UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SMITHS GROUP PLC,

SAFRAN S.A.,
MORPHO DETECTION, LLC,
MORPHO DETECTION INTERNATIONAL, LLC,

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), 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 April 20, 2016, defendants Smiths Group plc ("Smiths"), Safran S.A. ("Safran"), Morpho Detection, LLC and Morpho Detection International, LLC ("Morpho") entered into an agreement, pursuant to which Smiths intends to acquire Morpho's global explosive detection business from Safran. The value of the transaction is approximately $710 million.

The United States filed a civil antitrust Complaint on March 30, 2017, seeking to enjoin

the proposed acquisition. The Complaint alleges that the likely effect of the acquisition would be to lessen competition substantially for the development, engineering, production, distribution, sales, and servicing of desktop explosive trace detection ("ETD") devices sold for passenger air travel or air cargo transport in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would give Smiths the ability and incentive to raise prices, decrease the quality of service, and lessen innovation for customers in the United States.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants are required to divest Morpho's global ETD business. These assets collectively are referred to as the "Divestiture Assets." Under the terms of the Hold Separate Stipulation and Order, defendants will take certain steps to ensure that the Divestiture Assets are operated as a competitive, independent, economically viable, and ongoing business concern, that the Divestiture Assets will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

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

Smiths is a London-based corporation with a U.S. subsidiary, Smiths Detection U.S., Inc. ("Smiths Detection"), headquartered in Edgewood, Maryland. Smiths is a globally diversified technology company that provides products for the healthcare, energy and petrochemicals, threat and contraband detection, and telecommunications industries. Smiths Detection develops, engineers, produces, distributes, sells, and services a wide range of threat and contraband detection technologies, including x-ray, explosive trace detection ("ETD"), and infra-red spectroscopy used at airports, ports and borders, and in critical infrastructure worldwide. In 2015, Smiths' worldwide revenues were approximately $4.5 billion. Smiths Detection's worldwide revenues were approximately $730 million and its U.S. revenues were approximately $225.7 million.

Morpho Detection, LLC, based in Newark, California, and Morpho Detection International, LLC, based in Irving, Texas, (collectively "Morpho") are subsidiaries of Safran, a Paris-based $17.3 billion aerospace and defense company. Morpho develops, engineers, produces, distributes, sells, and services two categories of threat detection devices, explosive detection systems and ETD devices, which are used at airports, air cargo facilities, and other high-risk critical infrastructure sites worldwide. In 2015, Morpho's worldwide revenues were approximately $325 million and its U.S. revenues were approximately $262 million.

Pursuant to an agreement dated April 20, 2016, Smiths intends to purchase Morpho's explosive detection system and ETD device businesses for approximately $710 million.

B. Explosive Detection Industry Overview

Equipment designed to detect and identify explosives is used across a broad spectrum of government agencies and private companies for security screening. This equipment includes desktop ETD devices used at passenger checkpoints or air cargo facilities throughout the United States. ETD devices may be stationary ("desktop" ETDs) or mobile ("handheld" ETDs). Desktop ETD devices are a secondary screening method employed after an alert is made by a primary screening device, such as an X-ray scanner or an explosive detection system. Desktop ETD devices detect trace amounts of explosive residue or other contraband on hands, belongings, and cargo from a tiny sample swabbed from the object and placed inside the detector.

Desktop ETD devices used at airport checkpoints and air cargo facilities need an external power source and a controlled environment, but are considered more reliable and accurate than handheld ETD devices, and are capable of greater throughput. Generally, an ETD device's operational performance is evaluated on sensitivity, selectivity or identification, and speed.

U.S. customers require desktop ETD vendors to have a local service network, with a ready supply of consumables and components. A local service presence allows vendors to provide training to new employees who operate their devices and provide timely repair and maintenance. Likewise, desktop ETDs require regular service, maintenance, and a ready supply of consumables, so having a local service presence enables vendors to respond expeditiously when a device requires attention, and reduces downtime that can slow the pace of passenger and baggage screening at airports and other critical facilities.

