Federal Trade Commission

Consent Decrees: Is the Public Getting Its Money's Worth?

Remarks of J. Thomas Rosch*
Commissioner, Federal Trade Commission

before the

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Introduction

Today I would like to share with you my American perspective on settlements that resolve and pretermit antitrust proceedings—what we call consent decrees in the civil context and plea bargains in the criminal context—and to offer some points of comparison and contrast with your procedures and practices across the Atlantic. I will focus my remarks on consent decrees—for the simple reason that the Federal Trade Commission, as you probably know, does not have any jurisdiction over *pure* criminal

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing this paper.

antitrust matters.[1] That jurisdiction belongs exclusively to the United States Department of Justice, and in particular, its Antitrust Division.

My remarks today about consent decrees concern the basic question of whether the *public interest* is being properly served. Or to put it more bluntly, is the public (in the United States, the taxpayers) getting their money's worth out of our enforcement efforts when the Commission or the Antitrust Division decide to settle a civil antitrust matter? There should be internal and procedural safeguards to ensure that consent decrees do indeed serve the public interest when they are being accepted or approved by an agency. With respect to the Commission, the public interest is critical because it is what cabins the "wide discretion" that we otherwise wield to fashion remedial orders[2] that only have to bear a "reasonable relation to the unlawful practices found to exist."[3]

At the Commission, we have a procedure in our rules for putting proposed consent decrees out for public comment,[4] although to the best of my knowledge, we have

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[1] But as I have detailed elsewhere, the Commission does investigate and challenge per se illegal conduct that falls short of a criminal violation, such as unintegrated physician groups and invitations to collude. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission*, Remarks before the George Mason Law Review's 14th Annual Symposium on Antitrust Law (Feb. 9, 2011), at 4-10, *available at* http://www.ftc.gov/speeches/rosch/110209georgemasoncartelsmergers.pdf.

[2] *See, e.g.*, Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946).

[3] *See, e.g.*, FTC v. Nat'l Lead Co., 352 U.S. 419, 429 (1957) (*quoting Jacob Siegel*, 327 U.S. at 612-13). *See infra* notes 60-65 and accompanying text.

[4] 16 C.F.R. § 2.34(c) (2010) (providing for a public comment period of 30 days, or some other period that the Commission may specify). For parallel procedures applicable to the Justice Department's consent judgments, *see* 15 U.S.C. § 16(b-d) (2009).

never withdrawn a proposed decree based on comments we have received.[5] Beyond that procedure, in my view it is incumbent upon each Commissioner to decide for himself or herself that a proposed decree appropriately treats with the violations and harms that he or she has reason to believe have occurred, or would have occurred, *and equally importantly*, that the decree otherwise advances, or at least does not disserve, the public interest. Notably, however, what the Commission does *not* have is a procedure for judicial approval—unlike consent decrees entered into by the Antitrust Division[6]—and one of the questions I want to pose today is whether we should. Furthermore, on a related topic, I know that you all here in Europe have had a very recent experience with judicial review of Article 9 commitment decisions in the *Alrosa* case.[7] I have some reflections on this decision as well.

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[5] 16 C.F.R. §§ 2.34(e)(1) & 3.25(f) (2010) (reserving to the Commission the right to withdraw its acceptance of a consent decree after the public comment period); *but see* Campbell Soup Co., 77 F.T.C. 664 (1970) (declining to withdraw acceptance of consent decree notwithstanding negative comments from a third-party), discussed *infra* notes 70-80 and accompanying text. On occasion, however, the Commission has withdrawn its acceptance of consent decrees for other reasons, namely, in the context of merger cases in which the parties subsequently have failed to consummate, or have decided to abandon, the transaction that is the subject of the decree.

[6] 15 U.S.C. § 16(e) & (f) (2009) (popularly referred to as the Tunney Act). To make sure I am being clear, I use the term "judicial approval" because the procedure I am talking about requires that a federal district court *approve* a settlement as being in the public interest. This is different from "judicial review," which merely refers to an appeal or petition for review to a federal court of appeals, which *reviews* a settlement that has been accepted and made final by the agency.

[7] Case C 441/07 P, Comm'n v. Alrosa Co. Ltd., 2010 ECJ EUR-Lex LEXIS 686 (June 29, 2010), *available at* 2010 O.J. (C 234) 3, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:234:0003:0004:EN:PDF, *and at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0441:EN:HTML, *setting aside judgment in and dismissing* Case No. T 170/06, Alrosa Co. Ltd. v. Comm'n, 2007 E.C.R. II-02601, 2007 ECJ EUR-Lex LEXIS 3364 (2007), *available at* 2007 O.J. (C 199) 37, http://eur-

As I say, the Commission has no involvement with plea bargains struck in pure criminal antitrust cases; we may on occasion refer potential criminal matters to the Antitrust Division for investigation[8] but we do not get involved in either their prosecution or settlement. But here, too, I note there are procedures to ensure that plea bargains are in the best interest of the public. Not only do plea agreements have to be reviewed and accepted by a federal district court,[9] but the victims of antitrust crimes may have input under the Crime Victims' Rights Act.[10] Particularly in the context of cartel enforcement, where deterrence is the primary goal, I think that procedures and practices relating to plea bargaining—whether in the United States or in Europe—should take into account the behavior, rational or irrational, of companies and their individual agents. Indeed, there have been recent writings on this topic from both sides of the Atlantic,[11] but that is a topic for another day and another conference.

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lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:199:0037:0037:EN:PDF, *and at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006A0170:EN:HTML. For the European Commission's challenged decision, *see* Case COMP/B-2/38.381 – De Beers, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/38381/38381_1065_1.pdf *and summary at* 2006 O.J. (L 205) 24, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:205:0024:0025:EN:PDF.

[8] *See* 15 U.S.C. §§ 46(k) & 56(b) (2009).

[9] FED. R. CRIM. P. 11(c).

[10] 18 U.S.C. § 3771 (2009). *See generally Antitrust Division -- Victims' Rights*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/victim/index.html (last visited Mar. 23, 2011).

[11] *See, e.g.*, PAPER, OFFICE OF FAIR TRADING, UNITED KINGDOM, WHAT DOES BEHAVIOURAL ECONOMICS MEAN FOR COMPETITION POLICY?, Pub. No. OFT1224 (Mar. 2010), *available at* http://www.oft.gov.uk/shared_oft/economic_research/oft1224.pdf; Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Firms: A Primer*, CESifo Working Paper Series No. 2937 (Feb. 2010), *available at*

Consent Decrees, Reason to Believe and the Public Interest

In thinking about consent decrees and their proper use in settling antitrust proceedings brought by the Commission, it is important to consider how such proceedings begin in the first place. In contrast to a private litigant, the Commission—as an antitrust and consumer protection enforcement agency—brings litigation *only in the public interest*. The public interest mandate is explicitly set forth in Section 5(b) of the Federal Trade Commission (FTC) Act, which empowers the Commission to "issue and serve . . . a complaint stating its charges" whenever it has "reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce," *and* if it appears to the Commission that a proceeding brought by it with respect to such method, act or practice "would be to the interest of the public[.]"[12]

As the statutory language clearly spells out, the United States Congress has authorized the Commission to file complaints only when it has "reason to believe" that an unfair method of competition, or an unfair deceptive act or practice, violating any of the laws enforced by the Commission has been or is occurring,[13] *and* that the commencement

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553645; Maurice E. Stucke, *Am I a Price-Fixer? A Behavioral Economics Analysis of Cartels, in* CRIMINALISING CARTELS: A CRITICAL INTERDISCIPLINARY STUDY OF AN INTERNATIONAL REGULATORY MOVEMENT ch. 12, 263 (Hart Publishing, Oxford, *forthcoming* 2011), *abstract available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535720.

