

## II. Legal Standard Governing the Court's Public Interest Determination

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. 16(e). The Court, in making its public interest determination, should apply to deferential standard and should withhold its approval only under limited conditions. Specifically, the Court should review the proposed Final Judgment in light of the violations charged in the complaint and "withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" *Mass. School of Law v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

It is not proper during a Tunney Act review "to reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459; see also *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6–7 (D.D.C. 2003) (rejecting argument that court should consider effects in markets other than those raised in the complaint); *United States v. Pearson PLC*, 55 F. Supp. 2d 43, 45 (D.D.C. 1999) (noting that a court should not "base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). Because "[t]he 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,"<sup>2</sup> 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 the United States might have but did not pursue. *Microsoft*, 56 F.3d at 1459–60; see also *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (DC Cir. 1993) (noting that a Tunney Act proceeding does not permit "de novo determination of facts and issues" because "[t]he balancing of competing social and political interests

affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General" (citations omitted)).

Moreover, the United States is entitled to "due respect" concerning its "prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case." *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 6 (citing *Microsoft*, 56 F.3d at 1461).

## III. Summary of Public Comments

The United States received comments from two entities, the American Antitrust Institute ("AAI," comment attached as Exhibit 1) and Spanish Broadcasting System, Inc. ("SBS," comment attached as Exhibit 2).

AAI takes the position that the United States' CIS fails to address and evaluate "the consequences of this merger in conventional terms in an overall market consisting of Spanish-language media, examining such traditional criteria as advertising effects [and] the consumer interest in diversity of sources of political and cultural information." AAI cmt. at 1. AAI also states that the United States' CIS fails to explain why the proposed Final Judgment does not require the elimination of all rights Univision currently possesses in Entravision and the divestiture of all stock Univision holds in Entravision. AAI cmt. at 1 n.2. These points are similar to SBS's comments on these issues and are addressed below. Additionally, AAI argues that the Division should have considered indicia of harm to non-price competition, such as quality and innovation.

SBS, a Spanish-language radio company that competes in many markets with HBC and Entravision, states that the United States should have alleged harm in its Complaint based on purported effects of the transaction on a "Spanish-language broadcasting market." SBS cmt. at 1–2. SBS further claims that the transaction will increase Univision's incentives (1) to refuse to deal with or discriminate against Spanish-language radio competitors who seek to advertise through Univision and (2) to force advertisers who wish to advertise through both radio and television to purchase time from both Univision and HBC. *Id.* at 3. In addition, SBS argues that the United States' remedy fails to solve the competitive concerns in the Spanish-language radio markets raised in the Complaint because, according to SBS, Univision will be able to exercise undue influence over Entravision. *Id.* at 1, 4–6.

## IV. The United States' Response to Specific Comments

Because both comments raise the general issue of whether the effects of the merger should be analyzed in light of an "overall" Spanish-language media market, the United States will first respond to that issue. It will then respond to the specific points AAI and SBS raised concerning whether the remedy addresses the competitive harm raised in the Complaint.

### A. Allegations Not Raised in the Complaint Are Irrelevant to Whether the Proposed Final Judgment Is in the Public Interest

#### 1. SBS's Proposed Market and Alleged Harm Are Extraneous to the Competitive Issues Raised in the Complaint

The Complaint alleges that the relevant market consists of the provision of advertising time on Spanish-language radio stations to the significant number of advertisers that consider Spanish-language radio advertising to be a particularly effective advertising medium. See Complaint ¶¶12–15. SBS, however, takes the position that the complaint should have raised additional allegations of harm based on purported effects in a combined Spanish-language radio and television market. SBS cmt. at 1–2.

The Complaint's market definition does not extend to the issues raised by SBS, nor should it. The market definition analysis in the Complaint properly begins by examining how advertisers individually negotiate transactions with radio broadcasters such as Entravision and HBC. The resulting price for advertising time reflects the circumstances of these individual negotiations and the preferences of each advertiser. The Complaint's market definition reflects these individualized negotiations by looking at the options available to individual advertisers. The Complaint alleges that a significant number of advertisers exist who do not have reasonable alternatives to advertising on Spanish-language radio; in other words, these advertisers cannot effectively switch to other media in the face of a small but significant increase in the price of advertising time on Spanish-language radio. This set of advertisers forms the relevant market alleged in the Complaint.

SBS does not appear to take issue with the theoretical framework underlying the Complaint's market definition. Rather, it alleges that there is another market to consider; namely, a purported market consisting of a set of advertisers that are dependent on

<sup>2</sup> It is the United States' responsibility to investigate a transaction and decide what allegations to raise in any challenge it may bring. See *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is generally committed to an agency's absolute discretion.").