C. Desktop ETD Device Industry Regulation

The Transportation Security Administration ("TSA") mandates separate security performance screening standards for passenger air travel and for air cargo transport. Desktop ETD devices that meet the TSA threat certification standards are listed either on: (a) the Qualified Product List ("QPL") for desktop ETD devices purchased by the TSA for checkpoint screening of passengers, carry-on bags and hold baggage at airports; and/or (b) the Air Cargo Screening Technology List ("ACSTL"), for desktop ETD devices purchased by air cargo companies for screening of air cargo. In addition, desktop ETD devices purchased by the TSA for passenger air travel include customized software that is exclusively available to the TSA.

U.S. sales of desktop ETD devices to the TSA for passenger air travel depend upon a small number of large, infrequent TSA procurements, which typically arise when the TSA updates its certification standards to meet emerging threats. Annual sales of desktop ETD devices used for passenger air travel in the United States averaged about $13 million over the last six years. Sales to air cargo companies follow a similar pattern, with large procurements occurring infrequently as air cargo carriers respond to evolving threats and new technology. Annual sales of desktop ETD devices used to screen air cargo averaged approximately $5.5 million over the last six years.

QPL qualification is a multi-step process that can take up to two years. Labs under the direction of the Department of Homeland Security test devices to ensure the necessary threats are detected. The TSA then conducts operational testing on-site at airports to confirm that its performance standards are met. If a desktop ETD device makes it through these steps, it will be qualified and placed on the QPL. The ACSTL qualification process generally is the same as the

qualification process for the QPL, but the mandated threat detection standards differ in order to account for a wider range of air cargo packaging material.

When the TSA opens a solicitation for desktop ETD devices, only vendors with desktop ETD devices on the QPL can participate. The TSA is currently conducting an expedited evaluation of desktop ETD devices to be qualified for inclusion on the QPL, in anticipation of an upcoming procurement likely in the second half of 2017. The TSA does not publish the QPL, but does issue a press release when a contract is awarded, which includes the name of the vendor and its desktop ETD device.

The ACSTL qualification process generally is the same as the qualification process for the QPL, but the mandated threat detection standards differ in order to account for a wider range of air cargo packaging material. The current ACSTL threat detection standard expires within the next two years. The TSA has begun testing and qualifying new desktop ETD devices to meet a new threat detection standard. Grandfathered devices may still be used by air cargo carriers until the expiration date, but any new purchases of such devices require a TSA waiver.

D. Relevant Markets Affected by the Proposed Acquisition

Defendants compete in the development, production, engineering, distribution, sales, and servicing of desktop ETD devices for passenger air travel and air cargo transport in the United States. The Complaint alleges that each of these desktop ETD device applications is a relevant product market in which competitive effects can be assessed. The different applications are recognized in the desktop ETD device industry as separate product lines; they have unique customers with different technical and service requirements. Competition would be reduced from three-to-two for the sale of desktop ETD devices in these highly concentrated markets in

the United States as a result of the proposed acquisition. For purchasers of desktop ETD devices for passenger air travel and air cargo transport in the United States, Smiths and Morpho are two of only three suppliers.

1. Desktop ETD Devices for Passenger Air Travel in the United States

The Complaint alleges likely harm in the market for desktop ETD devices for passenger air travel in the United States. The TSA may purchase only desktop ETD devices that are listed on the QPL, and QPL qualification requires that devices meet specific criteria and successfully complete rigorous testing. As these devices are purchased exclusively by the TSA and may not be sold outside of the United States, the relevant geographic market is the United States.

A hypothetical profit-maximizing monopolist of desktop ETD devices sold for passenger air travel in the United States likely would impose a small but significant non-transitory increase in price ("SSNIP") that would not be defeated by substitution away from desktop ETD devices with QPL certification or by the TSA purchasing desktop ETD devices outside the United States. Accordingly, the development, engineering, production, distribution, sale, and servicing of desktop ETD devices sold for passenger air travel in the United States is a relevant market within the meaning of Section 7 of the Clayton Act.

