



## GUEST COMMENTARY

### **The Competitive Impact Statement: More Explanation Would Better Aid the Court in Tunney Act Proceedings**

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#### **I. Introduction**

The district court's recent order entering the final judgment in *HPE-Juniper*<sup>1</sup> is the first time in a while that a court has grappled fully with how to manage the disclosure and public interest requirements in the Tunney Act. The court's extensive discussion provides an opportunity to consider how the various obligations on the parties and the court interact. The Tunney Act process viewed as a whole contemplates sufficient government (and defendant) disclosures to elicit substantive public comment and ultimately assist the court when it determines whether the agreed-to resolution is in the public interest. The Department of Justice should embrace this opportunity and provide a fuller description of its choices and reasons when settling an antitrust case.

The Tunney Act ("Act")<sup>2</sup> imposes a number of obligations on the parties when settlement of an antitrust case brought by the Department of Justice is proposed to a court. The main obligations on plaintiff United States include an explanation of the proceeding, a description of the competitive harm alleged in the government's complaint, a corresponding explanation of how the terms of the settlement appropriately resolve those allegations, and a brief discussion of alternatives the government considered. The defendants are required to disclose any communications between the defendants and the administration (excluding direct communications between defense counsel and the Department of Justice—generally the Antitrust Division). The Act requires publication and a 60-day period for public comment. Finally, the Act requires the court to determine that the settlement is in the public interest before entering the final judgment.

Most Tunney Act proceedings have been straightforward if not in fact *pro forma*. Many antitrust cases, especially mergers, are settled before the government commences litigation. The

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<sup>1</sup> Order Granting Motion for Entry of Final Judgment ("*HPE-Juniper* Order"), *United States v. Hewlett Packard Enterprise Co.*, No. 25-CV-00951, (N.D. Cal. Aug. 12, 2026) (Pitts, J.).

<sup>2</sup> 15 U.S.C. § 16.

government files the proposed final judgment and a Competitive Impact Statement (“CIS”) that includes a brief description of the proceeding, often at the same time it files the complaint.<sup>3</sup> There are frequently no public comments filed during the required 60-day period. Timing may vary, but the government publishes any comments it receives, responds to them as it deems appropriate, and moves for entry of the final judgment. The government’s discussion of “actually considered” alternatives required by §16(b)(6) is uniformly brief: when filing the settlement along with the complaint, the government usually states its choice as between litigating fully or closing its investigation; if the complaint has already been filed, the stated alternatives are litigating or dismissing. In either case, the government concludes that the settlement is a reasonable balance of the costs and risks of litigation weighed against the competitive benefit of remediating the alleged harm quickly.<sup>4</sup> And almost never has a defendant had cause to disclose communications that took place outside the settlement discussions themselves.

The court’s role is limited to assessing whether the settlement is in the “public interest,” which the Act does not define. The court’s role is not to revisit the complaint, determine whether additional allegations or counts should have been included, or otherwise to step into the shoes of the government. The government is granted significant deference in its remedial choices, and the court often enters judgment without further proceedings of any kind, although in some cases courts have grappled with their limited role and at times questioned whether they are mere “rubber stamps” for the parties’ settlement.

## II. *United States v. HPE and Juniper*

The United States filed a complaint in early 2025 seeking to block Hewlett Packard Enterprise’s acquisition of Juniper Networks, alleging anticompetitive effects in a U.S. market for “enterprise” wireless network solutions (WLAN), where HPE and Juniper’s “Mist” WLAN products competed with market-leader Cisco and other smaller firms.<sup>5</sup> Following pretrial discovery and nearing their trial date, the parties reached a settlement whereby HPE would divest its “Instant On” business and license the source code for Juniper’s “Mist” platform. The settlement was filed with the court in June 2025, starting the Tunney Act proceedings.

The *HPE–Juniper* settlement was anything but *pro forma*.<sup>6</sup> Following permissive intervention by a number of states, prompted by extensive reporting of communications outside the direct settlement negotiations, the court allowed some limited discovery by the states, ordered briefing and a hearing (but denied a request for a further evidentiary hearing), and made its determinations. First, it concluded that the government had not fully disclosed certain remedies that the government had considered (including some that had been presented to defendants). Second, it concluded that the defendants had not fully disclosed all the communications covered by the Act’s disclosure

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<sup>3</sup> If the settlement comes after litigation has already begun, then the complaint will have already been filed, as was the case in *HPE–Juniper*.

