IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **GENERAL ELECTRIC COMPANY**, and **INSTRUMENTARIUM OYJ**, Defendants.	CASE NUMBER: 1:03CV01923 JUDGE: Hon. Royce C. Lamberth DECK TYPE: Antitrust Date: 10/30/03

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 5(b) of the Clayton Act, as amended by Section 2 of the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. § 16(b)-(h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On September 16, 2003, the United States of America filed a civil antitrust Complaint alleging that the proposed acquisition by General Electric Company ("GE") of Instrumentarium OYJ ("Instrumentarium") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that GE and Instrumentarium are two of the nation's three leading suppliers of patient monitors used to take the vital physiologic measurements of patients requiring critical care ("critical care monitors"). The Complaint further alleges that GE dominates the sale of full-size, mobile C-arms used for surgical, orthopedic, pain management, and basic vascular procedures ("orthopedic-vascular C-arms"), with Instrumentarium as one of three smaller

players in that market. GE and Instrumentarium compete head-to-head in the development, manufacture, and sale of critical care monitors and orthopedic-vascular C-arms.

The Complaint alleges that the proposed acquisition would eliminate head-to-head competition between GE and Instrumentarium and would substantially increase the likelihood that GE will unilaterally increase the prices or reduce the product quality of critical care monitors and orthopedic-vascular C-arms to the detriment of consumers. The request for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing consummation of the proposed acquisition or preventing the defendants from entering into or carrying out any agreement, understanding, or plan, the effect of which would be to exchange those assets between the defendants; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and a proposed Final Judgment, which permit GE to complete its acquisition of Instrumentarium, yet preserve competition in the markets in which the proposed transaction raises significant competitive concerns. The proposed Final Judgment orders the defendants to divest two businesses to acquirers that are acceptable to the United States: (1) Instrumentarium's Spacelabs business, which is Instrumentarium's primary manufacturing, distribution, research and development, and sales operations for critical care monitors; and (2) Instrumentarium's Ziehm subsidiaries, which house Instrumentarium's C-arm business and its line of C-arm products, currently conducted through Instrumentarium Imaging Ziehm, Inc. and Instrumentarium Imaging Ziehm GmbH. The defendants must complete the required

divestitures within one hundred twenty (120) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later. The United States, in its sole discretion, may agree to an extension of this time period of up to two, thirty (30) day periods, not to exceed sixty (60) calendar days in total. Under the terms of the Hold Separate Stipulation and Order, GE is required to take certain steps to ensure that the assets to be divested are preserved and held separate from its other assets and businesses.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

GE is a global technology and services company that has its principal offices in Fairfield, Connecticut. GE Medical Systems, a subsidiary of GE, is a major worldwide provider of medical equipment products and services, including patient monitors and C-arms, and has its principal offices in Waukesha, Wisconsin. In 2002, GE had total revenues of approximately $131.7 billion, and GE Medical Systems had revenues of approximately $9 billion.

Instrumentarium is a major worldwide provider of medical equipment products and services, including patient monitors and C-arms, and has its principal offices in Helsinki, Finland. Instrumentarium manufactures and sells patient monitors through its Datex-Ohmeda and Spacelabs subsidiaries, and manufactures and sells C-arms through its Ziehm operations.

Instrumentarium's revenues were approximately $1 billion in 2002.

GE and Instrumentarium reached an agreement on December 18, 2002 that provides for GE to purchase Instrumentarium through a cash tender offer valued at approximately $2 billion. This transaction, which would increase concentration in the already concentrated critical care monitor and orthopedic-vascular C-arm markets, precipitated the government's suit.

B. Product Markets

1. Critical Care Monitors

a. Description of the Market

The Complaint alleges that patient monitors used to take the vital physiologic measurements of patients requiring critical care are a relevant product market within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18. Patient monitors are routinely used throughout hospitals and other healthcare facilities to measure and display information about various patient physiologic parameters. The parameters range from basic measurements, such as temperature, noninvasive blood pressure, and electrocardiography, to sophisticated invasive blood pressures (measurements of the blood pressure in various internal organs through the use of catheters). The information allows healthcare providers to monitor the health and stability of patients and is vital to the provision of healthcare.