[12] 15 U.S.C. § 45(b) (2009).

[13] The Commission's enforcement of Section 7 of the Clayton Act prohibiting anticompetitive mergers also expressly incorporates the "reason to believe" standard. *See* 15 U.S.C. § 21(b) ("Whenever the Commission . . . vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, . . .").

of litigation against the person or business charged with the offending conduct would be "in the interest of the public." These two bedrock principles—the "reason to believe" standard and the "public interest" mandate—undergird any litigation brought by the Commission.[14]

In my view, it follows that if and when the Commission decides to settle any litigation it has brought or has determined to bring, such a settlement—in terms of the agreed-upon relief—should fairly consider not only the unfair methods, acts or practices that the Commission had *reason to believe* to have been committed by the respondent, but such a settlement should be, first and foremost, in the *public interest*,[15] and not be

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[14] *See, e.g.*, FTC v. Raladam Co., 283 U.S. 643, 649 (1931) ("Thus, the Commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, the Commission still may not proceed unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial.") (*citing* FTC v. Klesner, 280 U.S. 19, 28 (1929)). *See also id.* at 654 ("A proceeding under § 5 is not one instituted before the Commission by one party against another. It is instituted by the Commission itself, and is authorized whenever the Commission has reason to believe that unfair methods of competition in commerce are being used, and that a proceeding by it in respect thereof would be to the interest of the public. Acting upon its belief, the Commission issues charges and enters upon an inquiry which, of course, it has jurisdiction to make.").

My own application of the "reason-to-believe" standard incorporates the "public interest" mandate as a subsidiary question, and separately asks (1) whether there is enough evidence to form a reason to believe that further investigation may as a factual and legal matter demonstrate liability, and (2) whether there is a sound legal basis for the theory of liability and harm we are pursuing. *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?*, Remarks before the ABA Annual Meeting (Aug. 5, 2010), at 3, *available at* http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf.

[15] *See* Johnson Prods. Co. v. FTC, 549 F.2d 35, 38 (7th Cir. 1977) ("The Commission, unlike a private litigant, must act in furtherance of the public interest.") (explaining that the public interest mandate entitles the Commission to reserve to itself the option of withdrawing its acceptance of a consent decree after the public comment period).

undertaken principally for some other private or personal reason. In other words, the terms of settlement of any litigation brought by the Commission should be negotiated and approved based on the same standards that caused the Commission to file suit in the first place. Otherwise, the Commission runs the risk that the litigation it has brought, or has determined to bring, may be viewed and criticized as lacking the required reason-to-believe that a violation of law has occurred, and/or as failing to account for the public interest at stake.

The risk I have just identified is neither trivial nor imagined. In *FTC v. Standard Oil Co.*,[16] the respondent, Standard Oil Company of California, mounted a collateral attack against an administrative complaint that the Commission had issued against it and seven other major oil companies, charging them with "maintain[ing] and reinforc[ing] a non-competitive market structure in the refining of crude oil into petroleum products," "exercis[ing] monopoly power in the refining of petroleum products," and engaging in "common courses of action in accommodating the needs and goals of each other throughout the petroleum industry."[17] In a lawsuit filed with a United States district court in Northern California, Standard Oil alleged that the Commission had issued its complaint without having a reason to believe that Standard Oil had violated Section 5 of

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It should be emphasized that in fashioning a consent decree (or a litigated decree), the Commission need not consider whether all of the conduct covered by the "fencing in" part of the decree constitute a violation of the law; to the contrary, as discussed *infra* notes 60-65 and accompanying text, the "fencing in" part of the decree can cover perfectly legal conduct so long as the conduct is "reasonably related to a violation." But there must always be a "reason to believe" that there is *a violation* and that the remedy is "in the public interest" in order to justify a decree, whether litigated or on consent.

[16] 449 U.S. 232 (1980).

[17] *Id.* at 234 & n.3.

the FTC Act.[18] The district court dismissed Standard Oil's complaint on the ground that the Commission's reason-to-believe determination was a preliminary agency action and hence unreviewable by the courts.[19] The court of appeals for the Ninth Circuit disagreed, however, holding that the Commission's issuance of a complaint was a final agency action that could be reviewed as to whether the Commission had in fact made a reason-to-believe determination, or had acted for some other reason such as "outside pressure."[20]

In the end, the United States Supreme Court sided with the district court. The Court held that the Commission's reason-to-believe determination, while it admittedly results in the agency issuing a complaint, is itself not a "definitive statement of position" as to whether a violation of the FTC Act has occurred, and hence not a final agency action.[21] In reaching this conclusion, however, the Supreme Court cautioned in a footnote that "we do not encourage the issuance of complaints by the Commission without a conscientious compliance with the 'reason to believe' obligation in [Section 5(b) of the FTC Act]. The adjudicatory proceedings which follow the issuance of a complaint may last for months or years. They result in substantial expense to the respondent and may divert management personnel from their administrative and productive duties to the corporation. Without a well-grounded reason to believe that

[18] *Id.* at 235.

[19] *Id.* at 237.

[20] *Id.* at 237-38.

[21] *Id.* at 241.

unlawful conduct has occurred, the Commission does not serve the public interest by subjecting business enterprises to these burdens."[22]

While the *Standard Oil* decision insulates the Commission's reason-to-believe determination from respondent challenge and judicial review, it nonetheless serves as a continuing reminder that the Commission needs to have "a well-grounded reason to believe that unlawful conduct has occurred" whenever it files a complaint under Section 5.[23] Having thus formed "a well-grounded reason to believe," however, the Commission should not then negotiate and approve consent decrees that do not adequately remedy the unlawful conduct that gave rise to the adjudicatory proceeding in the first place. To do otherwise would not serve the public interest either.

Some Examples of Unwarranted Consent Decrees

Measured against the standard I have just described, some consent decrees unfortunately may fall short. Among them are what I will call "cheap decrees"—consent decrees that are questionable because they have been negotiated for reasons other than remedying the violations of law that the Commission had reason to believe were

[22] *Id.* at 246 n.14. I have in the past shared my own concerns about the pace at which the Commission conducts its administrative litigation and expressed hope that with the revisions to our "Part 3" rules—now in place, the Commission will be able to provide an effective and viable adjudicatory process. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Reflections on Procedure at the Federal Trade Commission,* Remarks before the ABA Antitrust Masters Course IV (Sept. 25, 2008), at 3-6, *available at* http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf. *See* Fed. Trade Comm'n, Rules of Practice, 74 Fed. Reg. 20205 (May 1, 2009) (final rule amending 16 C.F.R. pts. 3 & 4).