<sup>4</sup> The CIS filed in *HPE–Juniper* followed that practice.

<sup>5</sup> Complaint, *United States v. Hewlett Packard Enterprise Co.*, No. 25-CV-00951, (N.D. Cal. Jan. 30, 2025).

<sup>6</sup> Judge Pitts’ order describes in detail what discovery revealed about communications between the defendants and the administration and the remedial choices the government faced. *HPE–Juniper* Order, *supra* note 1, at 11-20.

requirements. The court concluded, however, that because the additional discovery conducted by the intervening states had revealed the previously undisclosed remedies and communications, there was no harm to the public and therefore no reason to deny entry of the final judgment based on those failures.

The court's determination that entry of the final judgment would be in the public interest discussed the guidance provided by the Act and prior decisions, all within the constraints of the court's limited role. Judge Pitts noted that the 2004 amendments to the Act clarified that the courts must go beyond assuring the settlement does not make a "mockery of the judicial function," that "the Court's Tunney Act review focuses primarily on the proposed judgment's competitive effect" but also that the review "is not limited to the harms articulated in the complaint," and that, "the Tunney Act does not allow a court to 'engage in an unrestricted evaluation of what relief would best serve the public'" (citing *Microsoft* and other cases).<sup>7</sup> Judge Pitts' recital of these undefined and varying standards suggests that more clarity from the government could help courts address their public interest charge.

### III. Enhancing the Competitive Impact Statement

Judge Pitts spent considerable time reviewing the arguments and counter-arguments about the effectiveness of the divestiture and licensing remedy, noting an overall test (of sorts), whether the remedy is "within the reaches of the public interest."<sup>8</sup> Drawing on portions of the pre-trial record and points made in the government's post-intervention pleadings, the Court concluded that "despite . . . flaws identified by the states, . . . HPE's divestiture of the Instant On business could nonetheless promote competition in the market to some extent," and also noted some technical difficulties about alternatively divesting HPE's WLAN business.<sup>9</sup>

Much of the court's basis for its public interest determination drew on materials that were not in the original CIS. If the *HPE-Juniper* district court's focus on "considered" alternative remedies and a more-than-passing consideration of the public interest become prevailing practice, questions arise about what the government should discuss about its remedial choices and how courts should weigh the parties' and any commenters' discussions about the actual remedy. The CIS and the commenting process can form a stronger basis for the court's albeit limited scope of review.

Going forward, what more should a CIS say, and would any benchmarks help? It seems over-reactive to suggest that every antitrust settlement should include such a full-bore discussion as reflected in the court's extensive treatment here. Some (perhaps many) settlements are straightforward, and the proposed remedies seem clearly to address fully the alleged competitive harm.<sup>10</sup> But if a proposed remedy raises many questions about its scope, implementation, and

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<sup>7</sup> *Id.* at 21, 27, 28.

<sup>8</sup> *Id.* at 28-36.

<sup>9</sup> *Id.* at 32-33.

<sup>10</sup> For example, in a merger involving firms with many lines of business but presenting one competitive overlap, divestiture of the entirety of one firm's business (especially to a buyer already identified) would seem not to require much discussion beyond the basics.

technical requirements that the court will likely have to address, more extensive discussion at the outset—in the CIS—would ease the court’s path. The showing should be “meet for the case.”<sup>11</sup> Rather than recite rote statements regarding the alternative to settling, namely proceeding to trial, a well-crafted CIS can better assist the court to conclude that the proposed remedy, and not some other possible relief, serves the competition goals that led to the complaint.

A framework for integrating the three main aspects of the Tunney Act process can assist all the interested parties—government plaintiff, public commenters, the court. How to proceed will vary depending on the type of case and the theory of harm.