Patients requiring critical care need more and different parameters monitored than do patients who are in less serious condition. To treat the patients requiring critical care, hospitals and other healthcare facilities must have monitors with the functionality to measure and simultaneously display information about a large number of parameters. Critical care monitors are sophisticated machines that can measure and display information regarding six or more

patient parameters. In addition to basic parameters, critical care monitors typically measure cardiac output (the volume of blood pumped by the heart in a specific time period) and multiple invasive blood pressures. Critical care monitors also require significant networking capabilities so that information can be sent to and displayed at a central station.

Critical care monitors are distinct from other products, including monitors used to monitor patients in less serious condition ("low-acuity monitors") and monitors used in the operating room ("OR monitors"). Low-acuity monitors are less complex and significantly less expensive machines that measure fewer parameters. OR monitors use specialized software and technologies not required elsewhere in the hospital. They may be configured for anesthesia machine compatibility, monitor different parameters, such as the level of anesthetic gas in a patient's airway, and tend to be significantly more expensive.

A hospital or other healthcare facility seeking to purchase a critical care monitor would not consider any other products–including a low-acuity monitor or an OR monitor–to be a realistic substitute. A small but significant increase in the price of a critical care monitor would not cause a sufficient number of hospitals or other healthcare facilities seeking to purchase a critical care monitor to switch to an OR monitor, a low-acuity monitor, or any other type of medical device so as to make such a price increase unprofitable and unsustainable.

The Complaint alleges that the relevant geographic market for the sale of critical care monitors is the United States. Any company seeking to sell a critical care monitor in the United States must register with the Food and Drug Administration ("FDA") and receive approval for its products. To be competitive, a critical care monitor supplier must also establish local distribution, service, and support networks. Thus, in the face of a small but significant increase

in the price of critical care monitors, purchasers in the United States cannot turn to any producer of critical care monitors that has not received FDA approval for its products, and are unlikely to turn in substantial numbers to providers that have not established a sales and service presence in the United States.

b. Harm to Competition as a Consequence of the Acquisition

Critical care monitors are highly differentiated products, which are distinguished from each other by price, product features, vendor reputation, and customer service. The market for critical care monitors is already highly concentrated. GE, Instrumentarium, and one other firm are the leading suppliers. Based on shares of unit sales, GE has a share of approximately 33 percent of the market, and Instrumentarium has a share of approximately 16 percent. While there are other firms that manufacture critical care monitors, product limitations and other factors, such as their degree of customer acceptance, lessen the ability of these firms to compete for many customers.

GE and Instrumentarium have competed vigorously in the development, manufacture, and sale of critical care monitors. A significant number of customers view GE's and Instrumentarium's monitors as particularly close substitutes and do not view the products of the other vendors as equally close. In individualized negotiations, these customers have benefitted from the rivalry between GE and Instrumentarium, and received lower prices, better quality, or improved service as a result. Hospitals and other healthcare facilities that purchase critical care monitors have also benefitted generally from competition between GE and Instrumentarium on price, innovation, product features, and service. The proposed transaction would eliminate the competition between GE and Instrumentarium, reduce the number of significant suppliers of

critical care monitors from three to two, and substantially increase the likelihood that GE will unilaterally increase the price of critical care monitors to a significant number of customers.

