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## Deal or no deal? Consensual arrangements as an instrument of European competition policy

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**Deal or No Deal?**

**Consensual Arrangements as an Instrument of European  
Competition Policy**

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## Deal or No Deal?

### Consensual Arrangements as an Instrument of European Competition Policy

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**Abstract:** Roughly during the last decade, European Competition Policy has undergone a series of fundamental changes. All four areas – cartel policy, merger policy, abuse control, and state aid control – have been subject to a modernization process, which led to a focus on analysing the effects of individual cases and established a tendency towards deciding each case on its individual merits. These

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changes can be understood as a move away from rule-based competition policy towards a case-by-case approach. The case-by-case approach especially includes consensual arrangements, so-called 'deals' between the competition authority and business companies. Therefore, this paper will discuss the pros and cons of 'deals' as an instrument of (European) competition policy. The paper's central focus lies on the economic analysis of the advantages and disadvantages of using consensual arrangements as a relevant instrument of European competition policy. With respect to European competition policy, we conclude that we need to issue a note of caution. From an economic perspective, an expansion of consensual elements necessarily walks hand in hand with a continual weakening of the protection of competition. Consumer welfare will not benefit from expanding the role and importance of consensual arrangements as a means of European competition policy.

**Keywords:** European competition policy, consensual arrangements, antitrust settlements, merger control, deals, political economics

**JEL-Codes:** L40, K21, D02, P16

## Antitrust Parable (2) – The Kroes and The Almunia

*The Kroes.* The Kroes' job was to catch as many fish as possible, and the bigger the better. Every fish she caught she showed it off and was very proud. When she caught a really big fish the press would report in wonderment about Kroes's great prowess. If another NCA got a bigger fish, she was embarrassed and immediately went after a fish that was even bigger. Smaller fishes she threw back because she wanted more fish. She saw to it that there were plenty of places for fish to breed and plenty of sources of food for them. Anything that prevented the fish from thriving and multiplying she opposed, because she wanted more and bigger fish.

*The Almunia.* The Almunia hated cases and wanted only to protect the business. He did not want to catch cases, but caught any he discovered. But he also encouraged staff to scare away cases [settlement?]. He sealed up the holes where cases could hide. He looked for any technique anywhere that would scare away cases [press releases, speeches, RFI...]. If something worked against having cases, he used it. If he caught a case he apologized to the townspeople because one had gotten through. He did everything he could so there would be no cases now or in the future. He wanted to protect the grain for the townspeople.

(<http://chillingcompetition.com/2012/06/14/antitrust-parable-2-the-kroes-and-the-almunia/>; 16.08.2012; 14.34)

## 1. From Rule-Based Antitrust to Consensual Arrangements?

Roughly during the last decade, European Competition Policy has undergone a series of fundamental changes. All four areas – cartel policy, merger policy, abuse control, and state aid control – have been subject to a modernization process, putting more focus on analysing the effects of individual cases and establishing a tendency towards deciding each case on its individual merits (so-called *effects based approach* instead of the previous *form or rule based approach*).<sup>1</sup> The interrelations of the European Commission's (EC) enforcement activities both with the member states competition policies (European Competition Network; Budzinski 2006) and with other countries' antitrust systems (International Competition Network; Budzinski 2004, 2012) have been substantially re-shaped and redesigned, emphasizing cooperative and consensual arrangements among competition law enforcers. Even the underlying constitution of European competition policy has experienced change in the course of the implementation of the Lisbon Treaty (in operation since 1 December 2009), which 'only' speaks of "establishing of the competition rules necessary for the functioning of the internal market" (Art. 3 (1) TFEU) instead of the previous phrasing which insisted upon a "system ensuring that competition in the internal market is not distorted" (Art. 3 (1) EC). It is the opinion of many commentators that the instrumental character of competition has been punctuated within the European economic system, eroding or depreciating any priority of the protection of competition in comparison to both non-competition community goals as well as alternative and conflicting instruments (inter alia, Riley 2007).

