

the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See *United States v. Microsoft*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

In conducting this inquiry, “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).<sup>5</sup> Rather:

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶61,508, at 71,980 (W.D. Mo. May 17, 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bachtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460–62. Case law requires that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is “within the reaches of the public interest.” More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).<sup>6</sup>

<sup>5</sup> See *United States v. Gillette Co.*, 406 F. Supp. 713, 715–16 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer “whether the settlement achieved [was] within the reaches of the public interest”). A “public interest” determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the Tunney Act. Although the Tunney Act authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. No. 93–1463, 93rd Cong., 2d Sess. 8–9 (1974), reprinted in 1974 U.S.C.C.N. 6535, 6538.

<sup>6</sup> Cf. *BNS*, 858 F.2d at 463 (holding that the court's “ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree”); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to “look at the

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United States v. Am. Telephone & Telegraph Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459. Because the “court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States might have but did not pursue. *Id.* at 1459–60.

#### VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the Tunney Act that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 13, 2003.

Respectfully submitted,

Anthony E. Harris,  
Illinois Bar No. 1133713, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, Telephone: (202) 307–6583.

#### Certificate of Service

I, Anthony E. Harris, hereby certify that on November 14, 2003, I caused the foregoing Competitive Impact Statement to be served on defendants by sending a facsimile and by mailing a copy first-class, postage prepaid, to duly authorized legal representatives of those parties, as follows:

overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass”). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”).

Counsel for Defendants Alcan Inc. and Alcan Aluminum Corp.

D. Stuart Meiklejohn, Esquire, Michael B. Miller, Esquire, Sullivan & Cromwell, 125 Broad Street, New York, NY 10004–2498

Counsel for Defendants Pechiney, S.A., and Pechiney Rolled Products, LLC

W. Dale Collins, Esquire, Shearman & Sterling LLP, 599 Lexington Avenue, New York, NY 10022–6069

Anthony E. Harris, Esquire,  
Illinois Bar #1133713, U.S. Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, DC 20530, Telephone No.: (202) 307–6583.

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## DEPARTMENT OF JUSTICE

### Antitrust Division

#### ***United States and the State of Florida v. Waste Management, Inc., and Allied Waste Industries, Inc.; Complaint, Proposed Final Judgment and Competitive Impact Statement***

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement were filed with the U.S. District Court for the District of Columbia in *United States and State of Florida v. Waste Management, Inc., and Allied Waste Industries, Inc., Civ. Action No. 1:03CV02076*. On October 14, 2003, the United States and the State of Florida filed a Complaint, which sought to enjoin Waste Management, Inc. (“Waste Management”) from acquiring certain small container commercial hauling assets in Broward County, Florida from Allied Waste Industries, Inc. (“Allied”). The Complaint alleged that Waste Management's acquisition of these small container commercial hauling assets from Allied would substantially lessen competition resulting in higher prices for small container commercial hauling services in Broward County, Florida in violation of the Clayton Act, as amended, 15 U.S.C. 18. The proposed Final Judgment, also filed on October 14, 2003, requires defendants to divest contracts and accounts on selected Allied small container commercial hauling routes, to preserve competition in the provision of small container commercial hauling services. A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, and the remedies available to