2. Desktop ETD Devices for Air Cargo Transport in the United States

The Complaint also alleges likely harm in the market for desktop ETD devices for air cargo transport in the United States. Air cargo transport companies operating in the United States require that desktop ETD devices meet certain performance standards, which typically include ACSTL qualification by the TSA. Desktop ETD devices on the ACSTL also must undergo significant testing to ensure they meet and deliver the required technical standards and

performance. As these devices are purchased for use at airports located in the United States, and because their sale involves a significant service component, the relevant geographic market is the United States.

A hypothetical profit-maximizing monopolist of desktop ETD devices sold for air cargo transport in the United States likely would impose a SSNIP that would not be defeated by substitution away from desktop ETD devices in the relevant market or by air cargo companies purchasing the desktop ETD devices outside the United States. Accordingly, the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for air cargo transport in the United States is a relevant market within the meaning of Section 7 of the Clayton Act.

E. Anticompetitive Effects of the Proposed Transaction

Smiths' acquisition of Morpho would eliminate head-to-head competition between these two firms in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for passenger air travel and air cargo transport in the United States. For their most significant customers, Smiths and Morpho are two of only three suppliers which historically have qualified to provide desktop ETD devices and related services for these two applications in the United States.

1. Desktop ETD Devices for Passenger Air Travel in the United States

The TSA historically has relied on three suppliers qualified to meet its QPL standards for desktop ETD devices for passenger air travel. Smiths and Morpho are two of those three suppliers that have competed on price and other terms of sale. Such competition has led to lower prices, better service and more innovative products for the TSA.

In particular, Morpho has a history of bidding aggressively for contracts to supply and service desktop ETD devices in this market. By underbidding its rivals, Morpho delivered to the TSA a lower-priced option while also incentivizing competitors to respond with more competitive prices and terms of sale. Absent the merger, Morpho was expected to continue to be an aggressive competitor. As a result, the proposed acquisition would give Smiths the ability and the incentive to raise prices and decrease the quality of its service.

The TSA is expected to issue a new solicitation to supply desktop ETD devices in the second half of 2017. Smiths and Morpho likely will continue to be two of only three competitors qualified to bid for this significant supply contract. Again, the acquisition would reduce from three-to-two the number of suppliers for the TSA's upcoming procurement, likely leading to higher prices and less advantageous terms for that agency.

Additionally, Smiths and Morpho each have sizable and active research and development operations and teams of engineers and technical staff working on desktop ETD devices for the passenger air travel market. Each firm has provided the other with the incentive to improve current products and develop new desktop ETD devices. A merged Smiths and Morpho would eliminate that competition depriving customers of more innovative future products and services.

Without the required divestiture of assets, Smiths' acquisition of Morpho's desktop ETD devices for passenger air travel would have eliminated an aggressive competitor in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices. Thus, the elimination of Morpho likely would result in significant harm from higher prices, decreased innovation, and poorer quality of service in violation of Section 7 of the Clayton Act.

2. Desktop ETD Devices for Air Cargo Transport in the United States

Smiths' acquisition of Morpho also would eliminate head-to-head competition between these two firms in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices for the air cargo transport market in the United States. Smiths and Morpho are two of only three suppliers that are listed on the ACSTL and thus, can provide desktop ETD devices and a local service network.

As in the passenger air travel market, Morpho has a history of bidding aggressively for contracts to supply and service desktop ETD devices in the air cargo transport market, which is likely to result in lower bids from Morpho and its rivals once new ACSTL solicitation is announced in the next two years. The proposed acquisition would, therefore, give Smiths the ability and the incentive to raise prices and decrease the quality of its service for air cargo transport customers.

The sizable research and development operations, engineers, and technical staff of Smiths and Morpho, respectively, which work on desktop ETD devices for the passenger air travel market, also work to improve current and develop new desktop ETD devices for the air cargo transport market. Each firm has provided the other with the incentive to improve current products and develop new desktop ETD devices for the air cargo transport market. A merged Smiths and Morpho would eliminate that incentive, potentially depriving customers of more innovative future products and services.