With the new commission taking office in February 2010, the role of competition appears to be subject to further change, continuing the previous trends. For instance, in the "Europe 2020" Strategy of the new commission, competition policy does not play an explicit role – even though the new leaders of the competition commission emphasise that competition takes or should take a 'cross-cutting' function regarding alternative goals and aims (Almunia 2010a; Italianer 2010a). However, other programmatic statements of the commissioner and his general director have further fuelled the impression that competition may have to make way for other policies in case of conflicting goals, for instance for industrial policy regaining strength. The *Frankfurter Allgemeine Zeitung*, for instance, writes with an eye to programmatic remarks by the general director of the competition commission, Alexander Italianer: "The European Commission aims at adjusting its competitive politics towards a new industrial policy and other political aims. [...] This new point of view, including that competition is used instrumentally to achieve other economic political aims, corresponds to the Lisbon Treaty, in which competition is merely mentioned as a means to realise the internal market. The internal market's

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<sup>1</sup> See, emphasizing the advantages, Röller 2005, Röller & de la Mano 2006, Neven & de la Mano 2009, as well as, rather critical, Schmidt & Voigt 2008, Christiansen 2010, Budzinski 2011a.

goals are qualified through aims which require governmental intervention, which includes social progress, social justice, environmental quality and cohesion.”<sup>2</sup>

Corresponding are various statements by the new European Commissioner for Competition, Joaquín Almunia, such as “[the] goal [...] is to give Europe a modern industrial policy built on EU competition rules” (Almunia 2010b: 6) or “[my] goal is finding a balance between protecting consumer welfare and creating the right conditions for business in Europe to grow to the scale needed to take on global competitors” (Almunia 2010c: 7). It becomes clear that the protection of competition via the consumer welfare standard is no longer the ultimate aim of the commission. Instead, the Almunia Commission appears to be open for considering trade-offs between competition and other objectives, for instance, in an industrial policy context – without prejudice or a strong *a priori* competition presumption. For instance, environmental protection measures, such as the reduction of carbon dioxide emissions, emerge as a justification for the approval of state aid as long as competition is not *excessively* distorted (‘green defense’; *ArcelorMittal Case* (T-399/10) 2010). However, one must not ignore that at least Brussels Competition Commission considers the realization of the Lisbon targets and “Europe 2020” only possible on the basis of a functioning competitive order. “Competition is an instrument, not an end in itself. But it is indeed a vital instrument in very many respects. Without fair, robust, and effective competition policy and enforcement, I don’t see how we Europeans [...] shape up to compete with the other, dynamic players that are increasingly present on the world scene. Of course, competition is not the only tool we should use to pursue this goal” (Almunia 2011: 7). Hence, competition is seen as an important but certainly not as the only or the primary instrument. The priority is given to other aims: “[Our] priority number one is to help increase our competitiveness in the world, our growth potential and the ability of our economies to create jobs [...]” (Almunia 2011: 2). On the other hand, the chief guardian of competition points out that this aim can be first and foremost achieved by competition: “Competition policy will make a substantial contribution to this, by encouraging companies to compete on the merits and innovate, which they are more likely to do if they operate in a sound and undistorted environment” (ibid.).

From an institutional economic point of view, these programmatic comments along with the longer-run change dynamics in European competition policy can be understood to move away from a rule-based competition policy towards a case-by-case approach.

A rule-based commercial policy, rooted in strong institutions, typically pursues only one clearly defined goal such as stability of the monetary value (absence of infla-

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<sup>2</sup> Frankfurter Allgemeine Zeitung, March 10, 2010, p. 11; translated by the authors.

tion) or consumer welfare.<sup>3</sup> By doing so, it does not allow much scope for the political decision-makers to introduce other goals and (vested) interests. A more interventionist economic policy deciding individual cases on a case-by-case approach, associated with weak institutions, enables political decision-makers to consider case-specific 'peculiarities' and exceptional circumstances – but also to inject vested interests and tactical manoeuvres. Furthermore, the scope offered by a case-by-case approach includes scope for deals between the political and administrative decision-makers and the norm addressees. Thus, moving competition policy away from a rule-based and towards a case-by-case approach enhances the scope for employing the policy instrument 'consensual arrangements', so-called 'deals' between the competition authority (enforcing competition rules) and business companies (that are subject to competition rules).<sup>4</sup> Any consensual arrangement requires the parties to the deal to consider the other parties' interest to a sufficient extent; all partners to the deal must benefit from the deal.