Successful entry or expansion in the development, manufacture, and sale of critical care monitors is difficult, time-consuming, and costly, and is unlikely to defeat an anticompetitive price increase or reduction in product quality in the event that GE acquired Instrumentarium. First, suppliers require FDA approval to begin marketing a critical care monitor or to introduce a new model. The product development and approval process is costly and time-consuming. Second, vendor reputation is an important factor in effectively selling critical care monitors. Hospitals and other healthcare facilities rely on critical care monitors when treating patients that are in serious condition and are reluctant to purchase from suppliers, such as new entrants or fringe firms, whose products are not well known. Third, it takes substantial time and resources to develop the expertise necessary to successfully produce and market critical care monitors. Vendors must also maintain significant ongoing research and development efforts to continue innovations that meet customer demand as well as stringent safety standards. Finally, suppliers of critical care monitors must go through the costly and time-consuming process of establishing extensive sales and service networks. Customers rely on sales representatives to inform them about new products and technologies. Many hospitals and other healthcare facilities also rely on critical care monitor providers for service and are reluctant to purchase from vendors without an established presence and service network in their area.

2. Orthopedic-Vascular C-arms

a. Description of the Market

The Complaint alleges that orthopedic-vascular C-arms are a separate and distinct

product market for purposes of Section 7 of the Clayton Act, 15 U.S.C. § 18. C-arms are fluoroscopic x-ray devices that offer real-time, continuous images during certain medical and surgical procedures. C-arms may be mobile ("mobile C-arms"), stationary ("fixed C-arms"), or small ("mini C-arms"). Mobile C-arms typically consist of two wheeled units, one to support the C-arm unit and the other to support the display monitors and imaging processor. The C-arm unit consists of a curved arm with an x-ray tube mounted on one end and an image intensifier, which converts the x-rays into a viewable image, on the other end. Orthopedic-vascular C-arms are mobile C-arms designed for general surgery, orthopedic, pain management, or basic vascular procedures. These procedures include, but are not limited to, placing splints, localized needle biopsy, endoscopy, colonoscopy, and basic vascular procedures, such as balloon angiography and endovascular stent graphs.

A hospital or other healthcare facility seeking to purchase an orthopedic-vascular C-arm would not consider any other imaging equipment, such as a fixed C-arm, mini C-arm, CT scanner, or other x-ray equipment, to be a realistic substitute. Fixed C-arms are dedicated to a specific room, are generally used for cardiac procedures, and cost significantly more than any mobile C-arm. Mini C-arms cannot image an entire torso and are limited in the medical procedures in which they can be used. CT scanners and other x-ray equipment do not have the functionality to provide real-time, continuous viewing during medical procedures.

Another type of mobile C-arm is designed for advanced vascular and cardiac procedures. These mobile C-arms are designed to image a beating heart or the brain. To produce a good image, these mobile C-arms are equipped with greater hardware and software functionality and are therefore priced at much higher levels than orthopedic-vascular C-arms. A hospital or other

healthcare facility seeking to purchase an orthopedic-vascular C-arm would not consider a mobile C-arm designed for advanced vascular and cardiac procedures to be a realistic substitute. A small but significant increase in the price of an orthopedic-vascular C-arm would not cause a sufficient number of hospitals or other healthcare facilities seeking to purchase orthopedic-vascular C-arms to switch to any alternative products so as to make such a price increase unprofitable and unsustainable.

The Complaint alleges that the relevant geographic market for the sale of orthopedic-vascular C-arms is the United States. Any company seeking to sell an orthopedic-vascular C-arm in the United States must register with the FDA and receive approval for its products. To be competitive, an orthopedic-vascular C-arm supplier must also establish local distribution, service, and support networks. Thus, in the face of a small but significant increase in the price of orthopedic-vascular C-arms, purchasers in the United States cannot turn to any producer of orthopedic-vascular C-arms that has not received FDA approval for its products, and are unlikely to turn in substantial numbers to providers that have not established a sales and service presence in the United States.

b. Harm to Competition as a Consequence of the Acquisition

The market for orthopedic-vascular C-arms is highly concentrated. GE dominates the sale of orthopedic-vascular C-arms, with approximately 68 percent of unit sales. Instrumentarium and two other firms have smaller market shares. The market for orthopedic-vascular C-arms would become even more concentrated if GE acquired Instrumentarium.

