UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. THALES S.A. and GEMALTO N.V., Defendants.	Case No.:

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

Defendant Thales S.A. (Thales) and Defendant Gemalto N.V. (Gemalto) entered into an agreement, dated December 17, 2017, pursuant to which Thales would acquire, by means of an all-cash tender offer, all of the outstanding ordinary shares of Gemalto for approximately $5.64 billion. The United States filed a civil antitrust Complaint on February 28, 2019, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition in the provision of General Purpose (GP) Hardware Security Modules (HSMs) in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in higher prices for GP HSMs as well

as a reduction in quality, product support, and innovation.

At the same time the Complaint was filed, the United States filed a 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 make certain divestures for the purpose of remedying the loss of competition in the U.S. market for GP HSMs that would have resulted from the merger. Under the terms of the Stipulation and Order, Defendants will take certain steps to ensure that the divested GP HSM Products business is operated as a competitively independent, economically viable and ongoing business concern, that 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 Proposed Transaction

Thales is an international company incorporated in France with its principal office in Paris. Thales is active globally in five main industries: (i) aeronautics; (ii) space; (iii) ground transportation; (iv) defense; and (v) security. In 2017, it had global revenue of approximately $19.6 billion, operations in fifty-six countries, and approximately 65,100 employees. Thales

eSecurity is a business unit of Thales that primarily encompasses three legal entities: (1) Thales eSecurity Inc. (based in the United States with offices in Plantation, Florida; San Jose, California; and Boston, Massachusetts); (2) Thales UK Ltd. (based in the United Kingdom); and (3) Thales Transport & Security HK Ltd. (based in Hong Kong). Thales eSecurity specializes in developing, marketing, and selling data security products, including but not limited to GP HSMs, payment HSMs, and encryption and key management software and hardware.

Thales sells GP HSMs to customers worldwide, including government and commercial organizations throughout the United States. In 2008, Thales acquired nCipher, a company that specialized in cryptographic security and sold, among other things, GP HSMs under the brand name nCipher. After that acquisition, Thales changed the brand name of those GP HSMs to nShield. To resolve the United States' concerns in this matter, and pursuant to commitments made to the European Commission on November 7, 2018, Thales has agreed to divest its nShield business. As part of the commitments to the European Commission, Thales has already separated the nShield business and related assets and personnel from the rest of its businesses and appointed a hold separate manager whose responsibility it is to manage the nShield business as a distinct and separate entity from the businesses retained by Thales until the divestiture is completed. This new business unit is operating under the name nCipher Security.

Gemalto is an international digital security company incorporated in the Netherlands with its principal office in Amsterdam. Gemalto is active globally in providing authentication and data protection technology, platforms, and services in five main areas: (i) banking and payment; (ii) enterprise and cybersecurity; (iii) government; (iv) mobile; and (v) machine-to-machine Internet of Things. In 2017, Gemalto had global revenue of approximately $3.7 billion,

operations in forty-eight countries, and approximately 15,000 employees. Gemalto develops, markets, and sells GP HSMs, as well as other security solutions and services, including but not limited to payment HSMs and encryption and key management software and hardware. In the United States, Gemalto sells its products and services primarily through SafeNet, Inc. (based in Belcamp, Maryland), SafeNet Assured Technologies, LLC (based in Abingdon, Maryland), and Gemalto Inc. (based in Austin, Texas). Gemalto sells GP HSMs to customers worldwide, including government and commercial organizations throughout the United States, under the brand name SafeNet Luna.

The proposed acquisition of Gemalto by Thales, as initially agreed to by Defendants on December 17, 2017, would lessen competition substantially in the U.S. market for GP HSMs. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on February 28, 2019.

B. The Competitive Effects of the Transaction on the Market for GP HSMs

GP HSMs are tamper-resistant hardware environments for secure encryption processing and key management. They are most frequently included as components of complex encryption solutions used by government and private organizations to safeguard their most sensitive data. The universe of sensitive electronic data has been expanding rapidly and relates to a wide range of subjects, such as personally identifiable information, health records, financial information, tax records, trade secrets, software code, and other confidential information. Inappropriate use, theft, corruption, or disclosure of this data could result in significant harm to an organization's customers or constituents and the organization itself.

Organizations increasingly rely on encryption as a crucial component of the security measures implemented to safeguard sensitive data from internal and external threats. Encryption is a process that converts readable data (plain text) into an unreadable format (cipher text) using an algorithm and an encryption key. Decryption is the reverse of encryption, converting cipher text back to plain text. Encryption algorithms are based on highly complex math and are often standardized and open source.

Encryption keys consist of a randomly generated series of numbers. Because encrypted data is virtually impossible to decipher using today's technology without the encryption key, attackers who want unauthorized access to sensitive data generally focus their efforts on obtaining those encryption keys. With the right key, an attacker can freely access an organization's sensitive data. Conversely, a lost or corrupted key could make encrypted data unrecoverable by the organization. Organizations therefore must implement processes that safeguard against improper use of the encryption keys while simultaneously ensuring they are readily available when required for authorized use.