Thinking about rules meant to protect competition against anticompetitive practices and arrangements from business companies, a policy by deals does not represent an obviously advantageous or logical approach due to the fundamental conflict of interests between the enforcers and the norm addressees. Yet, the EC appear to be embracing this concept to an increasing extent. Therefore, this paper will discuss the pros and cons regarding the employment of consensual arrangements as an instrument of (European) competition policy.<sup>5</sup>

While at least the gradual shift from a rule-based to a case-by-case approach in the context of the so-called 'effects based approach' is arguably undoubted, there is a lack of empirical evidence concerning the increasing number of 'deals'. Unfortunately, this paper cannot close this gap either due to a lack of comprehensive data. However, in the second section we trace indication and case examples demonstrating that deals represent a relevant policy instrument and that its importance has increased recently.

The paper's central focus, however, lies on the economic analysis of the advantages and disadvantages of using consensual arrangements as a relevant instrument of European competition policy. Irrespective of whether the reader believes in the indication that we trace in section 2, we offer scientific ammunition to contribute to the discussion of the future direction of European competition policy (section 3).

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<sup>3</sup> The fundamental discussion whether consumer welfare represents the appropriate goal or concepts like total welfare, protection of the competitive process, or competition liberty (etc.) will not be considered in this paper. But see, for instance and inter alia, Hellwig 2006, Budzinski 2008, Vanberg 2011, and, Werden 2011.

<sup>4</sup> Compare a similar understanding of deals, but with a different focus Davidoff & Zaring 2009. Deals can either be initiated by the competitive authorities or by the companies.

<sup>5</sup> See also Budzinski & Kuchinke 2011.



Eventually, we conclude with a warning against extending the employment of consensual arrangements and deals in competition policy (section 4).

## 2. In Search for Evidence: Indication of a Trend towards Consensual Arrangements?

### 2.1. Assessments and Statements

Traces of an increasing importance of deals in European competition policy can be detected in all the classical areas of competition policy – namely, cartel policy, merger control and abuse control. In the cartel policy area, for instance, the EC increasingly focuses on so-called *settlements*, i.e., on consensual agreements with the (confessed or convicted) cartel members (Dekeyser & Roques 2010; Wils 2010; Holmes & Girardet 2011).<sup>6</sup> Through bilateral consultations in the aftermath of the detection of a cartel, a common view of the facts of the case between the EC and the cartel members is sought to be established. The goal is that the guilty companies acknowledge the facts of the case and, conversely, the EC grants a ten per cent discount on the cartel fine. By acknowledging the facts of the case, the cartel members *de facto* refrain from an appeal against the EC's decision. Even though the right to appeal remains intact *de jure*, the written acknowledgement of being guilty of the cartel accusations as the EC has established them would significantly harm any chances of a successful appeal procedure. The general director of the EC's competition directorate Italianer (2010b: 3) euphorically reports first applications of the settlement instrument: "As you will have seen, the Commission yesterday reached its first settlement in the DRAM cartel case. This is a milestone in our enforcement against cartels. Settlement procedures allow the Commission to speed up investigations, free up resources to deal with other cases and therefore improve the efficiency of our cartel enforcement. This first settlement case has proved that the Commission was serious about using this procedure. It also proved that we gained trust from the companies willing to settle, which is a positive sign for the future." Commissioner Almunia (2010c: 4) adds: "As to settlements, of the five cartel decisions adopted in the past months, we've already used this new instrument twice; in the DRAMs and Animal Feed cases. The DRAMs case – in which ten companies were fined 330 million Euros, including a 10 per cent reduction for settling – was a milestone. The benefits of settling were immediately apparent: there have been no appeals – which in standard procedures can last for years – and our investigations gave rise to a ripple effect of leniency applications in related sectors. The