[23] I have previously likened the Commission's reason-to-believe determination to a "probable cause" determination that a prosecutor or grand jury would make in the context of commencing criminal proceedings against a defendant. *See* Rosch, *So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?, supra* note 14, at 3-5.

committed, and/or on terms that do not substantially advance the public interest. For example, a consent decree may result from reluctance or fear to try the case, or from the respondent's concern about the costs of trial or what other issues a full-blown investigation or discovery may uncover. While these may be wholly legitimate concerns warranting settlement in the context of a lawsuit involving two *private* parties, they are not legitimate in the context of an adjudicatory proceeding brought by the Commission, which acts only in the *public* interest. As a matter of responsible public policy, the Commission should not approve a decree that reflects the private and personal considerations of those involved in the litigation without having satisfied for itself—and the American public—that the decree appropriately remedies the violations identified by the Commission's reason-to-believe determination and otherwise serves the public interest.

Sometimes consent decrees are unwarranted because the respondents, for example, in the context of a challenged merger, offer up a remedy that "gives up the sleeves out of the respondent's vest," that is, to allow the main transaction to be cleared. Specifically, it has been suggested that parties in pharmaceutical mergers and other cases involving innovation markets, rather than fight agency enforcement, have agreed to divestitures or compulsory licensing of relevant innovation assets, e.g., patents and related know-how,[24] because these assets represent an insignificant part of the entire

[24] *See, e.g.*, Complaint, Decision & Final Order, Ciba Geigy Ltd., FTC File No. 961 0055, Dkt. No. C-3725, 123 F.T.C. 842 (Mar. 24, 1997), *available at* http://www.ftc.gov/os/caselist/9610055.shtm. In *Ciba-Geigy*, the Commission voted 5-0 to accept a proposed consent decree that would have the parties divest Sandoz's overlapping herbicide and flea control product businesses. Additionally, the Commission voted 4-1 to compel the parties' grant of non-exclusive licenses to their patent rights for

transaction that they are anxious to consummate.[25] This suggestion raises a concern that the agreed-upon remedies in innovation market cases are more than what the Commission would have been able to obtain, had it been forced to litigate the merger case.[26] Notably, the Commission has only infrequently brought merger cases based on an innovation market theory, and has never won such a case, to my knowledge.[27] Moreover, there can be substantial disagreement among the Commissioners over the nature and extent of the harms to competition caused by mergers involving innovation markets.[28] I will discuss a

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gene therapy research in order to remedy competitive concerns in several gene therapy (innovation) markets.

[25] Ronald W. Davis, *Innovation Markets and Merger Enforcement: Current Practice in Perspective*, 71 ANTITRUST L.J. 677, 693-94 (2003) ("To date, however, the enforcement targets have elected to settle rather than fight, presumably, (a) because the agencies' challenges have, by and large, not involved businesses that were vital to the transactions under investigation, and (b) because the executives making the decision on whether to fight or settle are just as uncertain as everyone else about where their R&D programs will ultimately lead.").

[26] *Id.* at 693 ("One might have thought that some of these enforcement actions would be vulnerable to severe judicial scrutiny if tested in the context of a preliminary injunction hearing.") (citing M. Howard Morse, *The Limits of Innovation Markets*, ANTITRUST & INTELLECTUAL PROPERTY (ABA Section of Antitrust Law, Spring 2001), at 1).

[27] *See* I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 587 (6th ed. 2007) ("To date, no court has invalidated a transaction solely because it reduced competition in an innovation market."); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Some Thoughts on the Role of Intellectual Property in Innovation Market Cases and Refusals to License*, Remarks before the Conference on Antitrust and Digital Enforcement in the Technology Sector (Jan. 31, 2011), at 6, 10-12, *available at* http://www.ftc.gov/speeches/rosch/110131technologysector.pdf; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Antitrust Regulation of Innovation Markets*, Remarks before the ABA Antitrust Intellectual Property Conference (Feb. 5, 2009), at 13-14, *available at* http://www.ftc.gov/speeches/rosch/090205innovationspeech.pdf.

[28] *See, e.g.*, Genzyme Corp.-Novazyme Pharms., Inc., FTC File No. 021-0026 (investigation closed Jan. 13, 2004), *available at* http://www.ftc.gov/opa/2004/01/genzyme.shtm.

concrete example of this disagreement in a moment but my point here is that this sort of disagreement obviously colors the assessment of whether a proposed decree appropriately remedies the violations of law, and the attendant harms to competition, that the Commission—or some of the Commissioners—had reason to believe would flow from a challenged transaction.

Let me now give you an example to illustrate what I have been talking about. In *Negotiated Data Solutions LLC*,[29] I joined the Commission majority's Statement of its reasons for voting to issue a complaint against Negotiated Data Solutions LLC (commonly referred to as N-Data) and to accept the proposed consent decree settling the charges.[30] As explained in its Statement, the Commission had reason to believe that N-Data's alleged reneging on a prior patent licensing commitment that its predecessor company, National Semiconductor, had made to the Institute of Electrical and Electronics Engineers (IEEE), a standard-setting body, constituted both an unfair method of competition and an unfair act or practice, in violation of Section 5 of the FTC Act.[31] Both the Statement and the accompanying Analysis of Proposed Consent Order to Aid Public Comment[32] describe in detail the Commission's determination that N-Data's

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[29] Negotiated Data Solutions LLC, FTC File No. 051 0094, Dkt. No. C-4234, *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

[30] Stmt. of the Fed. Trade Comm'n, Negotiated Data Solutions LLC, FTC File No. 051 0094, Dkt. No. C-4234 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf.

[31] *See* Complaint ¶¶ 1, 38-39, Negotiated Data Solutions LLC, FTC File No. 051 0094, Dkt. No. C-4234 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122complaint.pdf.

[32] Analysis of Proposed Consent Order to Aid Public Comment at 4-9, Negotiated Data Solutions LLC, FTC File No. 051 0094, Dkt. No. C-4234 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf.

alleged conduct violated both prongs of Section 5, consistent with the controlling and limiting case law,[33] as well as the statute's legislative history. The Analysis of Proposed Consent Order further explains that the consent decree would remedy the harm flowing from these violations, namely, by precluding N-Data from enforcing the relevant patents against putative infringers unless it has first offered to license them on the terms set forth in the prior commitment letter to IEEE.[34]

There was no question that N-Data had monopoly power in that case. This power, however, was a function of the patented technology's inclusion in the IEEE standard and that standard's subsequent adoption by the industry. From my perspective, N-Data's conduct at issue—its alleged breach of the prior licensing commitment—did not allow it to acquire or maintain its monopoly power and thus I did not believe it constituted "exclusionary conduct" (an essential element of a Section 2 offense under the Sherman Act). But I thought that under the very peculiar circumstances of the case (including the standard-setting context in which the commitment was made and N-Data's subsequent exploitation of "locked in" licensees and their customers), the practice constituted both an unfair act or practice and an unfair method of competition under Section 5. Consequently, I was willing to treat N-Data's conduct as a pure Section 5 offense, which

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[33] *See generally* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Official Airline Guides v. FTC, 630 F.2d 920 (2d Cir. 1980). *See also* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Section 2 and Standard-Setting:* Rambus, N-Data *& the Role of Causation,* Remarks before the LSI 4th Antitrust Conference on Standard Setting & Patent Pools (Oct. 2, 2008), at 10-13, *available at* http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf.

