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Oracle/Sun Microsystems: The challenge of reviewing a merger involving open source software

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1. Introduction

On 21 January 2010 the Commission unconditionally cleared the planned takeover of Sun Microsystems (‘Sun’), a software and hardware vendor, by Oracle Corporation (‘Oracle’), one of the world’s leading software companies. The clearance followed an extensive investigation into the database market where Oracle was the leading proprietary vendor and Sun the leading open source vendor. The case also attracted a certain level of public attention and triggered reactions by many parties. The legal test applied in this case was not based on the acquisition or strengthening of a dominant position but on the elimination of an important competitive force, which would be Sun’s MySQL. The Horizon
tal Merger Guidelines (2) recognize that some firms, despite having a relatively small market share may be an important competitive force and that a merger involving such a firm may change the competitive dynamics in a significant, anti-competitive way.

In this context, the Commission was also for the first time faced with the question of how to assess the competitive force of an open source software product such as MySQL. Sun distributed MySQL free of charge and derived revenue mainly from optional service contracts. Therefore MySQL’s market share measured in revenue was very low. The open source nature of MySQL moreover required the Commission to look specifically at the incentive and ability of Oracle to degrade or eliminate MySQL after the implementation of the proposed transaction.

The case also attracted a certain level of public attention and reaction by many parties. Finally, from a procedural point of view the case was interesting because the assessments in the US and in the EU followed different timetables.

The Commission also had to assess how to take into account public pledges made by Oracle on 14 December 2010 considering that they did not constitute formal remedies.

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2. Oracle, Sun and the IT stack

The US company Oracle is a major business software vendor. It develops and distributes enterprise software solutions and related services, including middleware, databases and enterprise application software. Sun is active in hardware (servers, desktops, microelectronics, and storage devices) and software, including operating systems, Java software development technology, middleware, database software and related services.

The product offerings of Oracle and Sun can be seen as part of an IT or technology ‘stack’ which consists of the various hardware and software components necessary for companies to ultimately use business software applications. Hardware products, including servers, storage units and client PCs, constitute the first layer. In order to function, a server needs an operating system. Databases operate on top of the operating systems and enable the storing and systematic retrieval of data. The next layer is middleware, which encompasses a wide category of software products that provide an infrastructure for applications to run on a server, be accessed from a variety of clients over a network and be able to connect to a variety of information sources. The last layer of the stack is applications. One important category of applications is enterprise application software (‘EAS’) to support the major business functions for example accounting, finance and human resources.

Sun’s and Oracle’s assets were to a large extent complementary. As a result the proposed transaction allowed the merged entity to become a fully integrated provider of hardware and business software and to offer all layers of the IT stack. However, the transaction also led to some important horizontal overlaps among others in the database market and potential vertical effects relating to the Java development environment.

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

(2) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the Horizontal Merger Guidelines), OJ C 31, 5.2.2004, p. 5.
These two issues will be presented in more detail below.

3. Databases

3.1. The parties’ database offerings and the database market

Databases play an important part in the functioning of many enterprises and organisations. They support a variety of applications, whether pre-packaged or customized in-house applications, including web applications, online transaction processing, online analytical processing and data warehousing. Databases can also be ‘embedded’ in another hardware (for example, a mobile phone or a vehicle) or software products. In that case they are not sold as a standalone product to the end user. The Commission considered embedded databases to form part of a relevant product market comprising all relational databases.

Oracle offers a variety of database products. Its core product is the Oracle database which is suitable for high-end applications. Oracle also offers three stripped down versions of its database targeted at users that do not require all high-end features. Oracle charges a license fee for most of its database products and is the revenue leader in the database market.

Sun’s main database product is MySQL. MySQL is available as an open source product. Open source denotes a specific way of developing and distributing software in which the source code of the software is made publicly available. Consequently, MySQL can be downloaded free of charge from the internet for use.

There are different types of open source licenses. MySQL is licensed under the most widely used open source license, the General Public License v2 (‘GPL’). One of the characteristics of the GPL is that if a product, which contains modified or unmodified MySQL source code and thus is a ‘derived work’ in the sense of copyright law, is commercialised, then it must also be licensed under the GPL and its entire source code must be disclosed to the public. This is sometimes described as the ‘viral’ effect of the GPL.

