy of figures provided in the spread-sheets and also via their economists, to analyse information provided by PeopleSoft and other market participants that in Oracle's view would be useful to their defence. Specifically in this respect, Oracle requested access to the names of the competitors and customers providing replies.

My own view at the time was that sufficient access had been granted to Oracle in order to enable them to exercise their rights of defence at that stage of the procedure.

When further access was not made available, Oracle's views on this subject were set out in detail in their reply to the SO. This would have required a substantiated response.

In the event however, the fact that the Commission's objections against the proposed concentration are now dropped means that the issue of access to file is rendered obsolete. It is also noted that, subsequent to the reply to the SO and the oral hearing, the factual basis of the Commission's investigation and competitive assessment, was broadened by additional information provided by Oracle in response to the Commission's request for information and also by information rendered available during the US trial.

As regards PeopleSoft, as an involved party, they were provided with a non-confidential version of the SO in accordance with Article 13 (3) second paragraph of Regulation No 447/98 (Implementing Regulation). Certain additional documents submitted by Oracle in the course of the procedure were also disclosed as soon as non-confidential versions were made available. Upon request, PeopleSoft also received a non-confidential version of Oracle's reply to the SO, albeit only on 3 May 2004.

The Oral Hearing took place on 30 March and 1 April 2004. Apart from Oracle and PeopleSoft, SAP, ING Europe and SSA Global were admitted to participate as interested third parties. These third parties were supplied by the case-team with a non-confidential version of the SO.

On 13 April 2004 the Commission suspended the procedure in the case for a second time further to the failure of Oracle to respect the time limit to supply information requested in a formal Commission decision. This request had been made in order to enlarge the scope of the factual information upon which the Commission's competition assessment could be made. Upon request, PeopleSoft was supplied with a copy of the Commission decision sent to Oracle. The procedure was resumed on 7 October upon receipt of the information required by the Commission.

On the basis of a further analysis based on all evidence acquired, DG Competition has concluded that the objections set out in the SO cannot be maintained.

In the light of the above, I consider that the rights to be heard of all participants to the present proceeding have been respected.

Brussels, 19 October 2004.

(signed)
Karen WILLIAMS



OPINION

**of the ADVISORY COMMITTEE on CONCENTRATIONS
given at its 129th meeting on 19 October 2004
concerning a preliminary draft decision relating to**

Case COMP/M.3216-Oracle/PeopleSoft

1. The Advisory Committee agrees with the Commission that the notified operation constitutes a concentration within the meaning of the Merger Regulation (EEC) No 4064/89 and that it has a Community dimension as defined by that Regulation.
2. The Advisory Committee agrees with the Commission that there is a relevant product market for:
 - a. High-function human resources (HR) solutions for large and complex enterprises;
 - b. High-function financial management (FMS) solutions for large and complex enterprises.
3. The Advisory Committee agrees with the Commission that best-of-breed software is not part of the markets for high-function FMS and HR solutions.
4. The Advisory Committee agrees with the Commission that outsourcers do not represent competitive constraints vis-à-vis high-function HR and FMS software.
5. The Advisory Committee agrees with the Commission that consultants and system integrators, as well as in-house systems, do not exert any substantial competitive constraint on the EAS market.
6. The Advisory Committee agrees with the Commission that the above mentioned product markets are global in scope.
7. The Advisory Committee agrees with the Commission that in the markets for high-function FMS and HR for large and complex enterprises, Oracle, PeopleSoft and SAP are the main players, but that it cannot be excluded that Lawson, Intenia, IFS, Qad and Microsoft are vendors in those markets.
8. The Advisory Committee agrees with the Commission that the proposed concentration will not lead to the creation nor the strengthening of a single dominant

position in the markets for high-function FMS and HR for large and complex enterprises.

9. The Advisory Committee agrees with the Commission that the proposed concentration will not lead to the creation nor the strengthening of a collective dominant position in the markets for high-function FMS and HR for large and complex enterprises.
10. The Advisory Committee agrees with the Commission that the proposed concentration does not create nor strengthen a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it and that the concentration therefore is to be declared compatible with the Common Market and with the EEA Agreement.
11. The Advisory Committee recommends publication of its opinion in the Official Journal of the European Union.
12. The Advisory Committee asks the Commission to take into account all the other points raised during the discussion.

<u>BELGIË/BELGIQUE</u>	<u>ČESKÁ REPUBLIKA</u>	<u>DANMARK</u>	<u>DEUTSCHLAND</u>	<u>EESTI</u>
(Signed)			(Signed)	
V. HABILS	---	---	E. MÜLLER	---
<u>ELLADA</u>	<u>ESPAÑA</u>	<u>FRANCE</u>	<u>IRELAND</u>	<u>ITALIA</u>
		(Signed)		(Signed)
---	---	S. MARTIN	---	M.G. PAZZI
<u>KYPROS/KIBRIS</u>	<u>LATVIJA</u>	<u>LIETUVA</u>	<u>LUXEMBOURG</u>	<u>MAGYARORSZÁG</u>
<u>MALTA</u>	<u>NEDERLAND</u>	<u>ÖSTERREICH</u>	<u>POLSKA</u>	<u>PORTUGAL</u>
	(Signed)	(Signed)		(Signed)
---	A. WESSELS	D. PAPARELLA	---	F. MATOS
<u>SLOVENIJA</u>	<u>SLOVENSKO</u>	<u>SUOMI-FINLAND</u>	<u>SVERIGE</u>	<u>UNITED KINGDOM</u>
		(Signed)	(Signed)	(Signed)
---	---	A. IHAMÄKI	O. BERGSTRÖM	I. NITSCHÉ