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<sup>6</sup> The so-called 'settlement package' consists of three documents: first Regulation 622/2008, which changes Regulation 773/2004 and formally introduces the settlement instrument (Art. 10a), second the 'settlement notice', which interprets the new regulation, and thirdly an informal memorandum, which gives further interpretations and hints concerning the courses of the procedure (Dekeyser & Roques 2010: 825).

other settlement case to date – Animal Feed Phosphates – was also a success. We discovered and fined a cartel – a classical market-sharing and price-fixing arrangement – which had run for over thirty years. Although not all the parties settled – we call this a hybrid settlement case –, the procedure proved to be highly efficient, including the fact that we expect only one appeal.” The use of such consensual arrangements is optional for all parties involved (otherwise, the standard procedure applies) and is supposed to, if possible, include all cartel members who are involved in a given case (Dekeyser & Roques 2010).

For the EC, the main goal of the settlement instrument is the prevention of expensive appeal proceedings against cartel decisions since approximately 90 per cent of the cartel sentences imposed by the EC have been contested in the past (Dekeyser & Roques 2010: 820-821). The principal content of the consensual arrangement between the cartel members and the EC is the volume of the monetary cartel fine (Dekeyser & Roques 2010: 829). Dekeyser and Roques (2010: 824-825) highlight the complementarity of this new instrument with the existing leniency programs, offering considerable penalty discounts for companies that help to detect and provide evidence against illegal cartels. The settlement arrangements, however, are not restricted to principal witness companies. Instead, they are open to all cartel members. This ‘deal policy’ is supposed to be increasingly applied in the future.<sup>7</sup>

According to recent statements by the EU Competition Commissioner, consensual arrangements of this type will not be restricted to sanctioning hard core cartels in the future. Instead, ‘commitments & settlements’, submitted or suggested by or cooperatively developed in close cooperation with the competition rules-violating companies, are desired to represent a major instrument for all types of antitrust offenses including the abuse of market power (the whole range of Art. 101 and 102 *TFEU*; Almunia 2010c; 2012). So-called Art. 9 commitment decisions (Art. 9 Regulation 1/2003) introduce the option for the EC to replace an infringement decision (Art. 7 Regulation 1/2003) on anticompetitive concerns against non-hardcore cartels and abusive strategies by dominant companies by a commitment decision (Edwards & Padilla 2010; Schweitzer 2010). The EC is entitled to accept commitments offered by the infringing companies – which may represent the outcome of commitment negotiations between the EC and the companies – and settle the case. Art. 9 type of decisions are used with an increasing frequency by the EC (Cavicchi 2011: 4). Almunia (2010c: 5) also emphasizes that the EC increasingly places value on cooperative monitoring of the agreed-upon arrangements and commitments. In this regard, Almunia points to the cases of Svenska Kraftnet, EDF, EONGas and ENI

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<sup>7</sup> “In 2010 – and for the first time – we have also taken two settlement decisions in the DRAMs and Animal Feed cases, saving a great deal of time and money. We are discussing settlements in a number of other cases, which shows that the new tool works well and is becoming a practical option to handle cartel cases” (Almunia 2011: 3).

in the energy sector as well as to the case of the Oneworld Alliance of major airlines (inter alia, British Airways, American Airlines and Iberia).

Furthermore, and with reference to European merger control, Almunia emphasizes the close cooperation with the merging companies to find (consensual?) solutions for all kinds of competition concerns that may occur during the merger control procedure – with the important common goal not to jeopardize the merger project as such. “Where a potential merger raises competition problems, the Commission works very closely with the parties to find a solution” (Almunia 2010a: 5). “Over time, we have come to develop a productive relationship with the business community and prospective merging parties in particular, which yields positive and concrete results for both sides and for consumers. [...] This productive dialogue between competition enforcers and the business community has also generated a broader preventive effect” (Almunia 2010b: 4).

