

Antitrust Law Blog

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EC Declines to Follow DOJ's Lead, Opens In-Depth Investigation of Oracle-Sun Deal

On September 3, 2009, the European Commission ("EC") announced that it was opening an in-depth investigation under the EU Merger Regulation of Oracle Corporation's proposed acquisition of Sun Microsystems. This announcement came despite the Department of Justice's ("DOJ") extended review and approval of the same deal without conditions in late August, in addition to DOJ's recent signaling of tougher merger review standards and closer cooperation with European competition authorities.

While DOJ's extended review is understood to have focused on the licensing of Java open-source software, Neelie Kroes, EC's Competition Commissioner, stated that Brussels wanted to look more closely at the impact on the database software business of Oracle, one of the leaders in that market, acquiring control of MySQL, an open source database product that was acquired by Sun last year. "The Commission has to examine very carefully the effects on competition in Europe when the world's leading proprietary database company proposes to take over the world's leading open source database company."

The EC's initial investigation confirmed that the database market is highly concentrated with three main competitors of proprietary databases – Oracle, IBM and Microsoft – controlling approximately 85% of the market in terms of revenue. The EC is concerned that the Oracle databases and Sun's MySQL compete directly in many sectors of the database market and that MySQL is widely expected to represent a greater competitive constraint as it becomes increasingly functional. The EC is also worried that the open source nature of Sun's MySQL might not fully eliminate the potential for anti-competitive effects and wants to investigate a number of issues, including Oracle's incentive to further develop MySQL as an open source database.

The EC's decision, in general, and the nature of the EC's concerns, in particular, has caused some concerns with industry observers who have highlighted that MySQL generated revenues of only €17m (\$24m) in Europe last year, and its roughly \$70m of annual sales make it only the 14th-largest database software maker.

Nonetheless, the EC's investigation appears to respond to claims from Oracle rivals that the

software maker would have little incentive to continue developing a product that could ultimately be prove disruptive to its core business. Ms Kroes explained:

[The EC] has an obligation to ensure that customers would not face reduced choice or higher prices as a result of this takeover. Databases are a key element of company IT systems. In the current economic context, all companies are looking for cost-effective IT solutions, and systems based on open-source software are increasingly emerging as viable alternatives to proprietary solutions. The Commission has to ensure that such alternatives would continue to be available.

The EC's decision to open an in-depth inquiry does not prejudge the final result of its investigation. The EC now has until January 19, 2010, to take a final decision and may consider (1) structural commitments – such as the divestment of MySQL; or (2) behavioral conditions – such as the continued licensing and development of MySQL software.

Authored by:

[Neil Ray](#)

(619) 338-6595

NRay@sheppardmullin.com