UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. ACTIVISION BLIZZARD, INC., *Defendant*.	Civil Action No.: 1:23-cv-00895

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment filed in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On April 3, 2023, the United States filed a civil antitrust Complaint against Activision Blizzard, Inc. ("Activision" or "Defendant"), which owns the *Overwatch* and *Call of Duty* professional esports leagues. The United States alleged that Activision and the independently owned teams in these leagues agreed to impose a "Competitive Balance Tax," (or the "Tax") which substantially lessened competition between the teams for esports players. The Tax, which effectively operated as a salary cap, imposed a fine on any team whose total annual player compensation exceeded a threshold set by Activision. Activision would then distribute the collected sum of such fines to the other teams in the league that had not exceeded the threshold. The Complaint alleges that the Tax had the purpose and effect of limiting competition between the teams in each league for esports players and suppressed esports players' wages, in violation

of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The Complaint seeks injunctive relief to prevent Activision from agreeing to or enforcing any rule that would, directly or indirectly, impose an upper limit on compensation for any player or players in any professional esports leagues that Activision owns or controls.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and Stipulation and Order, which are designed to remedy the anticompetitive effects alleged in the Complaint.

The proposed Final Judgment, which is explained more fully below, imposes the following obligations on Activision:

- Activision must certify that it has ended all rules in the *Overwatch* and *Call of Duty* Leagues that impose an upper limit on player compensation;
- Activision is prohibited from reinstating or implementing any rule that imposes an upper limit on player compensation in any professional esports leagues it owns or controls;
- Activision must provide notice of the meaning and requirements of the Final Judgment to all teams and players in professional esports leagues it owns or controls;
- Activision must implement a revised antitrust compliance policy and a whistleblower protection policy; and
- Activision must remedy and report to the United States any violation or potential violation of the Final Judgment and cooperate with the United States for the purposes of determining or securing compliance with the Final Judgment.

Under the terms of the Stipulation and Order, Activision must abide by and comply with the provisions of the proposed Final Judgment until it is entered by the Court or until expiration of the time for all appeals of any Court ruling declining entry of the proposed Final Judgment.

The United States and Activision have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Activision's Professional Esports Leagues

Activision is a leading video game developer and publisher, which owns and operates professional esports leagues built around two of its most popular multiplayer video game franchises, *Overwatch* and *Call of Duty*. Activision is incorporated in Delaware and headquartered in Santa Monica, California.

Overwatch became one of the best-selling video games in 2016, its first year of release, and has since attracted millions of players. Since the release of the original *Call of Duty* game in 2003, Activision has published 18 additional titles in the series and reportedly has sold more than 400 million units, making it one of the best-selling video game franchises in history.

To capitalize on the success of *Overwatch* and *Call of Duty*, Activision created two professional esports leagues that feature teams comprising the very best *Overwatch* and *Call of Duty* players in the world. Launched in 2018, Activision's *Overwatch* League currently has 20 city-based teams located across North America, Europe, and Asia. The popularity of Activision's *Overwatch* League has been a leading contributor to the growth of esports in the United States. Soon after, in 2020, Activision launched its *Call of Duty* League with 12 teams using the same city-based model as the *Overwatch* League.

The *Overwatch* and *Call of Duty* Leagues have generated hundreds of millions of dollars for Activision from franchise fees, sponsorship revenues, exclusive streaming deals with YouTube, and the *Overwatch* League's television broadcast deal with Disney (including subsidiaries ESPN and ABC). Millions of viewers around the world have tuned in to watch professional *Overwatch* and *Call of Duty* players compete in league matches. In the inaugural season of the *Overwatch* League, 107 million viewers streamed matches over Twitch. By the next year, it was the most watched esports league in the world with more than 75.9 million hours watched. The *Call of Duty* League's official streaming channels attract more than 15 million views per month, and more than 300,000 viewers tuned in to the inaugural league championship in 2020.

The *Overwatch* and *Call of Duty* Leagues, like other sports leagues, feature independently owned teams that not only compete to win matches, but also compete to hire and retain the best players. Because *Overwatch* and *Call of Duty* are both multiplayer, team-based games, teams in the *Overwatch* and *Call of Duty* Leagues must recruit and sign a roster of players who fill different roles within the game and can work with and complement their teammates' skills. Esports athletes spend thousands of hours practicing and honing their skills for a chance to make a professional roster; once they sign with a team, many players train at least eight hours every day and up to 70 hours each week.

Esports athletes often have short careers as a result of the intense physical and mental toll of elite competition, and thus have limited time to maximize their earnings.

B. The Unlawful Agreements

The Complaint alleges that Activision and the teams in the *Overwatch* and *Call of Duty* Leagues engaged in unlawful conduct that suppressed compensation for professional esports

players in those leagues. From the inception of each league, Activision and the teams agreed to impose rules that had the purpose and effect of substantially lessening competition for players by suppressing player compensation. Under these rules, which Activision called the "Competitive Balance Tax," teams were fined if their total player compensation exceeded a threshold set by Activision each year. For every dollar a team spent over that threshold, Activision would fine the team one dollar and distribute the collected sum pro rata to all non-offending teams in the league. For example, if Activision set a Competitive Balance Tax threshold of $1 million, a team that spent $1.2 million on player compensation in a season would pay a $200,000 fine, which Activision would then distribute to the other teams.