The database market is very concentrated. In 2008, Oracle, IBM and Microsoft together controlled almost 90% of the market measured in revenues.

Table 1: Database market shares measures in revenues, 2008 (Source: IDC, Gartner)

<table>
<thead>
<tr>
<th>Database vendor</th>
<th>Market share 2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oracle</td>
<td>[40-50] %</td>
</tr>
<tr>
<td>IBM</td>
<td>[20-30] %</td>
</tr>
<tr>
<td>Microsoft</td>
<td>[10-20] %</td>
</tr>
<tr>
<td>Sybase</td>
<td>[0-5] %</td>
</tr>
<tr>
<td>Teradata</td>
<td>[0-5] %</td>
</tr>
<tr>
<td>Sun (MySQL)</td>
<td>[0-5] %</td>
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</table>

MySQL’s market share measured in revenues is very small. However, even a large number of users of an open source database would not necessarily translate into significant revenue because the software is available free of charge. Therefore revenue figures alone are not sufficient to assess MySQL’s competitive significance. There is also no data available on the total size of the database market measured in active installations as open source vendors do not have the ability to track whether, once downloaded, the open source database is actually installed and used.

The database market is characterised by several specificities which have an impact on how competition takes place.

First, marginal costs of selling an additional software license are very low, while sunk costs, mostly for R&D are very high. This leads to significant
economies of scale which in turn give the database vendors strong incentives to achieve a high volume of sales.

Second, the market for database software is subject to network effects, i.e. the value of a database for any user increases with the number of other users. This arises because a higher number of users will make it more attractive for providers of IT support services to invest in expert knowledge of the database product. Also the higher the number of users, the more attractive it will be for software developers to integrate the database product into their own offerings or to develop applications that make use of the database product. Significant network effects result in barriers to entry, which in turn are one factor that explains the relatively high degree of concentration in the database market.

Third, the adoption of a database by a buyer often requires significant specific and irrecoverable investments. For example, the buyer will often need to invest in database specific training and in the development of applications customized for the particular database. Migrating data to another database often is no trivial exercise either. Consequently, when switching from one database to another, buyers will face additional and significant expenses compared to a situation in which they continue using the same database.

3.2. The legal test and its application to the specific case

The Horizontal Merger Guidelines recognize that some firms, despite having a relatively small market share, may be an important competitive force. A merger involving such a firm may change the competitive dynamics in a significant, anticompetitive way, in particular where the market is already concentrated (\(^{4}\) (\(^{5}\)).

Oracle considered the Commission’s theory of harm as unusual, unprecedented and ultimately illegal under the Merger Regulation (\(^{6}\)). In particular, Oracle claimed that previously the Commission had nearly always relied on showing dominance and closeness of competition, even in those cases in which the Commission based its theory of harm on the elimination of an important competitive force. Oracle further argued that the Horizontal Merger Guidelines mention, as factors potentially giving rise to an important competitive force, only the fact that the ‘maverick’ is either a recent entrant poised to exert an important competitive pressure in the future or an innovating firm.

The Commission rejected Oracle’s arguments.

First, under the new substantive test introduced by the Merger Regulation (see Article 2 (2) and (3)), the Commission is no longer required to show, in all cases, the creation or strengthening of a dominant position in order to declare a merger incompatible with the common market.

As expressly stated in the Merger Regulation and further specified in the Horizontal Merger Guidelines, the Commission must take into account in its assessment any significant impediment to effective competition likely to be caused by a concentration (\(^{6}\)). Beyond the concept of dominance, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, under certain circumstances, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition.

Second, the Commission is not required under this theory of harm to show that the merging parties are the closest competitors on the relevant market. Being closest competitors is only one of the factors listed in the Horizontal Merger Guidelines to assess whether significant non-coordinated effects are likely to result from a merger.

Third, the Horizontal Merger Guidelines do not require for the target of a transaction to be characterised as an important competitive force that it be a recent entrant or an innovating firm.

For the present transaction this theory of harm meant that the Commission assessed whether MySQL constituted an important competitive force in the database market, in particular with regard to competitive constraints on Oracle, and whether this competitive force was likely to be removed after the proposed transaction.

