

## COMPETITION LAW



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**EU High Court Affirms €21M Cartel Fine Against Akzo**

THURSDAY, SEP 10, 2009

The European Union's highest court on Thursday upheld a €20.99 million (\$30.6 million) fine against Dutch chemical giant Akzo Nobel NV and four wholly owned subsidiaries for their alleged participation in a cartel over vitamin B4, used mainly in animal feed.

**DMCA Claim To Proceed In Avaya Trade Secrets Suit**

## GUEST COLUMNS

**Another US Merger Europe Might Stop?**

While the outcome of the Oracle Corp.-Sun Microsystems Inc. deal is unknown, competitors such as IBM Corp. and Hewlett-Packard Co. might be trying to stir up fears among Sun's customers about what Oracle's plans for the company might be. Tactics like that may well work and could be disastrous for Sun at the end, says Sebastian Jungermann of Kaye Scholer LLP.

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## Another US Merger Europe Might Stop?

Law360, New York (September 10, 2009) -- Since the European Commission has rejected General Electric's planned \$42 billion acquisition of Honeywell International Inc. in June 2001, both, EU and U.S. authorities have made considerable efforts to reduce the possibility of conflict.

In 2001, the European Commission fully backed Competition Commissioner Mario Monti's decision to block the takeover of Honeywell even though the U.S. has cleared this transaction.

"The merger between GE and Honeywell, as it was notified, would have severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, particularly airlines," Monti said in a statement at that time.

Eight years later, another billion dollar deal, Oracle Corp.'s takeover of Sun Microsystems Inc., might be blocked by the European Commission again. After merger talks between IBM Corp. and Sun ended in April 2009, Oracle announced its offer on April 20 to pay \$9.50 in cash per share of Sun common stock.

As of Sept. 3, 2009, the European Commission has put a hold on the proposed \$7.4 billion merger between Oracle and Sun. This decision is especially sensitive because the U.S. Department of Justice's Antitrust Division completed its review and approved the merger in August 2009.

Even though regulators in the United States questioned Oracle's market power in some areas of its business, they have raised fewer concerns than the European Commission about open-source software.

The European Commission did not clear this transaction during its phase I review and has commenced an in-depth phase II investigation.

Competition Commissioner Neelie Kroes said: "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.

"In particular, the commission 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."

Oracle and Sun filed their notification in Europe in late July 2009, more than two months after informing U.S. officials. The European Commission usually has to reach a phase I decision within 25 working days, that period may be extended though under certain requirements.

Even though most merger cases are cleared during that phase I review, the Oracle-Sun merger was not. During its phase I review the commission had serious doubts that the proposed Oracle-Sun deal may give rise to a significant impediment to effective competition; the European Commission now commenced an in-depth phase II investigation.

The basic period for such phase II investigation is 90 working days, which will end on Jan. 19, 2010, for the Oracle-Sun case (if to will not be extended in case remedies are offered or in case the parties agree to an extension).

The European Commission's initial market investigation in phase I indicated that the proposed acquisition would raise serious doubts as to its compatibility with the European single market because of competition concerns on the market for databases.

The European Commission will now have to take a final decision on whether the concentration would significantly impede effective competition within the European Economic Area or a substantial part of it.

In general, also foreign-to-foreign mergers have to be notified with the European Commission when the European thresholds are met.

In theory, a local "hold-separate" arrangement might be acceptable for the European Commission to permit closing before clearance from the European Commission, but generally foreign-to-foreign mergers cannot be closed outside the EU without breaching the European Merger Regulation suspension obligation, unless the commission grants a derogation, which is very rare and highly unlikely in this case.

However, the European Merger Regulation prohibits a concentration that significantly impedes effective competition in the common market, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

If the European Commission thinks that a transaction is incompatible with the common market, it may block it or accept remedies such as divestment to an approved buyer or behavioral conditions.

Due to the European Commission their major concern is that Oracle's database software competes directly with Sun's MySQL open-source database platform.

MySQL is a relational database management system which has millions of installations worldwide. This software program runs as a server providing multi-user access to a number of databases. Its source code is available under terms of the GNU General Public License, as well as under a variety of proprietary agreements.

MySQL has been owned by the Swedish company MySQL AB and was taken over by Sun in 2008 for reportedly \$1 billion. MySQL is often used by free software projects which require a full-featured database management system, MySQL is also used in very high-scale World Wide Web products including Google, Facebook, Yahoo, Nokia, Siemens and others.

Sun's MySQL software could "represent a greater competitive constraint as it becomes increasingly functional," the European Commission said.

Although Sun's MySQL is open source, that might not decrease the potential anti-competitive effects of the transaction, the European Commission said. The alternative would be for Oracle to offer a compromise, such as selling off MySQL or making the commitment that other developers could still base software on MySQL code.

Whatever the outcome will be in Europe, this holdup represents a serious delay for a transaction that was originally expected to raise little antitrust scrutiny.

One reason Oracle came together with Sun was because Oracle was seen as a safer suitor than IBM Corp., which also bid for Sun in April 2009. IBM was viewed as a bigger antitrust risk because Sun and IBM overlap in the data-storage and server markets.

The European Commission sees the database market as a highly concentrated market, with the three main proprietary software companies — Oracle, IBM and Microsoft — controlling 85 percent of the market by revenue.

In more complex transactions the European Commission quite often contacts relevant third parties such as customers, suppliers and competitors for their views on the proposed merger and require them to complete detailed questionnaires on the relevant markets, even during the phase I review.

As laid down in the Best Practice Guidelines, "state-of-play meetings" may be held with such parties at different stages during the investigation and the European Commission may also call for so-called triangular meetings with the merging parties and also interested third parties to allow points of concern to be raised and discussed.

While the outcome of the Oracle deal is unknown, competitors such as IBM and Hewlett-Packard Co. might be trying to stir up fears among Sun's customers about what Oracle's plans for the company might be. Tactics like that may well work and could be disastrous for Sun at the end.

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*The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*

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