[34] *Analysis*, *supra* note 32, at 9-10.

the consent decree appropriately remedied, which I evaluated by applying the same reason-to-believe standard.[35]

The Commission's closure of its investigation in *Genzyme Corporation-Novazyme Pharmaceuticals*[36] illustrates the concerns I have raised about consent decrees in mergers involving innovation markets. *Genzyme-Novazyme* was a post-acquisition investigation[37] into a merger between the only two companies engaged in preclinical research related to Pompe disease, a rare and often fatal disorder affecting infants and children for which there was no known treatment.[38] Despite the relatively early stage of research and development that Genzyme and Novazyme were engaged in, there was no dispute that enzyme replacement therapy (ERT) was only the therapeutic approach that showed promise for treating the disease. As a result, the "universe" of research and

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[35] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *A Peek Inside: One Commissioner's Perspective on the Commission's Roles as Prosecutor and Judge*, Remarks Presented at the NERA Antitrust & Trade Regulation Seminar (July 3, 2008), at 8 (responding to the question of whether I applied a different standard for evaluating N-Data's conduct because it was a consent decree instead of a litigated matter).

[36] Press Release, Fed. Trade Comm'n, FTC Closes Its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), http://www.ftc.gov/opa/2004/01/genzyme.shtm.

[37] The acquisition did not trigger the premerger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the Commission therefore did not have the ability to investigate the merger until after the transaction had closed.

[38] Recently there was an American movie made about Pompe disease and the search for a cure, entitled *Extraordinary Measures* and starring Harrison Ford and Brendan Fraser. *See, e.g.*, Toni Clarke, *Genzyme Braces for the Movie* "Extraordinary Measures," Reuters (UK ed.), Jan. 20, 2010, 4:17 p.m. GMT, http://uk.reuters.com/article/2010/01/20/genzyme-movie-idUKN2014401220100120?pageNumber=1. In the movie, Fraser plays John Crowley, who had two children afflicted with Pompe disease and helped form the company Novazyme with the basic research of Dr. William Canfield, played by Harrison Ford.

development efforts was well-defined: before the merger, there were two companies engaged in that universe of research; afterwards, there was just one.[39] Notwithstanding that fact, the Commission voted 3-1 *not* to challenge the merger.

Then-Chairman Tim Muris voted with the majority and explained in a separate statement that there was no empirical research to suggest a direct relationship between concentration in research and development and the level of innovation.[40] Thus, in his view, the Horizontal Merger Guidelines' "rebuttable presumption" that significant market concentration is anticompetitive should not apply to merger analysis in an innovation market.[41] Commissioner Mozelle Thompson disagreed with this position, however,

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[39] Actually, at one point, there were as many as four different research and development efforts aimed at producing a commercially viable ERT for Pompe disease—Genzyme's internal program and three others initiated by Pharming, Synpac and Novazyme. *See* Clarke, *supra* note 38 ("The race for a cure was fought out among scientists at four companies, including Genzyme. Between 1998 and 2002, Genzyme teamed up with a trio of companies and had acquired rights to their experimental drugs."). In an interview, Robert Mattaliano, in charge of Genzyme's internal program, reportedly said, "Now we had four horses in the race, and there was a lot of competition and egos." *Id.* This state of affairs reportedly prompted Genzyme CEO Henri Termeer to shout rhetorically, "How many more babies have to die?" in a plea to get his researchers to stop bickering. *Id.*

[40] Stmt. of Timothy J. Muris, Chairman, Fed. Trade Comm'n, at 2-3 (observing that a 1996 Commission staff report "acknowledged that 'economic theory and empirical investigations have not established a general causal relationship between innovation and competition"), 5-6 (noting that "neither economic theory nor empirical research supports an inference regarding the merger's likely effect on innovation (and hence patient welfare) based simply on observing how the merger changed the number of independent R&D programs"), Genzyme Corp.-Novazyme Pharms., Inc., FTC File No. 021-0026 (Jan. 13, 2004), *available at* http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf.

[41] *Id.* at 23 ("The reason why no presumption attaches is clear. There is no reason to believe, a priori, that a particular merger is more likely to harm innovation than to help it—which is, of course, simply another way of saying that there is no empirical basis for a presumption."). Incidentally, the 2010 Horizontal Merger Guidelines issued by the Commission and the Antitrust Division retain this presumption of anticompetitive effects in mergers that cause significant increases in concentration. U.S. DEP'T OF JUSTICE &

"see[ing] no compelling reason why innovation mergers should be exempt from the *Horizontal Merger Guidelines* or the presumption of anticompetitive effects for mergers to monopoly[.]"[42] In his view, a rejection of the presumption eliminated "[t]he most significant fact in this merger analysis[,]" namely, that the merger brought together the only two companies in the world engaged in research and development for Pompe disease ERTs.[43] Added to these two diametrically opposite views was Commissioner Pam Harbour's position that "[a]lthough one may question whether we have yet reached the point where a general presumption of anticompetitive effects in highly concentrated innovation markets is applicable, in the extreme case of a merger to monopoly that eliminates all competition and diversity in the innovation market, such a presumption seems appropriate."[44]

While we now have the benefit of years of hindsight with respect to the competitive effects of the Genzyme-Novazyme merger,[45] the Commission demonstrably

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FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1.3 (Aug. 19, 2010 rev.), *available at* http://ftc.gov/os/2010/08/100819hmg.pdf.

[42] Dissenting Stmt. of Mozelle W. Thompson, Comm'r, Fed. Trade Comm'n, at 3, Genzyme Corp.-Novazyme Pharms., Inc., FTC File No. 021-0026 (Jan. 13, 2004), *available at* http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf.

[43] *Id.* at 4.

[44] Stmt. of Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, at 3, Genzyme Corp.-Novazyme Pharms., Inc., FTC File No. 021-0026 (Jan. 13, 2004), *available at* http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf. Commissioner Harbour chose not to vote on whether to close the investigation but she issued a public statement to express her views on the relationship between competition and innovation.

[45] Genzyme ultimately received FDA approval for a Pompe disease ERT, initially in 2006 and then again in 2010 for a scaled-up version of the product, marketed under the name LUMIZYME® in the United States and MYOZYME® in the rest of the world. *See* Press Release, Genzyme Corp., Genzyme Receives FDA Approval for Lumizyme for Pompe Disease, May 25, 2010,

wrestled with the issue when it voted to close the investigation in January 2004. A fundamental disagreement on the proper approach to innovation merger analysis can therefore affect not only whether the Commission decides to vote out a complaint, but also the propriety of any ensuing consent decree.[46] As I have observed before,[47] one of the virtues of the Commission as an enforcement agency is its independent, bipartisan structure—headed by five Commissioners who serve staggered 7-year terms, with no more than three coming from the same political party.[48] On a day-to-day basis, the need to create a majority forces the Commissioners to consider one another's views.[49] And

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http://www.businesswire.com/portal/site/genzyme/index.jsp?ndmViewId=news_view&ndmConfigId=1019673&newsId=20100525006514&newsLang=en.

[46] *Compare* Muris, *supra* note 40, at 20-21 ("Neither litigation nor a remedial order would likely benefit Pompe patients. . . . A remedy in this case also appears problematic. Although we have issued and will continue to issue complaints against consummated mergers when appropriate, unwinding the merger of preclinical research efforts on the particular facts of this case raises numerous issues."), *with* Thompson, *supra* note 42, at 13 ("I acknowledge that remedies for consummated mergers can provide challenges that may or may not result in remedies equal to those that would have been provided by a pre-merger injunction or consent order. But imprecise or otherwise imperfect remedies for consummated mergers may still be able to replace some or all of the meaningful competition lost due to the merger."), *and with* Harbour, *supra* note 44, at 4 ("Enthusiasm for justifiable enforcement must always be disciplined, however, by pragmatic considerations regarding the ability to achieve effective relief in a given case. . . . Specifically, in the pharmaceutical industry case, the overall impact on the patient class, which would not benefit from an undue disruption of the remaining research and development efforts, should also be taken into account.").