For the present case it also meant assessing the extent to which other current or potential open source competitors as well as forks of MySQL could replace MySQL as competitive force after the proposed transaction. A fork of a software product is created when a developer takes a legal copy of the

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\(^{1}\) Horizontal Merger Guidelines, paragraphs 37 and 38.  
\(^{2}\) It should be noted that the US Antitrust Agencies in the new proposed US Horizontal Merger Guidelines include a comparable theory of harm as brought forward by the Commission in the Oracle/Sun case. According to these proposed Guidelines the Agencies will consider whether a merger may lessen competition by eliminating a ‘maverick’ firm, i.e. a firm that has played, or likely will play an important role above and beyond the competition likely to be caused by a concentration. 
\(^{4}\) Horizontal Merger Guidelines, paragraph 2.
source code from one software package and starts independent development on it, creating a distinct piece of software.

3.3. How to assess the competitive constraint exerted by MySQL?

As MySQL is predominantly distributed under the GPL and free of charge, the Commission considered that its small revenue share in the database market did not appropriately reflect its competitive position. The Commission found indications that MySQL’s competitive position in the database market was stronger than suggested by its revenue share. It is generally acknowledged that MySQL is the world’s most popular open source database. MySQL is also significantly more widely distributed than any other open source database.

MySQL had certain features which determined the nature of the competitive constraint it exerted. MySQL was designed following a modular approach which differs from all other widely used databases. MySQL consists of three different layers: a top layer with tools for the monitoring and administration of the database, a middle layer consisting of the core database server, and a bottom layer for managing the physical storage of the data (storage engine).

The interfaces between the three different layers are documented and can be used by software developed by other parties. This allows customisation of the tools and storage engines layers.

Graph 2: The MySQL database

MySQL’s ‘pluggable’ architecture has resulted in a wide offer of storage engines, many of which have been designed to address very specific requirements. In addition to a number of storage engines developed and offered by MySQL itself, storage engines are also available from third parties. This choice between specialised storage engines allows customers to choose the best engine for their application. The modular architecture and the availability of multiple storage engines allows MySQL to target different technology segments of the market in parallel, thereby increasing MySQL’s competitiveness in various segments of the database market. This modular architecture has generated a very lively and dynamic eco-system of storage engines which in turn created more demand for MySQL.

The Commission analysed various sources of information to assess the competitive constraint exerted by MySQL on Oracle. These sources comprised in particular two internal Oracle datasets (described in more detail below), internal documents of Oracle and Sun, surveys as well as input provided by com-

Storage engines providers could obtain commercial license from the IP holder that allows them to market proprietary versions of their storage engines (as opposed to the ‘viral’ obligation of the GPL) and thereby generate revenues.
petitionors and customers of Oracle and MySQL who responded to the Commission’s questionnaires.

The two contemporaneous internal datasets submitted by Oracle that the Commission analysed were (i) the Customer Relationship Management database (CRM) and (ii) a dataset consisting of e-mail requests submitted by sales personnel to a centralised email address for executive approval of price discounts to customers (Headquarters Approvals e-mails – HQ Apps).

MySQL rarely appeared in the CRM dataset, which typically lists competitors in any given sales opportunity. However, the Commission found that CRM may be biased against MySQL and open source providers generally. This may arise because sales representatives of Oracle and proprietary software vendors more generally would not always be aware of the competitive presence of open source vendors (as customers can simply download the software for free).

As for HQ Apps, this is an internal ‘dataset’ of Oracle that contains the communications between sales teams and Oracle headquarters relating to non-standard rebates offered by Oracle. It was possible to determine for how many customers the sales teams had indicated the presence of specific competitors in order to justify their requests for non-standard rebates in the sample of the HQ Apps documents provided by Oracle. The qualitative and quantitative analysis of the HQ Apps dataset showed that MySQL could not be dismissed as a competitive constraint. A cross-check between HQ Apps and CRM also lent support to the view that the CRM database may be biased against open source providers.

The conclusions drawn from HQ Apps were confirmed by industry surveys. In particular a 2009 survey by Evans Data Corporation, a research firm, found that overall MySQL was the second most used database by number of developers and IT managers in the Europe, Middle East, and Africa (EMEA) region in the past year, just behind Microsoft’s SQL Server.

