

defendants from illegally benefitting from their market allocation agreement.

VI. Standard of Review Under the APPA for Proposed Final Judgment

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." 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)(emphasis added). As the Court of Appeals for the District of Columbia has held, the APPA 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 Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

In conducting this inquiry, "the 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."³ Rather, 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.⁴

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) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981)); see also *Microsoft*, 56 F.3d at 1458. "Indeed, the district court is without authority to 'reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made.'" *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 154 (D.D.C. 2002) (quoting *Microsoft*, 56 F.3d at 1459). Precedent requires that:

The 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.⁵

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."⁶

⁴ *United States v. Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶61,508, at 71,980 (W.D. Mo. 1977); see also *United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

⁵ *United States v. Bechtel Corp.*, 648 F.2d at 666 (emphasis added); see also *United States v. BNS, Inc.*, 858 F.2d at 462–63 (district court may not base its public interest determination on antitrust concerns in markets other than those alleged in government's complaint); *United States v. Gillette Co.*, 406 F. Supp. at 716 (court will not look at settlement "hypercritically, nor with a microscope"); *United States v. National Broad. Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978) (same).

⁶ *Microsoft*, 231 F. Supp. 2d at 153 (quoting *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citation omitted),

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. Since 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. *Microsoft*, 56 F.3d at 1459–60.

VII. 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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Certificate of Service

I hereby certify that I served a copy of the foregoing competitive impact statement via first class United States mail, this 3rd day of February, 2003, on:

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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) (standard is not whether decree is one that will best serve society, but whether it is within the reaches of the public interest); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978) (standard is not whether decree is the best of all possible settlements, but whether decree falls within the reaches of the public interest).

³ 119 Cong. Rec. 24,598 (1973). See *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the competitive impact statement and response to comments filed pursuant to the APPA. Although the APPA 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.A.N. 6535, 6538-39.