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, ission, ts3dUent,

never withdrawn a proposed decree based on comments we have received.[5]

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:.0006P 01 Tc 0.0002(g /T.JbapaniSeom)FTw

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

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."

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

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

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,[20] I joined the Commission majority's Statement of its reasons for voting to issue a complaint

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.

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

"see[ing] no compelling reason why innovation mergers should be exempt from the Horizontal Merger Guidelines' 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

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.

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 mindful0.0iari-9e'"

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.

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be put to better use elsewhere.”

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

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

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[88] Id. at *29-30, ¶ 48. .1t167 6.7&D6w (20.0005 Tc (Id.)Tj /TT013 /TT0 1 Tf 0 Tc

t i t e [89] Council Reg. (EC) No. 1/2003 of Dec. 16, 2002, on the implementation of the r 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

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 offerean ink De use0.00 (speciced3ththe Comm)8(0Tm ( )022643 00

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,

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.