[47] Rosch, *So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?*, *supra* note 14, at 10-11.

[48] 15 U.S.C. § 41 (2009).

[49] As former Commissioner Tom Leary has aptly put it, "[w]hen we deal with shades of gray"—as we often do—"the process is likely to produce better outcomes. It certainly nudges people toward the center." Thomas B. Leary, Comm'r, Fed. Trade Comm'n, *The Bipartisan Legacy*, Remarks before the American Antitrust Institute's Sixth Annual Conference (June 21, 2005), at 19, *available at* http://www.ftc.gov/speeches/leary/050803bipartisanlegacy.pdf.

this includes each Commissioner's individual exercise of his or her prosecutorial discretion under the reason-to-believe standard, and his or her assessment of the public interest concerns.[50]

Another aspect of consent decrees that sometimes deserves a closer look is the suspended judgment/"avalanche" clause, often used in the Commission's consumer protection cases. Through these provisions, the Commission will accept payment of a lower judgment amount than the damages that it estimates have actually been suffered by consumers, based on a respondent's sworn statement and supporting documentation indicating a lack of financial means to pay the full amount.[51] The unpaid balance of the judgment amount is therefore suspended, and does not become due and payable unless the respondent's sworn statement turns out to be materially false or incomplete.[52] Used in this manner, a suspended judgment/avalanche clause serves a legitimate purpose: it

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[50] *See infra* notes 70-80 and accompanying text (discussing a divided Commission's views over the extent to which the public interest requires it to consider alternative remedies proposed by third parties).

[51] *See, e.g.*, Stip. Final Order for Perm. Inj. & Settlement of Claims for Monetary Relief ¶ IX, FTC v. Sunny Health Nutrition Tech. & Prods., Inc., FTC File No. 062 3007, CIV No. 8:06-CV-2193-T-24EAJ (M.D. Fla. Nov. 30, 2006) (settling false advertising charges against respondents relating to three dietary supplements and accepting a reduced judgment amount of $375,000 based on their financial condition, despite an estimated consumer loss of $1,900,000), *available at* http://www.ftc.gov/os/caselist/0623007/finalorderpermanentinjunction.pdf; FTC v. Tono Records, No. CV-07-3786 JFW (RCX), 2008 U.S. Dist. LEXIS 36244 (C.D. Cal. May 1, 2008) (settling violations of the FTC Act and the Fair Debt Collection Practices Act with a judgment that suspends all but $50,934 of $1,186,754).

[52] *See, e.g.*, Stip. Order, FTC v. Sunny Health Nutrition Tech. & Prods., Inc., FTC File No. 062 3007, CIV No. 8:06-CV-2193-T-24EAJ (M.D. Fla. Feb. 22, 2007) (ordering payment of the suspended judgment balance of $1,525,000 based on respondents' failure to disclose $1,800,000 kept in a PayPal account), *available at* http://www.ftc.gov/os/caselist/0623007/070424stip0623007.pdf.

incentivizes a respondent who pleads indigence to tell the truth about his or her financial situation.

A suspended judgment/avalanche clause should not be used, however, to inflate the amount recovered in any given case, so as to make the Commission's overall numbers reported to the Congress or to the media look better than they actually are. I have therefore insisted on a practice that a press release not mention the amount of a suspended judgment and, in any event, that an inflated number not be reported to the Congress. Only the reduced amount of a judgment being paid by the respondent should be counted towards the Commission's annual tally. Furthermore, given the austere times we are now seeing in the federal government and the consequent need to ration our scarce resources, I have in recent months voted against a consent decree if it contains no monetary relief, and voted against a complaint that is likely to result in no monetary recovery. In my view, such a voting position is consistent with the theme of my remarks—i.e., whether the public is truly getting its money's worth when the Commission decides to accept a consent decree.

Judicial Approval of Consent Decrees

As I mentioned at the outset of my remarks, a distinguishing feature of the Commission's consent decree procedure is that we do not have any formal mechanism for judicial approval. This is remarkable because our counterparts at the Justice Department do—and have had such a procedure since 1974. The Tunney Act requires a federal district court to review and determine whether a proposed Justice Department

consent decree is "in the public interest."[53] The Act does not define the phrase "in the public interest" but instead, directs a court to consider a variety of factors relating to "the competitive impact of such judgment,"[54] and "the impact of entry of such judgment[.]"[55]

Although the intent of the Tunney Act was to prevent "judicial rubber stamping" of a proposed Justice Department consent decree,[56] a district court's "public interest" inquiry into the merits of such a decree is nevertheless a narrow one. As the court of appeals for the D.C. Circuit held in the *Microsoft* antitrust case, a district court should withhold its approval of a decree "'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.'"[57] Importantly, a court must be mindful that a proposed decree is the product of the Justice Department's exercise of

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[53] 15 U.S.C. § 16(e)(1) (2009); *see* United States v. Int'l Bus. Mach. Corp., 163 F.3d 737, 740 (2d Cir. 1998); United States v. Microsoft Corp., 56 F.3d 1448, 1451 (D.C. Cir. 1995).

[54] 15 U.S.C. § 16(e)(1)(A) (2009) ("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 . . .").

[55] 15 U.S.C. § 16(e)(1)(B) (2009) (". . . 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").

[56] *Microsoft Corp.*, 56 F.3d at 1458.

[57] Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1236 (D.C. Cir. 2004) (*quoting* Mass. Sch. of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997)).

prosecutorial discretion,[58] and therefore the court's role is not to substitute its judgment regarding the propriety of the remedy for that of the Justice Department, but rather, "only to confirm that the resulting settlement is 'within the *reaches* of the public interest.'"[59]

Perhaps the absence of a parallel mechanism for judicial approval for the Commission's proposed consent decrees reflects the historical fact that the Congress created the Commission as an "expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed"[60] and to provide the courts *and* the Justice Department with "the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation."[61] Indeed, Section 7 of the FTC Act epitomizes the Commission's unique role—it authorizes a court to refer "a suit in equity" brought by the Justice Department under the antitrust laws to the Commission, "as a master in chancery, to ascertain and report an appropriate form of decree therein."[62]

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[58] *Microsoft Corp.*, 56 F.3d at 1459-60; *accord Massachusetts*, 373 F.3d at 1236-37.

[59] *Microsoft Corp.*, 56 F.3d at 1458, 1460 (internal quotations omitted; emphasis in original) (*quoting* United States v. Western Elec. Co., 900 F.2d 283, 309 (D.C. Cir. 1990)); *accord Massachusetts*, 373 F.3d at 1239.

[60] Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946).

[61] FTC v. Cement Institute, 333 U.S. 683, 726 (1948).

[62] 15 U.S.C. § 47 (2009). The legislative history of Section 7 includes a statement from the Senate Committee on Interstate Commerce noting that "[t]hese powers, partly administrative and partly quasi judicial, are of great importance and will bring both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient." S. REP. NO. 597, 63D CONG., 2D SESS. 12 (1914).