On the basis of all available sources the Commission concluded that MySQL potentially exerted an important competitive constraint on Oracle and other proprietary database vendors. While this potential constraint was found to be particularly strong in some segments like the small and medium enterprise or low end segment and some parts of the ‘embedded use’ segment, the Commission found that MySQL did not constrain Oracle in the high end segment. In addition to the static view the nature of the constraint also had to be seen dynamically because MySQL’s specific modular architecture favours innovation by third parties developing storage engines that enhance MySQL’s functionalities so that it can target also higher-end applications.

3.4. Public pledges of Oracle – How should they be taken into account in the assessment?

On 14 December 2009 Oracle made a public announcement containing ten pledges vis-à-vis MySQL users, customers and developers. The announcement covered a wide range of activities related to MySQL and was made shortly after an oral hearing requested by Oracle, which took place on 10 and 11 December 2009, and more than one month after the issuing of a Statement of Objections on 9 November 2009.

With respect to customers, the announcement included, among others, pledges to continue to release enhanced future versions of MySQL under the GPL, to increase spending on MySQL R&D for three years, as well as to set up a customer advisory board.

With respect to storage engine providers, the announcement included, among others, pledges to continue to make storage engine application programming interfaces (APIs) available and to not assert certain provisions in the GPL against storage engine vendors (8). On the basis of these two pledges it can be expected that third-party storage engine vendors will be allowed to provide to their customers a combination of MySQL under the GPL and the storage engine (including if the latter is under a proprietary license) as an integrated product. Moreover, Oracle pledged to set up a storage engine advisory board.

In line with its public announcement Oracle immediately took steps to implement some of the pledges by sending letters to third-party storage engine vendors. In these letters Oracle pledged to amend the existing contractual terms after the closing of the proposed transaction by reproducing the relevant content of its public announcement.

Oracle’s pledges do not constitute formal remedies. The Commission has a long established and consistent practice regarding the remedies that are necessary in order to clear a merger once competition concerns have been established at the end of the investigation. These principles fully apply whenever

8 Copyleft is a requirement in the GPL that anyone who redistributes the software does so under the same license and also includes the source code.

9 If asserted, these provisions could force certain storage engine providers to license their storage engine under the GPL. This would reduce the incentives to develop such storage engines because it would prevent storage engine providers to implement a proprietary business model.
the Commission has identified competition concerns. The situation, however, is different when the facts of the case allow the Commission to arrive at the conclusion that a merger will not raise competition concerns.

The public announcement made by Oracle on 14 December 2009, addressed to the general public and in particular to open source users and developers and the subsequent actions taken by Oracle to implement some of the pledges constitute factual elements that the Commission had to take into account, along with all the other elements in its file, in its assessment of the likely impact of the transaction on the database market.

These needed to be taken into account in particular for the assessment of Oracle’s incentive and ability to degrade or eliminate MySQL as well as for the assessment of a possible replacement of MySQL’s potential competitive constraint by other open source databases or MySQL forks.

Furthermore, under Article 8(6) of the Merger Regulation the Commission may revoke a decision declaring a concentration compatible with the common market if the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible.

3.5. Could Oracle degrade or eliminate MySQL and would this be in Oracle’s interest?

After the proposed merger it could be expected that the Oracle database and MySQL would stop competing as they would be offered by the same vendor. Possible concerns were that Oracle might stop offering or developing or might degrade MySQL under the GPL, or that Oracle might remove the constraint exerted by third-party storage engines by modifying the interface or refusing to grant storage engine vendors the commercial licenses that would allow them to market proprietary versions of their storage engines to work with MySQL.

The Commission’s investigation, however, found that Oracle’s ability and incentives to degrade and eliminate MySQL after the proposed merger would be constrained due to the availability of MySQL under the GPL. For this assessment the Commission also took into account the public announcement made by Oracle on 14 December 2009.

As part of its ten pledges, Oracle announced that it will continue to enhance MySQL and make subsequent versions of MySQL available under the GPL. Furthermore, Oracle pledged to maintain and periodically enhance MySQL’s pluggable storage engine architecture to allow users the flexibility to choose from a portfolio of storage engines, including those developed by third parties. Also, Oracle pledged not to demand that third-party storage engine vendors obtain commercial (non-GPL) licenses in order to implement the application programming interfaces available as part of MySQL’s architecture.