Orthopedic-vascular C-arms are differentiated on the basis of image quality, ease of use, weight and size, firm reputation, and service. Customers negotiate transactions individually with

one or more vendors and have distinct and ranging preferences for certain products and vendors. The Complaint alleges that Instrumentarium provides GE with significant competition in the development, manufacture, and sale of orthopedic-vascular C-arms. This has included competition on price, service, innovation, and product features, such as image quality. A significant number of customers view the GE and Instrumentarium orthopedic-vascular C-arm products as close substitutes, and do not view the products of other vendors to be equally close. During individual negotiations, these customers have benefitted from the competition between GE and Instrumentarium to obtain lower prices, improved product quality and services, and better contract terms. The proposed transaction would eliminate the competition between GE and Instrumentarium, remove one of the few vendors providing competition to GE in orthopedic-vascular C-arm sales, and substantially increase the likelihood that GE will unilaterally increase the price of orthopedic-vascular C-arms to a significant number of customers.

If GE acquires Instrumentarium, there is unlikely to be timely entry by any firm that would be sufficient to defeat an anticompetitive price increase or reduction in product quality. Successful entry and expansion is difficult, time-consuming, and costly for several reasons. First, to sell an orthopedic-vascular C-arm to a customer in the United States, a firm must gain FDA approval. The product development and approval process is costly and time-consuming. Second, a vendor's reputation and name recognition are extremely important factors in effectively selling orthopedic-vascular C-arms; hospitals and healthcare facilities seek to purchase products with proven records of reliability, in no small part because mobile C-arms are used during important medical procedures, and a mobile C-arm's poor performance is costly and can endanger a patient's life or physical condition.

Third, because hospitals and other healthcare facilities rely on visits from sales representatives to learn about new products and technologies, and often rely on vendors for product service, a prospective supplier of orthopedic-vascular C-arms would have to establish sales, distribution, and service networks. Fourth, it takes substantial time and resources to develop the expertise necessary to successfully produce and market orthopedic-vascular C-arms. Suppliers must also maintain significant ongoing research and development efforts to continue innovations that meet customer demand as well as stringent safety standards to ensure future sales.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of GE's proposed acquisition of Instrumentarium in the critical care monitor and orthopedic-vascular C-arm markets by establishing a new, independent, economically viable competitor in each of those markets.

The proposed Final Judgment orders the defendants to divest the Spacelabs and Ziehm businesses to acquirers acceptable to the United States, in it sole discretion. The defendants must complete the required divestitures within one hundred twenty (120) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later. The United States, in its sole discretion, may agree to an extension of this time period of up to two, thirty (30) day periods, not to exceed sixty (60) calendar days in total.

Because GE and Instrumentarium have significant operations in Europe as well as the United States, the European Commission also reviewed GE's proposed acquisition of

Instrumentarium. To obtain regulatory approval in Europe, GE entered into Commitments that, among other things, required it to sell its Spacelabs patient monitor business. These Commitments, approved by the European Commission on September 2, 2003 ("the EC Commitments"), included a detailed description of the Spacelabs business.

The proposed Final Judgment adopts this detailed description as the definition of the Spacelabs business to be divested and attaches the description as Exhibit 1 to the proposed Final Judgment. Because this detailed description includes highly confidential information, such as customer lists and supply agreements, it was filed under seal. A nonconfidential version of the description was filed as Exhibit 2 to the proposed Final Judgment. There is, however, one addition to the description of the Spacelabs business to be divested. The proposed Final Judgment also provides that the acquirer of the Spacelabs business shall grant GE a limited license to certain technology to be divested, so that Instrumentarium can continue to use this technology in its connectors for patient monitoring equipment. The terms and duration of such license are to be negotiated between GE and the acquirer of the Spacelabs business. The proposed Final Judgment does not require GE to divest Datex-Ohmeda, another Instrumentarium business unit that manufactures and sells patient monitors, because that unit predominantly sells patient monitors other than critical care monitors.

