

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 100/FN/Oct05

In the matter between:

The Competition Commission

Applicant

and

Oracle Corporation (South Africa) (Pty) Ltd

Respondent

ORDER

In terms of the agreement reached between the respondent and the Competition Commission –

1. The respondent is ordered to pay an administrative penalty in the amount of R275 000 (two hundred and seventy five thousand rand) for contravening section 13A(3) of the Act, such amount to be paid to the Competition Commission not later than 30 (thirty) days of the date of this order.

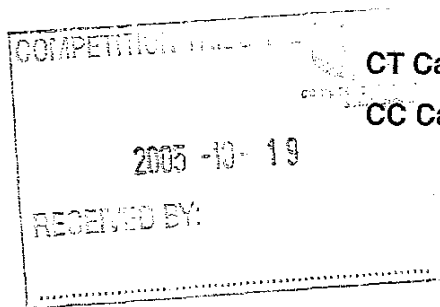

D Lewis

26 October 2005
Date

Concurring: N. Manoim, Y Carrim

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA



CT Case No:

CC Case No: 2005Feb1408

In the matter between:

The Competition Commission

Applicant

and

Oracle Corporation (South Africa) (Pty) Ltd

Respondent

**Agreement between the Competition Commission and the Respondent on
the terms of an appropriate Consent Order, in respect of an alleged
contravention of section 13A(3) of the Competition Act, 1998 (Act No. 89 of
1998), as amended**

The Applicant and the Respondent in the above matter hereby agree to the confirmation, by the Competition Tribunal, of this agreement as a consent order in terms of section 49D of Competition Act, 1998 (Act No. 89 of 1998), as amended, on the following terms:

1. Definitions

For the purposes of this Consent Order the following definitions shall apply:

- 1.1 The "Act" means the Competition Act, 1998 (Act No. 89, of 1998), as amended.

- 1.2 “*Commission*” means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the *Act*, with its principal place of business at Building C, Mulayo Building, dti Campus, Cnr Meintjies & Esselen Streets, Pretoria, Gauteng.
- 1.3 “*Competition Tribunal*” means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the *Act*, with its principal place of business at Building C, Mulayo Building, dti Campus, Cnr Meintjies & Esselen Streets, Pretoria, Gauteng.
- 1.4 “*Consent Order*” means this agreement in its duly signed form by both the Commission and the *Respondent* and confirmed by the *Competition Tribunal*.
- 1.5 “*Days*” means calendar days.
- 1.6 “*Respondent*” means the primary acquiring firm, Oracle Corporation (South Africa) (Pty) Ltd (otherwise herein referred to as “Oracle”), which changed its name from Richtrau No 56 (Pty) Ltd with effect from 1 June 2005 . *Oracle* is ultimately controlled by Oracle Corporation, a public company registered under the laws of Delaware, United States of America. Oracle is, in addition to having been the primary acquiring firm at the time of the relevant merger, also the successor in the title to the primary target firm, PeopleSoft Africa (Pty) Ltd (hereinafter referred to as “PeopleSoft”). At the time of the relevant merger, PeopleSoft was ultimately controlled by PeopleSoft Inc, a company registered under the laws of Delaware, United States of America.

2. Background

- 2.1 In June 2003 Oracle Corporation launched a hostile bid to take over PeopleSoft Inc. After a lengthy legal battle, the matter was amicably resolved in December 2004, paving the way for a takeover of PeopleSoft Inc by Oracle Corporation. This matter concerns the South African leg of this transaction.
- 2.2 At the start of the take over bid Oracle Corporation requested its legal representatives at the time, Morrison & Foerster LLP ("hereafter referred to as "the firm"), to perform an assessment of all of the jurisdictions worldwide in which competition authorities filings would need to be made.
- 2.3 As instructed the firm analyzed the potential applicability of the South African notification requirements based on publicly available information about PeopleSoft Inc's activities in South Africa. As the transaction was in a form of a hostile bid there was no means of obtaining the non-public information from PeopleSoft Inc that may have been relevant to an assessment of notification obligations, hence the advise was accordingly provided based on publicly available information.
- 2.4 PeopleSoft Inc's public reports contained a list of the company's subsidiaries, but the list did not include a South African subsidiary. PeopleSoft Inc's public reports also did not indicate that the company had any assets in South Africa. The public reports stated that PeopleSoft Inc offered its products in South Africa through an independent distributor, Activ8, but did not provide revenues for any products in South Africa. Based on this information the firm advised

Oracle Corporation that there was no factual basis on which to conclude that a filing in South Africa was necessary. The firm further advised Oracle Corporation that in light of the applicable information constraints, Oracle Corporation should consider its notification obligations upon closing the transaction. This was confirmed by the firm during the *Commission's* investigation.

- 2.5 Subsequent to the initial assessment being performed, it emerged that PeopleSoft Inc acquired JD Edwards in July 2003. Pursuant to this transaction, PeopleSoft Inc acquired the local JD Edwards subsidiary, JD Edwards (S.A.) (Pty) Ltd, and its name changed to PeopleSoft.
- 2.6 Following the acquisition mentioned in 2.5 above, PeopleSoft's auditors and financial year-end were also changed. As a consequence, the last set of financial statements of PeopleSoft available were those of the year ending 31 October 2002. Because of the change in auditors and the financial year of PeopleSoft, there was a significant delay of the next set of its audited financial statements.
- 2.7 The updated accurate consolidated asset and turnover figures for PeopleSoft only became available to Oracle Corporation's legal advisors in mid-January 2005. In early January, however, in the immediate aftermath of the overseas acquisition, Oracle Corporation had already issued worldwide instructions regarding the integration of the two entities, and the ultimate control over PeopleSoft had changed.
- 2.8 During mid-January the *Commission* became aware of the transaction and immediately advised Oracle of its notification obligations.