Taking into account these pledges and due to the specific characteristics of the open source product MySQL, the Commission found that Oracle was likely to continue offering and enhancing MySQL under the GPL after the proposed transaction. As regards the potential dynamic constraint exerted by MySQL, the public pledges addressing storage engine vendors are likely to sufficiently reduce Oracle’s ability to disadvantage features of products that are based on MySQL, including those products that compete in the market with Oracle databases.

3.6. Could other open source databases or MySQL forks replace the competitive constraint exerted by MySQL?

As part of its compatibility assessment, the Commission also needed to examine the extent to which other database vendors would replace the potential competitive constraint previously exerted by MySQL if Oracle were to eliminate or degrade MySQL after the merger. If MySQL’s competitive constraint could be replaced by another database, the merger would not give rise to competition concerns.

The Commission assessed the potential of other open source databases or MySQL forks to replace MySQL’s competitive constraint. In this context the Commission also took into account the pledges made by Oracle. The Commission found that after the proposed transaction other open source databases, in particular PostgreSQL, would have the potential to constrain Oracle to an important extent and to replace the competitive constraint currently exerted by MySQL in a timely and sufficient manner. The Commission also did not exclude that forks of MySQL could replace the competitive constraint previously exerted by MySQL.
3.7. Oracle support campaign and SaveMySQL petition: What is the evidentiary value of such campaigns?

The case raised a certain level of public attention and triggered reactions by many parties. Oracle garnered public support from many of its customers. The Commission received letters from more than 200 companies supporting the transaction. Following the oral hearing the Commission also started receiving a large number of e-mails from parties opposing the transaction, the large majority of which appear to have been sent in response to a call made by Monty Widenius, the founder of MySQL and owner of Monty Program AB, on his blog. A related initiative, the ‘SaveMySQL petition’, attracted more than 40 000 signatures in a short time.

The Commission questioned the evidentiary value of the supporting letters. It appeared that many of the senders of the letters were motivated to write to the Commission only after they had been contacted by Oracle and encouraged to do so after the Commission had issued a Statement of Objections. These letters thus do not provide a representative and unbiased sample of the position of database customers with respect to the proposed transaction that would have the same standing, for example, as a customer survey. Similar comments could be applied to the e-mails and the petition. It would not be appropriate to base the competitive assessment of a notified concentration solely on a simple count of the number of submissions received for or against the particular concentration, especially when such submissions appear to have been the result of orchestrated campaigns as in this case.

4. Java

Java is a ‘development environment’ created by Sun about 20 years ago. A development environment is a software platform allowing developers to build and deploy software applications. Java-based applications can run independently of the underlying operating system or hardware. The way Java achieves this ‘neutral’ approach is through interface software known as the Java Virtual Machine (JVM). The JVM, which is available on various computer and device types and architectures (for example, there are JVMs for Windows, Linux, Unix and others), executes Java applications. The main other development environment is Microsoft’s .NET, which can only be used for the development of software working on Windows.

Java is available, to a limited extent, under an open source license and free of charge (the OpenJDK platform (13), the binary executable versions of the JREs (14), etc.). However, in relation to certain uses of the Java IP rights, Sun licensed its rights to a number of software developers (among which EAS and middleware producers) against payment. The Commission investigated possible anti-competitive scenarios based on the fact that Oracle, by gaining control of these rights, could engage in a foreclosure strategy to the detriment of its downstream competitors in the middleware and EAS markets.

The investigation revealed that any possible foreclosure strategy by Oracle would have a limited impact on downstream EAS competitors, given that their dependence on a Java commercial license is limited.

On the other hand, Oracle’s competitors for middleware products need commercial licenses for Java Technology Compatibility Kits (TCK) (15) in order to commercially distribute Java certified software products. (The freely available versions of the implementation of the J2EE middleware products in many cases are not sufficient for their needs.)