## 2.2. Data

Since the application of deals within the framework of competition policy already is a longer-lasting tendency, some more indications can be derived from descriptive case statistics. In principle, the EC has three ways of intervention to prevent merger-induced anticompetitive effects: (i) prohibition, (ii) approval with obligations after an extensive investigation and analysis of the case, and (iii) approval with commitments after a brief (‘quick-look’) analysis within one month.<sup>8</sup> (i) and (ii) are so-called phase II proceedings whereas (iii) belongs to phase I proceedings. Commitments and obligations can both be structural means, such as de-investments, and behavioral consents.

Taking a first look at the present data, it can be seen that the *pro rata* case numbers for (i) and (ii) have decreased during the last decade whereas they have remained roughly constant for (iii).<sup>9</sup> This development and particularly the dramatically decreasing number of prohibition cases<sup>10</sup> might point towards an increasingly

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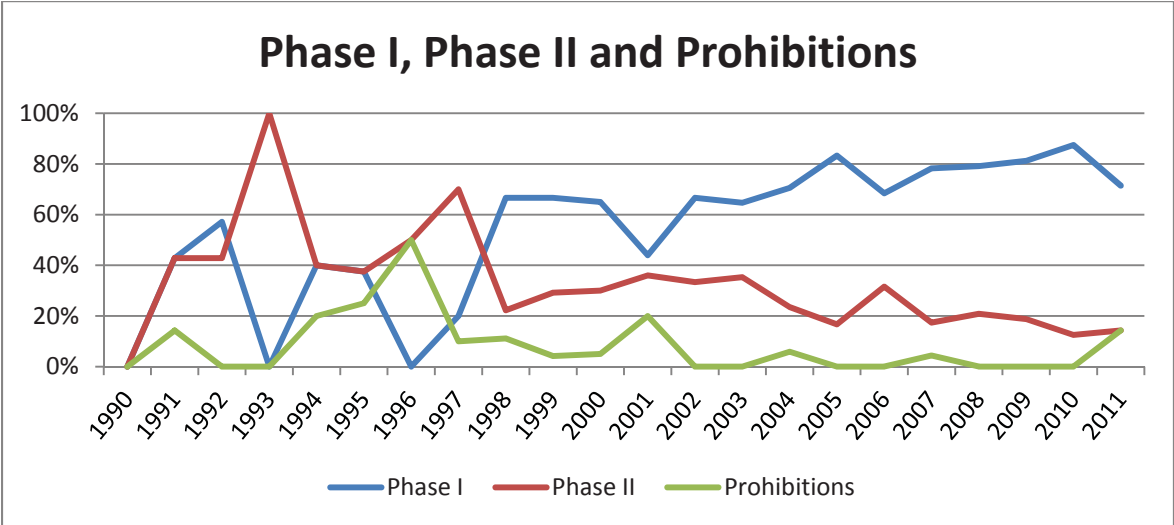
<sup>8</sup> It is also possible that the threat of a prohibition or prohibitive obligations causes a withdrawal of the merger project by the companies. However, there can be several other reasons to withdraw a merger notification during the control procedure, such as the failure of the merging parties to reach a final agreement on the merger conditions (note that notification to the EC must be done very early in the merging process), the lacking approval of the shareholders during the general assembly or the resistance of certain stakeholder groups. Since we cannot disentangle these very different withdrawal motivations, the number of withdrawals will not be counted in the merger control interventions of the EC in this paper.

<sup>9</sup> See appendices 1-3. Decision type (iii) may also have started a decreasing tendency in 2011.