In summary, because the Congress has placed the "primary responsibility for fashioning orders upon the Commission,"[63] the Supreme Court has repeatedly held that the Commission has "wide discretion" in determining what type of order is appropriate to remedy the violations of law it has found,[64] and that judicial review of the remedy is therefore limited to asking whether the remedy the Commission has selected has a "reasonable relation to the unlawful practices found to exist."[65] The standard of review should be no less deferential applied to a consent decree as it would be to a litigated decree. Thus, unlike the Justice Department, which must seek court approval for its consent decrees, we at the Commission are responsible for conducting our own public interest inquiry before accepting proposed decrees, and this inquiry operates as a check on the "wide discretion" that we otherwise wield to combat methods, acts and practices that violate the antitrust and consumer protection laws.

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[63] FTC v. Nat'l Lead Co., 352 U.S. 419, 429 (1957).

[64] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965); *Jacob Siegel,* 327 U.S. at 612-13; *see also* Moog Indus., Inc. v. FTC, 355 U.S. 411, 413 (1958) ("In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment."); FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."). *Colgate-Palmolive* and *Ruberoid* recognize the Commission's authority to fashion orders that subject respondents to some amount of "fencing in," that is to say, to curb perfectly legal conduct so long as the conduct is "reasonably related to a violation." *See National Lead,* 352 U.S. at 431 ("And, we might add, if there is a burden that cannot be made lighter after application to the Commission, then respondents must remember that those caught violating the Act must expect some fencing in.").

[65] *National Lead,* 352 U.S. at 428-29; *Jacob Siegel,* 327 U.S. at 613.

That said, there has been at least one reported instance in which a Commission consent decree underwent judicial approval under a "public interest" standard similar to that under the Tunney Act. In *FTC v. Onkyo U.S.A. Corp.*,[66] the Commission sought civil penalties against Onkyo for violations of a prior Commission order under Section 16(a) of the FTC Act.[67] Onkyo agreed to the entry of final judgment against it, and the district court conducted a public interest inquiry[68] even though it acknowledged that the proposed judgment was not subject to the Tunney Act.[69]

Moreover, despite its "wide discretion" in fashioning orders for relief, the Commission has, in the past, been divided over the extent to which it should consider alternative proposals for relief submitted by the public. In *Campbell Soup Company*,[70] the Commission charged the well-known manufacturer of canned soups with false and misleading advertisements that exaggerated the quantity or abundance of solid ingredients present in a bowl of Campbell soup with the placement of clear glass marbles in the bowl, which prevented the ingredients from sinking to the bottom, beyond the consumer's view.[71] In settlement of the charges, Campbell Soup Company agreed to a consent decree that prohibited it, prospectively, "from using any such picture or any

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[66] No. 95-1378-LFO, 1995-2 Trade Cas. (CCH) ¶ 71,111, 1995 U.S. Dist. LEXIS 21222 (D.D.C. Aug. 18, 1995).

[67] 15 U.S.C. § 56(a) (2009).

[68] *Onkyo*, 1995 U.S. Dist. LEXIS 21222, at *8 & n.5 (citing the public interest standard set forth in *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved")).

[69] *Id.* at *3 n.1 & *4 n.2.

[70] 77 F.T.C. 664 (1970).

[71] *Id.* at 665.

deceptive test or demonstration in advertising its products and, further, from misrepresenting the ingredients of any of its products in any manner."[72]

During the public comment period, an entity called SOUP, Inc.[73] petitioned the Commission to withdraw its acceptance of the proposed decree and moved to intervene in the proceedings.[74] SOUP also filed written comments concerning the adequacy of the proposed decree, arguing that the public will be effectively protected *only if* Campbell Soup was *also* required to disclose in its future advertisements the fact that its prior advertisements have been challenged as deceptive.[75]

The Commission majority denied SOUP's petition for withdrawal of acceptance of the proposed decree and SOUP's motions to intervene and for reconsideration.[76] It held that the additional relief requested by SOUP "which might theoretically be obtained after years of protracted litigation is not worth the expenditure of resources which could

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[72] *Id.* at 666.

[73] SOUP, Inc. stands for "Students Opposing Unfair Practices, Inc.," and according to papers that it filed with the D.C. Circuit, it styled itself as a "private, non-profit corporation designed primarily to assist the Federal Trade Commission in 'more vigorously protecting the consumers' rights to fair and honest advertising.'" S.O.U.P., Inc. v. FTC, 449 F.2d 1142, 1143 (D.C. Cir. 1971) (Bazelon, C.J., dissenting). In petitioning the D.C. Circuit for review of the Commission's order at 77 F.T.C. 664, SOUP unsuccessfully asked the court for leave to proceed in forma pauperis under 28 U.S.C. § 1915(a). *Id.* at 1142 (order denying SOUP's motion for leave). SOUP may have dropped its appeal following this adverse decision, as a LEXIS search did not turn up any further decision or order from the D.C. Circuit.

[74] *Campbell Soup,* 77 F.T.C. at 666-67.

[75] *Id.* at 667, 669.

[76] *Id.* at 671.

be put to better use elsewhere."[77] Commissioner Philip Elman dissented, however, expressing the view that the Commission should conduct an adversary proceeding in which SOUP could participate as an intervenor.[78] He cautioned that "[i]ssues of such large importance to the public should not be 'settled' on the basis of respondents' acceptance of a consent order whose adequacy has been seriously challenged by responsible representatives of the public interest."[79] Commissioner Mary Gardiner Jones also dissented; in her view, "the constructiveness of [SOUP's] proposal and its direct relevance to the substantive performance by the Commission of its statutory duty" warranted a Commission hearing to consider the adequacy of the consent decree and intervention by SOUP to present its arguments and evidence at such a hearing.[80]

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[77] *Id.* at 670. The Commission majority added that here "we do have an order, obtained without an interminable trial and series of appeals, which is fully adequate to protect the public; we shall not hesitate to enforce this order if this tawdry practice is revived." *Id.*

[78] *Id.* at 671 (Elman, Comm'r, dissenting). The Commission's rules of practice do not provide for intervention in connection with consent decree proceedings but they do in the context of adjudicative proceedings under Part 3. *See* 15 U.S.C. § 45(b) (2009); 16 C.F.R. § 3.14 (2010); Action on Safety & Health v. FTC, 498 F.2d 757, 762 (D.C. Cir. 1974) ("Neither the Federal Trade Commission Act nor the Commission's Rules of Procedure grant appellants any right to intervene in consent negotiations. Rather, the power to prescribe consent negotiation procedure is part of the general enforcement power of the Commission, and such enforcement decisions are generally not subject to judicial review."). SOUP was subsequently allowed to intervene in an adjudicative proceeding in another consumer protection matter. Firestone Tire & Rubber Co., 77 F.T.C. 1666 (1970).

[79] *Campbell Soup,* 77 F.T.C. at 672.

[80] *Id.* at 674 (Jones, Comm'r, dissenting).

Convergence or Divergence with Europe?

Let's now compare what I have said about FTC consent decrees with commitments under Article 9 of Council Regulation No. 1/2003.[81] The operative language requires that commitments offered by the parties under investigation "meet the concerns expressed to them by the Commission in its preliminary assessment" before the Commission[82] may accept and make them binding on the parties. At first blush, this language suggests that commitments under Article 9 should be evaluated in the same manner as FTC consent decrees—that is to say, they have to *address the infringement concerns* that have been raised by the European Commission.[83] Unlike the evaluation of FTC consent decrees, however, there does not appear to be an explicit requirement in the Council Regulation that the European Commission *also* ensure that commitments under Article 9 *serve the public interest* before they are accepted and made binding. This

[81] Council Reg. (EC) No. 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], art. 9, 2003 O.J. (L. 1) 1 (Apr. 1, 2003), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF.