The proposed transaction, therefore, likely would substantially lessen competition in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices

in the air cargo transport market in the United States, leading to higher prices, decreased innovation, and poorer quality of service in violation of Section 7 of the Clayton Act.

F. Difficulty of Entry

Given the substantial time and particular technology and software required to develop and qualify a desktop ETD device to be listed on the QPL or the ACSTL, timely and sufficient entry into either the passenger air travel market or the air cargo transport market is unlikely to mitigate the harmful effects of the proposed transaction caused by the elimination of Morpho as an independent supplier.

1. Desktop ETD Devices for Passenger Air Travel in the United States

Firms attempting to enter into the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the passenger air travel market face substantial entry barriers in terms of time and technology. The TSA process for qualification of a new desktop ETD device normally takes from 12 to 24 months. Testing includes multiple steps, each of which must be passed to proceed: (1) submission and corresponding review of a data package; (2) two rounds of functional testing of the unit in a controlled environment; and (3) operational testing of the unit on-site at an airport. As a result of these barriers, entry would not be timely, likely, or sufficient to defeat a price increase arising from the substantial lessening of competition that likely would result from Smiths' acquisition of Morpho.

2. Desktop ETD Devices for Air Cargo Transport in the United States

Firms attempting to enter into the development, engineering, production, distribution, sale, and servicing of desktop ETD devices in the air cargo transport market likewise face substantial entry barriers in terms of time and technology. Air cargo companies typically

require desktop ETD device providers to meet ACSTL standards, which demand an investment of time and money similar to that required under the TSA's QPL-testing process. Setting up a local network of service and training personnel and equipment is likewise a cost- and time-intensive endeavor. As a result of these barriers, entry would not be timely, likely, or sufficient to defeat a price increase arising from the substantial lessening of competition from Smiths' acquisition of Morpho.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing a new, independent, and economically viable competitor in the development, engineering, production, distribution, sale, and servicing of desktop ETD devices. Paragraph II(G) of the proposed Final Judgment defines the Divestiture Assets to include Morpho's global ETD business, including leases or subleases to Morpho's R&D, manufacturing, sales, and service facility located at Andover, Massachusetts; its R&D facility at Santa Ana, California; its three sales and service depots located at Cambridge, England, Mississauga, Canada, and Sydney, Australia. The Divestiture Assets include all tangible assets used in connection with Morpho's global ETD business, including, but not limited to, all research and development assets; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property; all licenses, permits and authorizations issued by any governmental organization; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, including service contracts, service subcontracts, and supply agreements or

contracts; all customer lists, customer records, contracts, accounts, and credit records; all repair and performance records and all other records.

The Divestiture Assets also include all intangible assets used in connection with Morpho's global ETD business, including, but not limited to, all patents, licenses and sublicenses, intellectual property (including the ionization process technology, the high-volume particle vapor sampling technology, and the mass spectrometry technology), copyrights, trademarks and trade names (excluding trademarks and trade names related to the words "Morpho" or "Morpho Detection"),[1] service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, customization and design of new algorithms, engineering specifications, specifications for materials, specifications for parts and components, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information defendants provide to their own employees, customers, suppliers, agents or licensees, and all research data relating to Morpho's global ETD business, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

Paragraph IV(A) requires Smiths, within ninety (90) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court,

[1] Morpho's parent, Safran, carved out from the sale of Morpho the "Morpho" and "Morpho Detection" trademarks and trade names, because Safran is the primary user of those trademarks and names. Safran also uses them for products and businesses other than ETD devices. Customers widely recognize Morpho's ETD devices by product and model names rather than by the company name, so excluding the Morpho and Morpho Detection trade names and trademarks will not adversely impact the viability or competitive significance of the Divestiture Assets as an ongoing business.

whichever is later, to divest the Divestiture Assets as a viable ongoing business. The Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

Pursuant to Paragraph IV(H), the Acquirer has the option to enter into a transition services agreement with Smiths sufficient to meet the Acquirer's need for assistance in matters relating the Divestiture Assets. The Acquirer may exercise this option for a period no longer than twelve (12) months following completion of the divestiture required by the Final Judgment.