GP HSMs provide the most secure way for organizations to effectively manage and protect their encryption keys, and many organizations use them to protect their most sensitive data. Key management functionality is also available from software-based solutions. While these software solutions are generally less expensive than GP HSMs, GP HSMs are more secure. GP HSMs provide additional security, in part, because they are isolated from the rest of the organization's IT system. Use of GP HSMs is often required by regulations, industry standards, or an organization's auditors or security policies.

GP HSMs are typically validated by independent testing organizations to confirm they meet certain specified levels of security; software-based key systems, by contrast, are not able to meet the most stringent levels of security.

Thales and Gemalto sell GP HSMs and related services directly to end-user organizations and through resellers who often combine the GP HSMs with additional security products or services. Thales and Gemalto also sell GP HSMs to cloud service providers (CSPs) such as Amazon Web Services and Microsoft Azure, who then sell GP HSM services, or HSM-as-a-service (HSMaaS), to their cloud customers. There are, however, many organizations that are reluctant to use HSMaaS because they want more control over the security of their data. Even if an organization chooses to use HSMaaS, it may also require an on-premises GP HSM to provide an additional layer of encryption security.

GP HSMs typically must be integrated into or configured to operate within an organization's existing IT environment. An organization needs assurance that a GP HSM will be an effective component of what may be an already complex data security infrastructure. Because of this, the GP HSM sales process typically includes a comprehensive exchange of information between the potential customer organization and GP HSM supplier.

Once an organization has installed a GP HSM into its IT infrastructure and is using it to protect its keys and to provide a secure data encryption environment, any breakdowns or malfunctions in the GP HSM could not only compromise the sensitive data but also jeopardize the organization's ability to perform day-to-day tasks that are necessary for the organization to carry out its business. Post-sales customer support and service are therefore essential. Many customers will not even consider a potential GP HSM supplier who has not established a strong

reputation for providing quality GP HSMs and continuous and effective post-sales service and support.

Thales and Gemalto are the two leading providers of GP HSMs in the United States, with market shares of approximately 30% and 36%, respectively, and a combined market share of approximately 66%. Together, Thales and Gemalto dominate the GP HSM market in the United States. As originally proposed, Thales' acquisition of Gemalto would substantially increase market concentration in an already highly concentrated market. Acquisitions that reduce the number of competitors in already concentrated markets tend to to substantially lessen competition.

Thales' proposed acquisition of Gemalto likely would substantially lessen competition and harm customers in the U.S. GP HSM market by eliminating head-to-head competition between the two leading suppliers in the United States. Thales and Gemalto are each other's closest competitors for GP HSMs. Thales and Gemalto regularly approve significant discounts on GP HSMs when competing against each other. Thales and Gemalto both have strong reputations for high-quality post-sales service and support. Competition between the two companies has also spurred innovation in the past. Thales' proposed acquisition of Gemalto would eliminate this head-to-head competition and reduce innovation, in addition to significantly increasing concentration in a highly concentrated market. The acquisition likely would result in higher prices, lower quality, and reduced supplier choices for customers.

It is unlikely that any firm would enter the market for GP HSM sales to customers in the United States in a manner sufficient to defeat the likely anticompetitive effects of the proposed

acquisition. Successful entry in the development, marketing, sale, and service of GP HSMs would be difficult, time-consuming, and costly.

Any new entrant would be required to expend significant time and capital to design and develop a series of GP HSMs that are at least comparable to Thales' and Gemalto's GP HSM product lines in terms of functionality and the ability to interoperate with a wide range of encryption solutions and IT resources. Moreover, a new entrant, as well as any existing foreign-based GP HSM provider seeking to expand and become a viable competitor in the supply of GP HSMs for use by individual organizations in the United States, would need to spend significant time and effort to demonstrate its ability to provide high-quality GP HSMs and continuous, high-quality post-sales service in the United States. It is unlikely that any such entry or expansion effort would produce an economically viable alternative to the merged firm in time to counteract the competitive harm likely to result from the proposed transaction.

As a result of its acquisition of Gemalto, as originally proposed, Thales would have emerged as the clearly dominant provider of GP HSMs in the United States with the ability to exercise substantial market power, increasing the likelihood that Thales could unilaterally increase prices or reduce its efforts to improve the quality of its products and services.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the market for GP HSMs by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires Thales, within thirty-five (35) calendar days after the filing of the Complaint, or five (5) days

after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business, Thales' GP HSM Products business. This includes all tangible and intangible assets primarily related to the production, operation, research, development, sale, or support of any Thales GP HSM Product.

Further, the proposed Final Judgment specifies the manner in which shared intangible assets shall be divested. These are assets that are used or have been under development for use as of January 7, 2019, which was the date Thales' GP HSM Products business was formally separated from the rest of Thales, in relation to both (i) Thales' GP HSM Products business and (ii) Thales' business relating to products other than GP HSM Products.

The proposed Final Judgment provides that, in the event that government approvals needed to complete the divestiture have been timely filed but remain outstanding at the end of the permitted divesture period, additional, limited extensions may be granted to allow Defendants and the acquirer time to obtain those approvals.