<sup>10</sup> The 2011 prohibition of the proposed merger between Aegean Airlines and Olympic Air was the first one since 2007 (Ryanair/Aer Lingus). It was followed by the prohibition of Deutsche Börse/NYSE Euronext in 2012.

permissive merger control (Maier-Rigaud & Parplies 2009; Budzinski 2010; Christensen 2010), possibly as a result of enforcement problems.<sup>11</sup>

Figure 1: Types of Intervention; Share in all Interventions



Source: Own illustration based on data by the European Commission (August 4, 2012 <http://ec.europa.eu/competition/mergers/statistics.pdf>)<sup>12</sup>

The relation between the different methods of intervention and the total number of interventions provides interesting evidence concerning the question whether the EC uses deals, i.e., consensual agreements with companies, more frequently. This is illustrated by figure 1. While the share of prohibitions in all interventions decreased to virtually zero and also the share of the phase II obligation decisions has clearly been decreasing from 2006 to 2011 (from 31.6 per cent in 2006 to 14.3 per cent in 2011 with an all-time low of 12.5 per cent in 2010), the share of the phase I approvals including company commitments has been significantly increasing and constituted 70-80 per cent of all interventions in the last five years. In this type of intervention the EC typically draws on commitment offers by the merging companies without submitting them to essential modifications.

Also even in cases where the EC inflicted obligations after an intense phase II examination these obligations have, however, frequently emerged from intense negotiations with the companies in question. An analysis of 22 phase II decisions of the type 'approval with obligations' since summer 2006 shows that the imposed remedies are primarily based on a negotiation process between the commission and the

<sup>11</sup> Theoretically, the decreasing number of prohibition and phase-II commitment cases could also be explained by an improved anticipation of EC merger control by merging companies, thus designing merger projects in a way compatible with European merger control and not undertaking such that would lead to a prohibition. However, Budzinski (2010: 451-455) shows that numerous indications actually hints at enforcement problems.

<sup>12</sup> Here, data is lacking for 1990 because no intervention (phase I, II or prohibition) took place.

merging companies.<sup>13</sup> The strategy applied thereby typically includes the EC seeking so-called 'remedy submissions' at the merging companies. These suggestions or suggested remedies are then examined with a so-called 'market test'. The test results are then feedbacked to the companies in partially very intense discussion forums whereupon the merging partners get the opportunity to suggest modified remedies. The process can last for several rounds. In the cases of Inco/Falconbridge, Universal/BMG, SFR/Tele 2 and Lufthansa/Austrian Airlines, for instance, it took four such rounds each after the first remedy suggestions were submitted by the companies. The sample mentioned above contains 2.45 negotiation rounds on average; this number, however, is only of limited information value because the intensity of the remedy negotiations differs from round to round. In the cases of T-Mobile Austria/Tele.Ring, Inco/Falconbridge, SFR/Tele 2, Thomson/Reuters and Lufthansa/Austrian Airlines, for example, particularly intense negotiations between EC and companies took place concerning the question of how to reach permission for the merger.

Furthermore, it can be established that the EC adopts the companies' competitively doubtful lines of argument at least sometimes. A recent example to substantiate this claim is the merger case of Oracle/Sun (Buhr et al. 2011; Vezzoso 2011, also for the following remarks).<sup>14</sup> The merger of those two software companies in summer 2009 led to objections concerning the market for data software, particularly because the open source competitor MySQL became Oracle's property due to the merger. According to experts and the EC, MySQL is a so-called 'maverick', i.e., an outside competitor putting exceptional competitive pressure on the established and market-leading suppliers through special innovative activity and a distinct business model. Additionally, Oracle will experience strong incentives to considerably reduce the development of this alternative business model after the merger and to effectively abandon it in the medium run. Yet, the EC finally approved the merger in November 2009 without imposing any remedies. This decision was made after the EC considered a non-binding public promise by Oracle sufficient to mitigate the anti-competitive concerns. Oracle promised to fully and dynamically maintain MySQL as an innovative maverick competitor. The EC thereby adopted Oracle's view that a violation of the non-binding public promise would imply a considerable loss of

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<sup>13</sup> Referring to the cases Omya/Huber, Dong/Elsam/Energi E2, T-Mobile Austria/Tele.Ring, Inco/Falconbridge, Gaz de France/Suez, Metso/Aker Kvaerner, JCI/Fiamm, Universal/BMG, SFR/Tele 2, Arjowiggins/M-Real Zanders, Kronospan/Constantia, Thomson/Reuters, Statoilhydro/Conoco Phillips, Friesland/Campina, ABF/GBI, Arsenal/DSP, Lufthansa/SN, Lufthansa/Austrian Airlines, Unilever/Sara Lee, Syngenta/Monsanto Sunflower, Western Digital Ireland/Viviti Technologies, J&J/Synthes and Südzucker/ED&F MAN. Except for the last three cases the detailed substantiations for the EC's decision were taken as a basis. Since these are not yet present for the last three cases press releases by the EC were used here.