The Complaint alleges that teams recognized that their spending on player compensation would have been higher absent the Competitive Balance Tax. The Tax minimized the risk that one team would substantially outbid another for a player. The Tax not only harmed the highest-paid players, but also depressed wages for all players on a team. For example, if a team wanted to pay a large salary to one player, the team would have to pay less to the other players on the team to avoid the Tax. Teams also understood that the Tax incentivized their competitors to limit player compensation in the same way, further exacerbating the Tax's anticompetitive effects. While players in other professional sports leagues have agreed to salary restrictions as part of collective bargaining agreements, the players in Activision's esports leagues are not members of a union and never negotiated or bargained for these rules.

The Complaint further alleges that, in October 2021, as a result of the Department of Justice's investigation into the Competitive Balance Tax, Activision issued memoranda to all teams in the *Overwatch* and *Call of Duty* Leagues announcing that it would no longer implement or enforce a Competitive Balance Tax in either league.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment closely track the relief sought in the Complaint and are intended to provide prompt, certain, and effective remedies that will ensure that Activision will not agree to or enforce any rule that would, directly or indirectly, impose an upper limit on compensation for any player or players in any professional esports league that Activision owns or controls. The requirements and prohibitions in the proposed Final Judgment will ensure that Activision has terminated its illegal conduct and prevent recurrence of the same or similar conduct. The proposed Final Judgment protects competition and workers by putting a stop to the anticompetitive esports player compensation restrictions alleged in the Complaint.

A. Prohibited Conduct

The proposed Final Judgment broadly prohibits Activision from imposing a "Competitive Balance Tax" rule or any similar rule or restraint in professional esports leagues that it owns or controls. Specifically, Section IV of the proposed Final Judgment ensures that Activision will not impose any rule that would, directly or indirectly, impose an upper limit on compensation for any player or players in any professional esports league owned or operated by Activision, including any rule that requires or incentivizes any professional esports team to impose an upper limit on its players' compensation or imposes a tax, fine, or other penalty on any professional esports team as a result of exceeding a certain amount of compensation for its players. Paragraph II(A) of the proposed Final Judgment provides that these prohibitions will continue to apply to Activision's "successors and assigns."

B. Conduct Not Prohibited

Section V clarifies that the proposed Final Judgment does not prohibit Activision from imposing compensation restrictions in certain limited and specified circumstances. Paragraph

V(A) states that the proposed Final Judgment does not prohibit Activision from engaging in conduct protected by any applicable labor exemption to the antitrust laws. Paragraph V(B) states that the proposed Final Judgment does not prohibit Activision from determining the compensation to be paid to its own employees.

C. Required Conduct

Sections VI and VII of the proposed Final Judgment impose requirements on Activision to prevent recurrence of the anticompetitive conduct and to ensure compliance with the terms of the Final Judgment. Under Paragraph VI(A) of the proposed Final Judgment, Activision must certify in an affidavit from a senior legal officer that (1) it has ended all rules that impose an upper threshold on compensation for any player or players in any professional esports leagues that Activision owns or controls, and (2) it will not implement or reinstate any such rules in any professional esports leagues that it owns or controls.

Under Section VI of the proposed Final Judgment, Activision must designate a senior legal officer who is responsible for supervising Activision's compliance with the Final Judgment. Among the duties required by Paragraph VI(D) of the proposed Final Judgment, the senior legal officer will be required to distribute copies of the Final Judgment, this Competitive Impact Statement, and notice of the meaning and requirements of the Final Judgment to (1) Activision's officers and any employees involved with Activision's esports business, (2) a director, officer, or manager of each team in Activision's professional esports leagues, and (3) all players in Activision's professional esports leagues. The senior legal officer must also implement a revised antitrust compliance policy and whistleblower protection policy at Activision.

Under Paragraph VI(D)(8), Activision must annually certify compliance with the Final Judgment. Paragraph VI(E) requires Activision to remedy and report to the United States any

violation or potential violation of the Final Judgment.

Finally, Section VII requires Activision to provide the United States with information and access to company records and employees for the purpose of determining or securing compliance with the Final Judgment.

D. Enforcement of Final Judgment

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph X(A) provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendant has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendant has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph X(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be caused by the challenged conduct. Defendant agrees that it will abide by the proposed Final Judgment and that it may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph X(C) provides that if the Court finds in an enforcement proceeding that Defendant has violated the Final Judgment, the United States may apply to the Court for an extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph X(C) provides that, in any successful effort by the United States to enforce the Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with that effort to enforce this Final Judgment, including the investigation of the potential violation.

Paragraph X(D) states that the United States may file an action against Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XI of the proposed Final Judgment provides that the Final Judgment will expire five years from the date of its entry, except that the Final Judgment may be terminated earlier upon notice by the United States to the Court and Defendant that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal Register* unless the

Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Chief, Civil Conduct Task Force
Antitrust Division
United States Department of Justice
450 Fifth St. NW, Suite 8600
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Activision. The United States is satisfied, however, that the relief required by the proposed Final Judgment will ensure that the anticompetitive conduct alleged in the Complaint is terminated and not reinstated by Activision and will restore the benefits of competition to players in professional esports leagues owned or operated by Activision. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

Under the Clayton Act and APPA, proposed Final Judgments, or "consent decrees," in antitrust cases brought by the United States are subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public

interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final Judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's Complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination

of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F.

Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section

shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 17, 2023

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA:

/s/ Micah D. Stein

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