

WSJ 9-13-04 Antitrust Smackdown

We don't really care if Oracle CEO Larry Ellison succeeds in his hostile takeover bid for PeopleSoft. That's a matter for PeopleSoft shareholders to decide. But last Thursday's court decision overruling antitrust objections to the Oracle bid is nonetheless a much-needed rebuke of the Bush Justice Department.

U.S. District Court Judge Vaughn Walker's 164-page opinion amounted to an antitrust policy smackdown. PeopleSoft CEO Craig Conway—backed by Justice and the usually litigious gang of state Attorneys General—had thrown up the antitrust objections as a way to deny his shareholders a chance to vote on Mr. Ellison's \$21 a share offer. But Judge Walker eviscerated the claim so thoroughly that we hope it will set a new and higher bar for future antitrust objections to mergers in high-tech markets.

Justice's odd legal claim had been that the market for business software could be defined by whatever a few large customers claim it is. In other words, if General Motors insisted that only three companies could provide it with business application software—say, Oracle, PeopleSoft and Germany's SAP—then the combination of any two of those suppliers would constitute an antitrust violation by putting too much market power in too few firms.

The virtue of Judge Walker's opinion is that he took into consideration the dynamic, highly competitive nature of today's technology businesses. For one thing, those markets are global, especially the competition to serve large multinational customers. For another, the Justice complaint ignored the many other software suppliers that could enter the high-end business applications market if Oracle began to raise prices after any merger. One of those new entrants might well be that tiny little outfit known as Microsoft, which bought European software company Navision in 2002.

The Justice Department is embarrassed in the Oracle case.

The Justice Department itself more or less proved this latter point when its own purchasing managers bought software in April not from the supposedly dominant Big Three but from American Management Systems, one of the niche players that makes this market so competitive.

(Judge Walker noticed this too.) Had Attorney General John Ashcroft been paying attention, he might have asked his Antitrust Division to consult his department's buyers for a more accurate definition of the software market.

The ruling is an embarrassment for Assistant Attorney General R. Hewitt Pate, who made the PeopleSoft case one of his first big initiatives after taking charge of the Antitrust Division last year. Justice had lost the similar Sungard disaster-recovery services case in 2001. But rather than rein in the career staff that wanted to revive this antitrust theory, Mr. Pate followed their lead into another legal cul-de-sac.

Instead of now appealing Judge Walker's ruling, Mr. Pate would be better off asking his lawyers to rethink their Herfindahl index and other static measures of competition that are outdated in a world of rapid technological change. Let's hope the Walker ruling also instructs the antitrust barons of the European Union, which is also scrutinizing any Oracle-PeopleSoft deal.

The business press is speculating that the Oracle ruling will induce a new wave of high-tech mergers, but if so the market itself will be the impetus. In the software business, competition and slower growth are reducing margins, which increases pressure for efficiencies from scale. PeopleSoft itself bought smaller rival, J.D. Edwards, last year. If its shareholders don't think Oracle's bid is adequate, they can always decline to tender their shares. That's capitalism.