The proposed Final Judgment also provides that Thales must provide the Acquirer relevant information to allow the Acquirer to evaluate whether to make offers of employment to Thales employees, and provides that Thales must not interfere in any hiring process. Under the terms of the proposed Final Judgment, the Acquirer may seek to hire additional employees up to 90 days after they acquire the divested assets. Thales may not re-hire employees hired by the Acquirer for one year after the divestiture is complete, and may not specifically solicit any of those individuals for two years.

The 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 to develop, service, and sell GP HSMs to customers in the United States. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers. The proposed Final Judgment also includes procedures pursuant to which the Acquirer may apply to the United States for the right to acquire additional assets that would be materially useful to the divested business, or hire specific additional personnel, for a limited time after the divesture date.

The proposed Final Judgment provides that Defendants must ensure that their products continue to interface and interoperate with the divested GP HSM Products for at least two years. This interoperability must be provided at cost, and on the same quality (which may be measured, for example, by reference to speed and frequency of content transmission, lag time, uptime, database or API synchronization, or data fields transmitted, exposed, or used) and terms that were provided at any time since January 1, 2017. Should the Acquirer determine that a third year of interoperability is necessary, it may request that this provision be extended an additional year.

The proposed Final Judgment also provides that Thales must provide certain transition services to Acquirer, at the Acquirer's request for a period of one year. The acquirer may request that the United States allow the period of these transition services to be extended for another year if necessary.

The proposed Final Judgment provides that Thales must use its best efforts to ensure that all contracts involving GP HSM Products be transferred to the Acquirer. When contracts involve both GP HSM Products and other products, the portions of the contracts relating to GP HSM Products will be conveyed. If Thales is unable to convey any of these contractual rights, the

proposed Final Judgment provides that it will use its best efforts to make the Acquirer whole.

The proposed Final Judgment also provides that Thales will grant the Acquirer a covenant not to sue for breach, in the field of GP HSMs, of any patent held by Thales.

The proposed Final Judgment provides that the United States may apply to the Court for appointment of a Monitoring Trustee with the power and authority to investigate and report on the parties' compliance with the terms of the Final Judgment and Stipulation and Order filed with the Court for entry during the pendency of the divestiture. The Monitoring Trustee's duties would include reviewing: (1) the implementation and execution of a compliance plan to prevent any misuse of confidential information relating to the divested business; and (2) any application by the Acquirer for additional employees or assets.

The Monitoring Trustee will not have any responsibility or obligation for the operation of the parties' businesses. The Monitoring Trustee will serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must assist the trustee in fulfilling its obligations. The Monitoring Trustee will file semiannual reports and shall serve until the provisions regarding employees, additional assets, and transition services have expired.

In the event that Defendants do 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. Defendants will pay all costs and expenses of any such trustee. After his or her appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States setting forth his or her 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 Divestiture Trustee's appointment.

The proposed Final Judgment contains provisions to require, for five years, that Defendants refrain from using any Confidential Information that they possess about the GP HSM Products business, except for certain permitted uses. Defendants must prepare a compliance plan to promote the success of these provisions and regularly report to the Division whether there has been a breach.

The proposed Final Judgment also contains provisions that require Defendants to report to the Division subsequent transactions that are related to GP HSMs, if those transactions otherwise would not be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. §18a.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph XVI(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have 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 Defendants have waived any argument that a different standard of proof should apply. This provision aligns the

standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XVI(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore all competition that would otherwise be harmed by the merger. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this 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 XVI(C) of the proposed Final Judgment provides that should the Court find in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph XIV(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Finally, Section XVII of the proposed Final Judgment provides that the Final Judgment shall expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court

and Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the provision of GP HSMs.

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 United States Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Aaron Hoag
Chief, Technology and Financial Services Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Room 7100
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 continued the litigation and sought preliminary and permanent injunctions against Thales' acquisition of Gemalto. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of GP HSMs 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 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); *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., 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 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").

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 in the government's complaint, whether the decree is sufficiently clear, whether its 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. Instead:

> [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).[1]

In determining whether a 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*, 38 F. Supp. 3d at 74-75 (noting that a court should not reject the proposed remedies because it believes others are preferable and that room must be made for the government to grant concessions in the negotiation process for settlements); *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 government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case"). The ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461 (*quoting United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990)). To meet this standard, the United States "need 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

[1] *See also 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").

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 ("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.

In its 2004 amendments,[2] 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*, 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

[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a 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).

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. 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. *See also 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"); S. Rep. No. 93-298 93d Cong., 1st Sess., 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.").

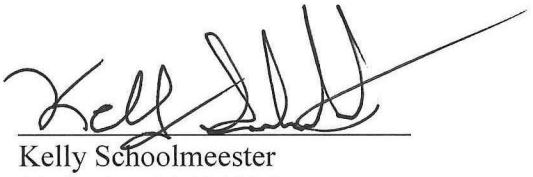
VIII.

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.

Dated: February 28, 2019

Respectfully submitted,



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