If the defendants have not divested the Spacelabs business within the required time period, the Court, upon application of the United States, is to appoint a trustee to complete the divestiture. Because the Commitments entered into in Europe also require selection of a trustee if GE does not complete the divestitures within a certain time, the proposed Final Judgment provides that the United States shall select a trustee, to be approved by the Court, after good-faith

consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission. The proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the plaintiff will have the opportunity to make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment by a period requested by the United States.

The proposed Final Judgment defines the Ziehm business to be divested as Instrumentarium's C-arm business and its line of C-arm products, currently conducted through two subsidiaries: Instrumentarium Imaging Ziehm, Inc. and Instrumentarium Imaging Ziehm GmbH. The business to be divested includes, with a few limited exceptions, all tangible and intangible assets used in Instrumentarium's C-arm business. These assets include two physical facilities (located in Riverside, California and Nuremberg, Germany), all contracts and agreements, and all intellectual property, except the use of the name "Instrumentarium." The proposed Final Judgment has a separate provision with regard to an Instrumentarium 3D-imaging research and development project that was conducted for Instrumentarium's other imaging businesses, as well as for its C-arm business. This ongoing 3D project is not part of the divestiture package, but the proposed Final Judgment requires the defendants to (1) maintain the project; (2) continue it for up to one year on a joint basis with the acquirer of Ziehm; and (3) grant the acquirer of Ziehm a perpetual, assignable, royalty-free nonexclusive license, limited to

the field of use of C-arms, to the intellectual property relating to 3D-imaging developed in the project during that period.

If the defendants have not divested the Ziehm business within the required time period, the Court, upon application of the United States, is to appoint a trustee selected by the United States and approved by the Court to complete the divestiture. The proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the plaintiff will have the opportunity to make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment by a period requested by the United States.

The proposed Final Judgment takes steps to ensure that the acquirers of both the Spacelabs and Ziehm businesses can and will be able to use these operations as viable, ongoing businesses in the manufacture and sale of critical care monitors and orthopedic-vascular C-arms, respectively, in the United States. The United States, in its sole discretion, must be satisfied that both the Spacelabs and Ziehm acquirers have the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the manufacture and sale of critical care monitors and orthopedic-vascular C-arms, respectively, in the United States.

The proposed Final Judgment is thus designed to maintain the present level of competition in both the critical care monitor and orthopedic-vascular C-arm markets by replacing the

competitor eliminated in each of these markets as a result of the acquisition with equally viable and effective competitors. It accomplishes this goal by, among other things: (1) requiring prompt divestitures so that the viability of the Spacelabs and Ziehm businesses is not harmed by an unreasonable delay in accomplishing those divestitures; (2) requiring divestitures of the tangible and intangible assets that make up each of the divested businesses so that the acquirers have the assets needed to make Spacelabs and Ziehm viable, competitive businesses; and (3) ensuring that the acquirers of Spacelabs and Ziehm have the intent and capability of competing effectively in the manufacture and sale of critical care monitors and orthopedic-vascular C-arms, respectively, in the United States.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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 a federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under 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 lawsuit that any private party may bring against the defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

The Tunney Act 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. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

James R. Wade
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 300
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

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against GE's acquisition of Instrumentarium. However, the United States is satisfied that the divestiture of the assets specified in the proposed Final Judgment will preserve competition in the production and sale of critical care monitors and orthopedic-vascular C-arms. The divestitures will preserve the structure of the markets that

existed prior to the acquisition and will preserve the existence of independent competitors.

VII. STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR THE PROPOSED FINAL JUDGMENT

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be 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." In making that determination, the Court may consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment 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). As the United States Court of Appeals for the D.C. Circuit held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[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 Senator Tunney).[1] Rather,

[1] *See also United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest"

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-Am. Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Case law requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

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determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Act authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538.

[2] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [Tunney] Act is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the Tunney Act 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. 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 might have but did not pursue. *Id*. at 1459-60.

VIII. DETERMINATIVE DOCUMENTS

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

Dated October 30, 2003.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Competitive Impact Statement was served on the following counsel by electronic mail in PDF format or hand delivery, this 30th day of October 2003:

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