<sup>14</sup> An older case in this category is the Newscorp/Telepíu merger of 2003 in which the EC approved the merger on the back of a financial restructuring defense. Curiously, however, the buying company represented the one in danger of running insolvency (and not the target of the takeover). See Budzinski (2009: 347-350).

reputation for Oracle, which would significantly harm Oracle's complete software business (!). Apart from the problem that it can hardly be controlled in detail whether Oracle really continues to develop open source MySQL as a competitor would do, the effectiveness of the reputation mechanism appears to be rather questionable. Already at the time of the merger control procedure, Oracle was strategically cutting back other sections of open source, such as the corresponding Solaris version, in particular after its takeover of Sun Microsystems (Vezzoso 2011: 18).<sup>15</sup>

Basically, the indication suggests that the EC aims at preventing merger prohibitions. Instead, the EC uses intense negotiations to modify merger plans so that the essential competition concerns are alleviated. While doing so, the commission obviously places great value on cooperation with and on the view of the merging companies. In connection to phase II decisions the EC - in correspondence with the market actors - often creatively intervenes severely into the structure of the affected markets, actively altering existing and creating new market structures and characteristics (for example in the cases of Gaz de France/Suez, ABF/GBI, Friesland/Campina or Lufthansa/Austrian Airlines). In the case of Thomson/Reuters, the EC – jointly with merging companies – designed and imposed complex remedies aiming at the reconstitution of the *pre-merger* competitive situation by the (artificial) entrance of *new* competitors. Similarly, in the case of ABF/GBI the EC negotiated and applied comprehensive and highly constructive remedies to restore the pre-merger triple oligopoly structure.<sup>16</sup>

An ostensibly surprising success of disintegration which was achieved by the EC in relation to power grids could be linked to a particular deal. At the end of February 2008 the commission achieved an agreement with E.ON. The company 'voluntarily' agreed to sell a part of its power grid to enhance the competition on the electricity market. This agreement turned out to be the initiation of a vertical disintegration of European electricity markets. According to consistent press reports, the arrangement between E.ON and the EC has not only surprised the public but also national politicians – and includes a sudden and complete u-turn of E.ON's position and company policy. Hence, immediate speculations arose what motivated E.ON to consent to the deal so surprisingly and abruptly, especially since this move massively weakened the negotiating position of the whole sector towards the EC and the regulating authorities in Europe. One of the most prominent speculations suspects the EC of having offered to stop two antitrust proceedings concerning offenses

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<sup>15</sup> The most recent decision concerning the Unilever/Sara Lee merger could be another example in this sense. However, a detailed explanation of the decision has not yet been published (as of March 5, 2011).

<sup>16</sup> The question must be asked whether a restoration or preservation of the pre-merger structural competition situation would not be achieved more efficiently and with less intensity of intervention (simply) through a prohibition of the merger in question.

against the Art. 101 and 102 TFEU as its part of the deal – in spite of an excellent state of evidence.<sup>17</sup> The ‘particularity’ of such a ‘deal’ consists in the fact that several political sectors of competition and regulation are linked to each other in a deal between competition authority and companies (‘cross-policy deal’).