- 2.9 As soon as it became apparent that notification was required in South Africa the implementation of the entity integration was immediately ceased.
- 2.10 The merger was subsequently notified on 01 February 2005 and the *Commission* approved the merger unconditionally on 24 February 2005.
- 2.11 Accordingly, the *Commission* accepts that the effect of implementation of the transaction in South Africa prior to the approval of the merger by the *Commission* was limited in extent, and arose substantially as a result of the lack of accurate and up-to-date information in respect of the target firm, which was primarily as a result of the hostile atmosphere of the take-over bid.

3. Relevant provisions of the Act

- 3.1 A transaction is notifiable to the *Commission* in terms of Chapter 3 of the *Act*, if it falls within the definition of a merger in terms of section 12 of the *Act*, and further if it meets the required thresholds determined by the Minister in General Notice 254 of 2001 ("the **Notice**") published in terms of Section 11 of the *Act*.

- 3.2 Section 12(1) of the *Act* provides that:

"(a) For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another business.

(b) *A merger contemplated in paragraph (a) may be achieved in any manner, including through -*

- (i) *purchase or lease of the shares, an interest or assets of the other firm in question; or*
- (ii) *amalgamation or other combination with the other firm in question.”*

3.3 In terms of the section 13A(1) of the *Act*, a party to an intermediate or a large merger must notify the *Commission* of that merger in the prescribed manner and form.

3.4 Further, in terms of section 13A(3) of the *Act*, the parties to an intermediate or large merger may not implement that merger until that merger has been approved, with or without conditions, by the *Commission* in terms of section 14(1)(b), by the *Competition Tribunal* in terms of Section 16(2), or the Competition Appeal Court in terms of section 17 of the *Act*.

4. **Commission's findings**

4.1 The *Commission* finds that the acquisition of PeopleSoft Inc by Oracle Corporation internationally resulted in the change of PeopleSoft's control locally, which change of control constituted a merger in terms of the *Act*.

4.2 Further, the *Commission* finds that the threshold for an intermediate merger as defined in the section 11(5)(b) as read with section 11(1) of the *Act* and Notice 253 of 2001 was met.

4.3 Further, the *Commission* finds that the merging parties implemented the merger prior to the notification to and approval by the *Commission* in contravention of section 13A(3) of the Act.

5. **Agreement concerning conduct**

5.1 The *Respondent* admits that the transaction constituted an intermediate merger as defined in Section 11(5)(b) of the Act.

5.2 The *Respondent* further admits that the merger was implemented in this instance prior to notification to and approval of the *Commission* in contravention of section 13A(3) of the Act.

5.3 However, the *Respondent* avers that it did not willfully contravene the provisions of the Act; that it acted in bona fide belief that the transaction was not required to be notified in South Africa; and that immediately upon being informed by the *Commission* and realizing that the transaction was notifiable in South Africa it notified the *Commission* of the merger.

6. **Agreement concerning administrative penalty**

6.1 The *Respondent* agrees to pay the amount of R275 000-00 (**Two Hundred and Seventy Five Thousand Rand**) as an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and (3) of the Act

6.2 The *Commission* accepts that the agreed penalty is appropriate because:

- 6.2.1 The *Respondent* acted in bona fide belief that the transaction was not notifiable in South Africa. As soon as it was informed by the Commission that the transaction was notifiable in South Africa it immediately took steps to minimize the implementation of the merger and to notify the merger.
- 6.2.2 The *Commission* was notified of the merger on 01 February 2005 while the merger was implemented on or about 01 January 2005. The transaction was therefore implemented a relatively short time before it was notified to the *Commission*.
- 6.2.3 There was no loss or damage or negative impact on the market as the merger was subsequently found by the *Commission* not to raise any competition or public interest concerns.
- 6.2.5 It does not appear that the *Respondent* profited from the contravention of the *Act*.
- 6.2.6 The *Respondent* has not previously been found to be in contravention of the *Act*.
- 6.3 An administrative penalty in the amount of R275 000-00 (**Two Hundred and Seventy Five Thousand Rand**) is hereby imposed against the *Respondent* in terms of section 59 of the *Act*, for contravening Section 13A (3) of the *Act*.
- 6.4 The penalty amount does not exceed 10% of the *Respondent's* annual turnover in the Republic and its exports from the Republic during its preceding financial years.

6.5 The *Respondent* is therefore liable for and agrees to pay an administrative penalty in the amount of R275 000-00 (**Two Hundred and Seventy Five Thousand Rand**) to be paid not later than thirty (30) days after the confirmation of the *Consent Order*.

6.6 The administrative penalty is payable into the bank account of the *Commission*, whose banking details are as follows:

Bank: ABSA

Name of Account: The Competition Commission Fees

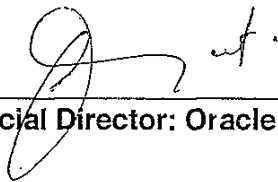
Branch Name: Pretoria

Branch Code: 323345

Account Number: 4050778576

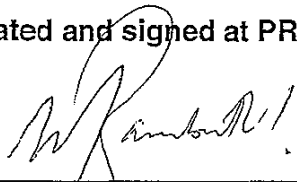
6.7 The *Commission* will pay over the penalty amount to the National Revenue Fund, referred to in section 59(4) of the *Act*.

Dated and signed at MIDRAND on this the 22 day of September 2005.



Financial Director: Oracle Corporation (South Africa) (Pty) Ltd

Dated and signed at PRETORIA on this the 13th day of October 2005.



The Commissioner (Acting)
Competition Commission