[82] Although the context of my remarks should make clear whether I am referring to the Federal Trade Commission or the European Commission, for the sake of clarity, if I am talking about the two agencies in the same sentence, I will refer to the former as the FTC and the latter as the European Commission.

[83] *See also* Council Reg. (EC) No. 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], preamble 13, 2003 O.J. (L. 1) 1 (Apr. 1, 2003) ("Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, . . ."), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF.

important difference is highlighted by the European Court of Justice's June 2010 decision in the *Alrosa* case,[84] as I will explain.

[84] Case C 441/07 P, Comm'n v. Alrosa Co. Ltd., 2010 ECJ EUR-Lex LEXIS 686 (June 29, 2010), *available at* 2010 O.J. (C 234) 3, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:234:0003:0004:EN:PDF, *and at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0441:EN:HTML.

For those who may not be familiar with the *Alrosa* case, here is a quick summary of the facts. The case concerns the competitive aspects of a December 2001 agreement for the supply of rough diamonds from Alrosa, a Russian producer of rough diamonds, to De Beers, a vertically integrated Luxembourg company that is involved in the entire diamond supply chain, from mining to production to jewelry.

In March 2002, the parties notified the European Commission regarding their supply agreement and sought a negative clearance or an exemption decision under Articles 81 and 82 EC. (Note that the parties made their notification prior to the abolition of this system by Regulation No. 1/2003.) In response, the Commission sent a statement of objections to the parties, taking the position that the notified agreement was capable of infringing Article 81(1) EC and therefore could not be exempted under Article 81(3) EC. The Commission also sent a separate statement of objections to DeBeers alone, in which it took the position that the notified agreement might constitute an abuse of dominant position prohibited by Article 82 EC. The Commission subsequently supplemented its statements with the position that the notified agreement would also violate Articles 53 and 54 of the Agreement on the European Economic Area.

The parties then attempted to settle the matter, first with individual commitments that Alrosa proposed but then withdrew, and then with joint commitments proposed by both undertakings. In June 2005, the Commission published the joint commitments for public comments (the so-called "market test"), which criticized the proposed commitments and caused the Commission to invite the parties to submit revised commitments. But De Beers instead offered individual commitments (calling for a progressive reduction in the volume of rough diamonds to be sold under the agreement, with a complete cessation of trade with Alrosa by 2009), which the Commission accepted and made binding on February 22, 2006. *See* Case COMP/B-2/38.381 – De Beers, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/38381/38381_1065_1.pdf *and summary at* 2006 O.J. (L 205) 24, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:205:0024:0025:EN:PDF.

Alrosa then challenged the Commission's decision by filing an action for annulment in the Court of First Instance (now General Court) pursuant to Article 230 EC (now Article 263 TFEU). The Court of First Instance annulled the Commission's decision on July 11, 2007. Case No. T 170/06, Alrosa Co. Ltd. v. Comm'n, 2007 E.C.R.

In *Alrosa*, the Court of Justice held that the European Commission's task under Article 9 is "confined to examining, and possibly accepting, the commitments offered by the undertakings concerned in the light of the problems identified by it in its preliminary assessment and having regard to the aims pursued."[85] The Commission's application of the principle of proportionality in this context "is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately."[86] Importantly, the Court of Justice stressed that the Commission's proportionality inquiry under Article 9 thus *markedly differs* from that under Article 7, in which the behavioral or structural remedies imposed must be proportionate to the infringement found to have been committed, and must be necessary to bring the infringement effectively to an end.[87]

Additionally, the Court of Justice acknowledged—and in my view, implicitly blessed—the possibility that undertakings "consciously accept that the concessions they

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II-02601, 2007 ECJ EUR-Lex LEXIS 3364 (2007), *available at* 2007 O.J. (C 199) 37, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:199:0037:0037:EN:PDF, *and at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006A0170:EN:HTML. The Commission then appealed to the European Court of Justice, which set aside the judgment of the Court of First Instance and dismissed Alrosa's action on June 29, 2010.

[85] *Alrosa*, 2010 ECJ EUR-Lex LEXIS 686, at *27, ¶ 40.

[86] *Id.*, at *28, ¶ 41. The Court of Justice did add that the Commission must also take into consideration the interests of third parties, *id.*, but I question whether this consideration can be given its adequate due when the Commission "is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it," *id.* at *35, ¶ 61.

[87] *Id.* at *27, ¶ 39.

make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination[,]" presumably because "the closure of the infringement proceedings brought against those undertakings allows them to avoid a finding of infringement of competition law and a possible fine."[88] This dynamic arises from the fact that Preamble 13 of Council Regulation No. 1/2003 makes clear that "[c]ommitment decisions are not appropriate in cases where the Commission intends to impose a fine."[89] Thus, an undertaking will likely be motivated to offer *broader* commitments than what the Commission could otherwise obtain had it proceeded to an infringement decision under Article 7, because by proceeding under Article 9, the undertaking can *avoid* a finding of infringement and the imposition of a fine.[90] Or as Professor Wouter Wils, currently a Hearing Officer for the Commission, has put it, "[t]he undertakings concerned will thus have a systematic bias in favour of commitment decisions rather than infringement decisions" because the latter carry with

[88] *Id.* at *29-30, ¶ 48.

[89] Council Reg. (EC) No. 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], preamble 13, 2003 O.J. (L. 1) 1 (Apr. 1, 2003). *See also* Wouter P. J. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003*, 29 WORLD COMPETITION: L. & ECON. REV. 345 (Sept. 2006), unpublished manuscript at 24 ("Contrary to the situation in the U.S.A., where antitrust investigations can be settled by consent decrees including payment of fines, and indeed even imprisonment, settlements of Commission investigations pursuant to Article 9 of Regulation No. 1/2003 cannot include the payment of a fine."), *available at* http://ssrn.com/abstract=900801.

[90] Council Reg. (EC) No. 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], preamble 13, 2003 O.J. (L. 1) 1 (Apr. 1, 2003) ("Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement.").

them the prospect of "the public censure, deterrence, disgorgement of illicit gains and punishment, and facilitation of follow-on actions for compensation[.]"[91]

In its action for annulment before the Court of First Instance (now the General Court), Alrosa essentially argued that De Beers had offered the Commission broader commitments than were necessary to remedy the preliminary infringement concerns: specifically, that "the prohibition on all trading relations between De Beers and itself for an indefinite period manifestly went beyond what was necessary in order to achieve the targeted objective[.]"[92] Setting aside whether De Beers could unilaterally and voluntarily offer such individual commitments—without Alrosa's assent—in the context of separate Article 82 (now 102) proceedings in which it was the putative dominant undertaking,[93] the question remains whether De Beers offered the Commission more than it needed to, in the hopes of avoiding a finding of infringement and the imposition of a fine. The Court of First Instance held that the Commission, "[i]n making use of the procedure allowing commitments offered by an undertaking concerned to be made binding, . . . was not relieved of its duty to apply the principle of proportionality, which requires in this case that there be an appraisal *in concreto* of the viability of those intermediate solutions."[94] But the Court of Justice disagreed, holding that the Commission "is not required itself to seek out less onerous or more moderate solutions than the commitments

[91] Wils, *Settlements of EU Antitrust Investigations*, *supra* note 89, unpublished manuscript at 8-9.