The facilities located in Santa Ana, California and Andover, Massachusetts each currently contain assets that are unrelated to desktop ETD devices. Accordingly, pursuant to Paragraphs IV(J) and IV(K), Smiths is required to remove the non-desktop ETD device assets from these facilities no later than thirty (30) days after the date the Transaction is closed.

In accordance with Paragraph IV(L), at Smiths' option, the Acquirer shall enter into an agreement to provide Smiths with a non-exclusive, worldwide, royalty-free, non-transferable, irrevocable license for the intangible assets described in Paragraph II(G)(3) of the Final Judgment, that, prior to the filing of the Complaint in this matter, were being developed to be used in connection with ETD devices (i.e., the ionization process technology, the high-volume particle vapor sampling technology, and the mass spectrometry technology); provided, however, that any license for ionization and mass spectrometry technology may not be used in connection with the development, engineering, production, distribution, sale and/or service of ETD devices. Such licenses will not be subject to any requirement to grant back to the defendants any

improvement or modifications made to these assets.

Pursuant to Paragraph IV(M), final approval of the sale of the Divestiture Assets, including the identity of the Acquirer, is left to the sole discretion of the United States to ensure the continued independence and viability of the Divestiture Assets to compete in the relevant markets.

According to Section V, in the event that Smiths does not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee selected by the United States to effect the divestiture. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that Smiths will pay all costs and expenses of the trustee. The Divestiture Trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After its appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States setting forth its efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the Divestiture Trustee and the United States will 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 or the term of the trustee's appointment.

Section XI of the proposed Final Judgment requires Smiths to provide notification to the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott Rodino Act, 15 U.S.C. 18a (the "HSR Act"), and in the same format as, and per the instructions relating to the notification required under that statute. The notification requirement applies in the case of any direct or indirect acquisitions of any assets of or interest in any entity

engaged in the development, engineering, production, distribution, sales, and servicing of desktop ETD devices in the United States; provided that notification pursuant to this Section shall not be required where the purchase price of the assets or interests being acquired is less than $30 million. Section XI further provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before such acquisitions can be consummated. The United States believes that Smiths may have an interest in acquiring other desktop ETD companies that have not yet qualified for either the QPL or ACSTL but which may attempt to qualify for the QPL or ASCTL in the future. Because some of these firms may not be large enough to trigger HSR reporting requirements, we are requiring this notification provision.

The Divestiture Assets are not limited only to desktop ETD devices but rather include Morpho's global ETD business, which includes desktop, handheld, and portal ETD products. These products share many commonalities, including intellectual property, research and development, patented technology, production processes, components, distribution, sales, and service support. Partitioning such closely related lines of business would be impractical and endanger the viability and competitiveness of an entity that consists solely of the desktop ETD business. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the provision of desktop ETD devices used in the relevant markets by preserving the Divestiture Assets as an independent and vigorous competitor to Smiths.

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 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 will neither impair nor assist 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 defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants 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 sixty (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 sixty (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 United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W.
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 defendants. The United States could have litigated and sought preliminary and permanent injunctions against Smiths' acquisition of Morpho. The United States is satisfied, however, that the divestiture of Morpho's global ETD business described in the proposed Final Judgment will preserve competition for the development, production, engineering, distribution, sales, and servicing of desktop ETD devices in the United States. Thus, the proposed Final Judgment would achieve 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 of the Complaint.

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

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-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
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> (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); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent 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 mechanism to enforce the final

judgment are clear and manageable.").[2]

As the United States 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 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 Microsoft*, 56 F.3d at 1458-62. 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) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held 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).[3] In determining whether a

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[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (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

proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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 *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *8 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *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). To meet this standard, the United States "need

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[obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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*, 2014 U.S. Dist. LEXIS 57801, at *9 (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 ("the '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. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding 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, 2014 U.S. Dist. LEXIS 57801, at *9 (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). The language wrote into the statute what Congress intended when it 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). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent 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."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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.

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Respectfully submitted,

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