The government should view the CIS as an opportunity to explain its remedial choices (within the constraints of privilege and confidentiality). Remedy choice is often as important as case selection. Just as the government has at times released statements explaining its reasoning behind decisions *not* to bring a case, using the CIS to explain its remedial approach would better inform interested parties and often provide the court with a stronger basis to accept the settlement. Adding more substance about choice of remedy can be done briefly and within the existing framework of the required CIS.<sup>12</sup>

The CIS should continue to describe the alleged violations with enough detail that the alleged harm to competition is clear and should meet the other requirements of the Act (full description of the remedial terms in the final settlement, remedies available to private parties, procedures for modification, etc.). The CIS should, however, go beyond the current general practice and discuss remedies that were considered (or discussed with the parties) but ultimately not pursued or required. To date, the government has not generally done more than say that the alternative to settlement would have been litigation, with resulting costs, risk of loss, and delay. More, however, can be discussed without revealing confidential information or privileged communications. And there is no legal reason the CIS discussion of alternative relief must be separate from its discussion of the agreed-to remedy’s resolution of the alleged harm.<sup>13</sup>

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<sup>11</sup> *Cal. Dental Ass’n v. FTC.*, 526 U.S. 756, 781 (1999).

<sup>12</sup> Both the Justice Department and FTC have at times issued “closing statements,” which similarly discuss their reasons for not proceeding. See Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Merger of Paramount Skydance and Warner Bros. (June 12, 2026), <https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-closing-its-investigation-merger-paramount>. Other instances where the government has published its reasons for not bringing a case include the FTC’s extensive statement in *Google-DoubleClick*, see Statement of the Federal Trade Commission Concerning Google-DoubleClick (Dec. 20, 2007), available at <https://www.ftc.gov/news-events/news/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation>, and the recent statements in the *IonQ/Skywater* merger (a 1-1 vote for consent/no-action, leading to early termination of the HSR waiting period), see Statement of Chairman Andrew N. Ferguson In the Matter of IonQ, Inc./SkyWater Technology, Inc. (July 31, 2026); Statement of Commissioner Mark R. Meador In the Matter of IonQ, Inc. and SkyWater Technology, Inc. (July 31, 2026), available at <https://www.ftc.gov/news-events/news/press-releases/2026/07/statements-grant-early-termination-ftcs-investigation-ionqs-proposed-acquisition-skywater>.

<sup>13</sup> Where needed, the CIS can identify which particular remedial choices are in fact “alternative relief” as contemplated by the Act. See 15 U.S.C. § 16(b)(6).

**Horizontal Mergers.** For horizontal mergers, the obvious and preferred remedy is almost always a divestiture, and the scope of the divestiture is almost always a consideration.<sup>14</sup> In describing the proposed final remedy’s scope, the CIS should identify the alternatives that were also considered. In particular, for horizontal mergers where divestiture or other structural relief is *not* required (*i.e.*, if a “behavioral” or conduct remedy is required instead), the CIS should explain how the remedy will resolve the alleged competitive harm through other remedial terms.

It is likely that in most horizontal merger cases, the government’s going-in position will be for a broad structural remedy fully covering the product and geographic markets. As the then-current 2020 Remedies Manual stated, “A Divestiture Must Include All Assets Necessary for the Purchaser to Be an Effective, Long-Term Competitor.”<sup>15</sup> There has often been a preference for divestiture of a “going concern.”<sup>16</sup> Accordingly, a decision to take a more limited remedy should be explained, with more or less detail depending on the case. In addition to explaining the basic remedial choice of structural or behavioral remedy, certain recurring issues in divestiture cases may deserve discussion. Among other issues that might arise:

1. If the divestiture is a carve-out from one of the parties and not a going concern, the CIS should explain the government’s analysis of how that divestiture is expected to succeed. If the remedy does not require an “upfront buyer” (where the buyer has already been identified and approved), the CIS should discuss whether any potential buyers have been identified.
2. If the decree requires divestiture of some combination of assets from both merging parties, the CIS should explain how the government expects the divestiture buyer to integrate the assets into a competitive entity.<sup>17</sup>
3. If a divestiture does not include some usually required “input” assets (*e.g.*, supplies that are not widely available), the CIS should explain how the settlement anticipates the divestiture buyer will cover those gaps.
4. If the divestiture buyer will need to recruit important skilled employees, the CIS should explain if the decree does not contain often-used employee transfer provisions.

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<sup>14</sup> The Antitrust Division has issued varied iterations of a merger remedies “manual,” most recently in 2020. *See* U.S. Dep’t of Justice, Antitrust Div., Merger Remedies Manual (“2020 Remedies Manual”) (Sept. 2020), *withdrawn* April 2022, *available at* <https://www.justice.gov/atr/page/file/1312416/dl?inline>. They have been “withdrawn,” but they consistently set out the issues and concerns that the Division addresses in every merger. Similarly, the FTC’s Bureau of Competition has issued various guidance documents. *See, e.g.*, Fed. Trade Comm’n, Merger Review, Remedies (last visited Oct. 7, 2026), *available at* <https://www.ftc.gov/enforcement/merger-review>.