[92] *Alrosa*, 2007 ECJ EUR-Lex LEXIS 3364, at *69, ¶ 156.

[93] *Alrosa*, 2010 ECJ EUR-Lex LEXIS 686, at *45-46, ¶ 88.

[94] *Alrosa*, 2007 ECJ EUR-Lex LEXIS 3364, at *69, ¶ 156 (italics in original).

offered to it[.]"[95] In other words, it appears that the Commission may simply accept the commitments offered to it by a party, as long as those commitments *at a minimum* address the infringement concerns that it has identified to the party.

In summary, according to *Alrosa*, the European Commission, when applying the principle of proportionality under Article 9 as opposed to Article 7, "is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it,"[96] even though an undertaking may well offer commitments that "go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination."[97] To my way of thinking, this ruling invites the Commission to adopt *overbroad* commitment decisions that are at odds with the public interest. Indeed, Professor Wils has cautioned against "the possible temptation for competition authorities, or their staff, to try to obtain desired results beyond the scope of their legal powers."[98] He argues—rightly, in my view—that "[i]n a system governed by the rule of law, it is important that public authorities do not act beyond their legal powers, however useful that action may otherwise also appear."[99] According to Professor Wils, "[c]ommitment decisions should thus only be used for commitments that are proportionate and necessary to bring effectively to an end a suspected infringement of Articles 81 or 82 EC, i.e., the type of remedies which the Commission would be able to

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[95] *Alrosa*, 2010 ECJ EUR-Lex LEXIS 686, at *35, ¶ 61.

[96] *Id.*

[97] *Id.* at *29-30, ¶ 48.

[98] Wils, *Settlements of EU Antitrust Investigations*, *supra* note 89, unpublished manuscript at 9.

[99] *Id.* at 10.

impose if it proceeded to adopt an infringement decision."[100] But the Court of Justice's holding in *Alrosa* has taken the opposite view.[101]

The *Alrosa* case also illustrates that the European Commission's commitment decisions under Article 9, like FTC consent decrees, are subject to public comment[102] but there is no mechanism for judicial approval. Instead, there lies a general right of appeal to the Court of Justice from European Commission decisions under Article 263 TFEU,[103] just as there lies a general right to petition for review of FTC orders under Section 5(c) of the FTC Act.[104] As a practical matter, however, a petition for review of an FTC consent decree is virtually unheard of because the agreement contains a standard provision waiving all rights to seek judicial review.[105] Similarly, Professor Wils has observed that while an undertaking that is the subject of an Article 9 commitment decision can apply for annulment of the decision, the grounds on which it could realistically prevail are quite

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[100] *Id.*

[101] *Alrosa*, 2010 ECJ EUR-Lex LEXIS 686, at *29-30, ¶ 48, & at *35, ¶ 61.

[102] *Compare* 16 C.F.R. §§ 2.34(c) & 3.25(f) (2010) *with* Council Reg. (EC) No. 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], art. 27(4), 2003 O.J. (L. 1) 1 (Apr. 1, 2003).

[103] Treaty on the Functioning of the European Union art. 263 (formerly, art. 230 EC), Mar. 25, 1957, 2008 O.J. (C 115) 162.

[104] 15 U.S.C. § 45(c) (2009).

[105] 16 C.F.R. § 2.32 (2010) ("Every agreement also shall waive further procedural steps and all rights to seek judicial review or otherwise to challenge or contest the validity of the order.").

limited.[106] Instead, what we are more likely to see are challenges to FTC consent decrees and EC commitment decisions by interested third parties, as in *S.O.U.P.* and *Alrosa*.[107]

Of course, the standard for judicial review for anyone seeking to challenge a commitment decision or a consent decree is very deferential to the agency. The European Court of Justice has made clear in *Alrosa* that judicial review of a commitment decision is limited to determining "whether the Commission's assessment [of the

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[106] Wouter P.J. Wils, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, 31 WORLD COMPETITION: L. & ECON. REV. 335 (Sept. 2008), unpublished manuscript at 6-7 ("As the undertakings have themselves offered the commitments, one can however expect that such appeals will be much less frequent than appeals by the addressees of decisions under Article 7 of Regulation 1/2003, finding an infringement and imposing remedies for its termination. Indeed, at the time of writing, no commitment decision has been the object of such an appeal."), *available at* http://ssrn.com/abstract=1135627; Wils, *Settlements of EU Antitrust Investigations*, *supra* note 89, unpublished manuscript at 10 ("In the case of infringement decisions, the (frequently used) possibility of bringing an application for annulment of the decision before the Court of First Instance guarantees that no remedies are imposed that go beyond what is proportional and necessary to bring the infringement of Articles 81 or 82 EC effectively to an end. In the case of commitment decisions, this control mechanism is in practice removed.") & 22 ("There can be no doubt that the undertakings concerned can bring an application for annulment of the commitment decision, given that they are the addressees of it and that it adversely affects their legal position in that it makes the commitments binding on them. There would however not appear to be many grounds on which one could imagine such a challenge to be brought in practice and to have a chance of success. One possible ground would be the inclusion by the Commission in its decision of commitments that go beyond what the undertakings have offered.").

[107] S.O.U.P., Inc. v. FTC, 449 F.2d 1142 (D.C. Cir. 1971); Case No. T 170/06, Alrosa Co. Ltd. v. Comm'n, 2007 E.C.R. II-02601, 2007 ECJ EUR-Lex LEXIS 3364 (2007). *See* Wils, *The Use of Settlements in Public Antitrust Enforcement*, *supra* note 106, unpublished manuscript at 7 n.19 (noting, however, that there have been third-party applications for annulment) & 15 n.63 (noting that "[t]he publication and possibility for third-party comments, and the ensuing possibility for third-party complainants to bring action before the EU Courts, constitute the functional equivalent of the publication for public comments and the public interest determination by the district court under the Tunney Act"). A search of the LEXIS database of decisions of the United States Circuit Courts of Appeals using the keywords "petition," "review", "Commission" or "FTC" and "consent decree" found only one case involving the FTC—the above-cited *S.O.U.P.* decision.

principle of proportionality in the context of Article 9] is manifestly incorrect."[108] Likewise, the United States Supreme Court has made clear that judicial review of an FTC decree is limited to asking whether the remedy the Commission has selected has a "reasonable relation to the unlawful practices found to exist."[109] The very deferential standard of review, coupled with the rarity of appeals from commitment decisions and consent decrees, underscores the need for both agencies—the European Commission and the Federal Trade Commission—to ensure that such settlements do indeed serve the public interest. In my view, *Alrosa* seemingly relaxes this requirement for the European Commission, which can be problematic.

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Thank you for your attention today. I look forward to discussing these and other ideas with the other members of the panel.

[108] *Alrosa*, 2010 ECJ EUR-Lex LEXIS 686, at *28, ¶ 42.

[109] Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946). *Accord* Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1393 (7th Cir. 1986) (Posner, J.) (upholding a decree ordering HCA to provide advance notification of future acquisitions: "There is no merit to the suggestion that the order is punitive. Burdensome, yes; more burdensome than the requirements of premerger notification that the law imposes on firms that have not been found to have made an unlawful acquisition, yes.").