The ability to engage in any foreclosure strategy crucially depended on the legal and procedural framework under which the Java Community Process (JCP) operates. The JCP is constituted by a collection of bilateral contracts between Sun and 1 200 members (16). It is a participatory process for developing and revising Java technology specifications to which Sun, before the operation, and now Oracle is bound. Complainants submitted that Oracle, once it had acquired control of Sun, would also ‘control’ the JCP and, as a consequence, the licensing of Java-related IP rights. The Commission assessed the various assumptions made by the complainants in the light of the complex set of rules governing the JCP. It concluded that, on the basis of the current framework, there were no grounds to conclude that the merged entity would have the ability to engage in a foreclosure strategy by either controlling the development of the Java platform to the detriment of competitors or by degrading the Java licensing mechanisms.

(12) Program developers can use the Java Development Kit (JDK) to write application software in Java.
(13) The Java Runtime Environment (JRE) is a component of the Java platform needed to run programs written in the Java language. As a practical matter, the JRE is usually what users download to ‘install Java’ on their computers.
(14) The TCK is a piece of Java-based software comprising a series of tests, to certify that the firm’s own version of the JRE is compliant with a Java platform specification. A company would need to obtain such certification since customers normally request it in order to be reassured that the software they purchase is ‘Java compatible’.
(15) Currently, important competitors of both Sun and Oracle are represented in the JCP: IBM, SAP AG, Hewlett Packard, Oracle itself, Cisco Systems, Adobe Systems, RedHat, as well as companies like Google, Motorola, Intel (a competitor of Sun for microprocessors) and Philips.
In addition, as regards the merged entity’s incentives, the Commission found that a foreclosure strategy was likely to damage the widespread support that Java currently enjoys among customers. In an industry characterized by strong network effects, the loss of this support would result in a significant reduction of the value of Java compliant applications and of Java as a ‘neutral’ application development framework. This would adversely affect the competitiveness of the Java based software products of the merged entity itself, to the benefit of the competing .NET platform. The Commission concluded that it was very unlikely that the benefits of foreclosure of access to Java would exceed the costs of such behaviour for the merged entity and that, therefore, the merged entity would have no incentive to foreclose.

5. Cooperation with the US authorities

The takeover of Sun by Oracle was also subject to merger control in the United States of America, where it was reviewed by the Department of Justice (DoJ).

Throughout the process, the cooperation between the DoJ and DG Competition was close and frequent, based on full transparency. The continuous dialogue with the DoJ during the review included the attendance of a representative of the DoJ at the oral hearing in Brussels.

However, Oracle chose to notify the transaction to the Commission on 30 July 2009, which was several months after it had initially notified in the US. The two merger review processes were therefore not aligned in terms of timing. The merger was (re-)filed with the DoJ on 27 May 2009 and the DoJ issued a second request on 26 June 2009. The US cleared the transaction unconditionally on 20 August 2009, only a few days before the Commission adopted its decision to initiate an in-depth investigation.

The experience gained during the Oracle/Sun Microsystems investigation showed that in cases involving markets with a global scope companies should try to take into account the different procedural timelines when planning to notify mergers to the various competition authorities in order to allow a coordinated, simultaneous and efficient review by the competent authorities.

6. Conclusions

The Commission eventually took the view that the transaction was unlikely to have significant harmful effects in the database market and in the other markets affected by the transaction.

This case shows that the Commission is prepared to seriously investigate a theory of harm based on the elimination of a special competitive force and to intervene against the proposed concentration in case the evidence supports this theory. This is one of few cases where the Commission followed this type of theory of harm, which is however entirely in line with the Commission’s Horizontal Merger Guidelines.

Moreover, the assessment of the database market involved the challenging analysis of the role of open source products, such as Sun’s MySQL. Their relevance on the competitive landscape could not be assessed solely on the basis of a traditional revenue-based approach, but had to be evaluated in a wider and more sophisticated perspective. The Commission managed to assess a very broad body of evidence, including Oracle internal datasets, internal documents from the parties, surveys as well as input provided by customers and competitors.

While in any horizontal merger case it can be presumed that after the proposed transaction two previously competing products will no longer compete if they are owned by the same firm, the Commission considered it necessary in the present case, given the open source nature of MySQL, to go further and to assess if Oracle would be able and whether it would be in its interest to degrade or eliminate MySQL after the proposed transaction. The Commission found that this was not the case.