<sup>15</sup> 2020 Remedies Manual, *supra* note 14, at 6.

<sup>16</sup> *See, e.g., id.* at 8-9 (“[T]he Division has a preference for requiring the divestiture of an existing standalone business” that “possesses all of the physical assets, personnel, customer lists, information systems, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product.”).

<sup>17</sup> Both points 1 and 2 arose in *HPE-Juniper*. *HPE-Juniper* Order, *supra* note 1, at 15. Notably, the required auction/license of Juniper’s AI Ops for Mist need not be to the divestiture buyer of HPE’s Instant On, presenting issues about the competitive posture of the divestee and licensee(s) *vis-à-vis* the merged firm. *See id.*

5. If the products or services in the market require access to important intellectual property, the CIS should discuss whether the defendant must transfer patents with a possible license back, or may instead retain that property and license the divestiture buyer and whether the defendant must provide ongoing technical support.

***Vertical mergers.*** For non-horizontal mergers, divestiture is often not the preferred remedy for the alleged harm. If the government considered structural relief but agreed to require behavioral remedies instead, the CIS should identify that consideration. The CIS should also explain how any particular conduct requirements are expected to resolve the competitive problem. Some frequently required terms include: information firewalls between vertical operations; isolation of certain employees from upstream and downstream units; and equal-dealing requirements as between one level of the business and competing businesses. (Specific industry facts will call for variation from case to case.)

***Conduct (non-merger) cases.*** Conduct cases can vary significantly and thus call for varying decree terms, depending on the conduct at issue. The CIS should explain whether additional remedial terms were considered and why they were not required. Certainly, if the government considered a structural remedy but decided not to require one, that alternative should be identified.

The government's description of how it considered these common issues would allow more meaningful public comment. These expanded discussions may alert the public to flaws in the remedy that might not otherwise have been revealed.<sup>18</sup> In turn, the improved public comments may better assist the court.

#### **IV. Public Comments to Assist the Court**

Public commenters can draw from both the government's complaint and the CIS to comment on how the agreed-to remedy resolves the alleged competitive harm.<sup>19</sup> In addition to discussing any perceived strengths and weaknesses in the remedy (*e.g.*, if the remedy does not address markets alleged in the complaint), any technical flaws in a structural remedy (*e.g.*, a patent being divested that does not in fact cover all the technology that the remedy contemplates) and any enforceability risks should be discussed.<sup>20</sup>

Numerous courts have repeatedly held that the district court's role is limited to considering the violations and harms as alleged, considering any comments, and making a general determination whether it is reasonably within the scope of possibility that the relief will redress the anticipated harm. Courts are expected neither to rubber stamp the settlement nor decide if additional harms should have been considered or (generally) if the government should have required more relief. In a rare case where real flaws in the specifics of a remedy are identified, the court may have a role in

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<sup>18</sup> In *HPE-Juniper* the parties revised the settlement between the time it was first filed and when it was moved for final entry, apparently in response to some comments.

<sup>19</sup> The FTC routinely invites public comment on its settlements and issues an explanation styled, "Analysis of Agreement Containing Consent Order to Aid Public Comment" (emphasis added).

<sup>20</sup> Comments that assert that the case has no merit and should be dismissed are not likely to be persuasive unless they identify specific reasons to believe that the remedy itself will cause competitive harm.

urging resolution of those flaws. More clarity from the government would help assure courts that the agreed-to competition relief should be entered as a final judgment.

## **V. Conclusion**

A major purpose of the Tunney Act is to assure that antitrust settlements entered as final and enforceable judgments are deemed in the public interest. To aid the court's assessment, the Act requires disclosure of the broad contours of the government's assessment and decisions, and it allows the public to comment meaningfully. No specific benchmarks are possible, but a reasonable approach to the scope of considered alternatives that should be disclosed along with the court's limited but considered weighing of those alternatives would likely be better than a description of the actual relief taken accompanied by a simple statement that the alternative was to go to trial. This exercise, along with the required disclosure of communications between the parties and the administration, will better assist the court, and foster the goals of the Act itself.