### **3. Economic Analysis of ‘Deal Policies’: The Economics of Consensual Arrangements**

The pros and cons of voluntary approaches or consensual arrangements have been discussed in several subjects within economics as well as in other disciplines. For example, in the late 1990s, there has been a vital discussion of so-called voluntary approaches in environmental policy, referring to consensual arrangements about environmental policy goals and instruments between major industries and governments, replacing or preempting public regulatory initiatives.<sup>18</sup> Similarly discussions took place in agricultural economics<sup>19</sup> and electricity economics<sup>20</sup>. After having identified traces of a trend towards consensual arrangements between the European competition authority and its norm addressees in the preceding sections, we now discuss the advantages and disadvantages of ‘deals’ from an economic perspective. We identify (I) asymmetric information, (II) transparency, accessibility and discrimination, (III) acceptance and costs, as well as (IV) the political economics of competition agencies as relevant areas where pros and cons of deal policies are displayed.

#### **3.1. Asymmetric Information**

Competition policy is characterized by considerable information asymmetries. Typically, companies have more and better information on the relevant market on their own behavior, products and situation at their disposal than the competition authority in charge. This insider knowledge cannot be completely accessed by the competition authority, offering scope for a strategic use of the information advantage by the norm addressees. This is further aggravated by the fact that the competition authority must to some extent rely on market information provided by

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<sup>17</sup> Tagesschau online (March 7, 2011 <<http://www.tagesschau.de/wirtschaft/eon30.html>>) reports: “Exactly these structural changes [sale of power grids] are intended to be introduced by E.ON with the sale of high-tension power lines – in reverse, the competition authority of Brussels examines a cessation of the cartel proceedings. In Brussels, nobody remembers a deal of a similar dimension.” [transl.] See also, for instance, New York Times from February 28, 2008.

<sup>18</sup> See inter alia, Rennings et al. 1997; Mazurek 1998; Carraro & Lévêque 1999; OECD 1999, Sullivan 2005 and Quandt 2010.

<sup>19</sup> See e. g. Schulze 1994.

<sup>20</sup> See e. g. Canadian Electricity Association 1996.

the norm addressees when doing its competitive assessment.<sup>21</sup> An additionally contributing factor in merger control is that the companies have already intensively dealt with the issue when they notify a merger. This circumstance can be regarded as particularly relevant during phase I proceedings in the European context because they are 'rash' decisions without a thorough examination by the competition authority. This means that companies enjoy a considerable scope to use their information advantages in this phase.

Consensual arrangements may be viewed as an instrument to alleviate the problem of asymmetric information to the extent that they offer incentives to the norm addressees to reveal unbiased information. Within the context of European competition policy, in particular two areas of advantages can be identified for this kind of deals:

- Remedies in merger control and abuse control: Due to their superior knowledge about the relevant markets, companies are able to propose more efficient and more effective remedies to competitive concerns than the competition authority.
- Inability to pay problem: in cartel proceedings, a consensual arrangement of the fine among cartel delinquents and the competition authority may prevent companies from facing insolvency due to the cartel sanction (Kienapfel & Wils 2011).

On the downside, this information may be strategically biased and distorted. The norm addressees routinely experience incentives to propose ineffective remedies if they benefit from the anticompetitive arrangement or conduct. The latter is virtually always the case when it comes to abuse control. In case of mergers it depends on the significance of the competitive concern for the overall business of the new entity. Ineffective remedies, more precisely, means remedies that do not effectively alleviate the competitive concern and/or, at the same time, are difficult to assess and

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<sup>21</sup> The extent of information asymmetries may vary. To what extent the competition authority in charge already treated and decided cases in a certain industry or sector is a question to be considered here. In 'new' cases the experience and the knowledge of the cartel authority may be limited and the information asymmetries are stronger than in markets which have already been subject to comprehensive and in-depth investigations by the competition authorities before. In 2004 for instance, the Federal Cartel Office of Germany dealt with a merger of hospitals for the first time (Kuchinke & Kallfass 2006). Thus, it was important for the authority to firstly acquire knowledge about the special characteristics of this industry and the relevant markets in question. With the occurrence of more cases in the following years, the accordingly increased experience and knowledge of the cartel office reflects in a (from a health economics point of view) improved quality of the merger control decisions in this industry. Numerous health-economic aspects are better understood now and the later decisions are theoretically more profound and clarified due to a decrease of information asymmetries.



supervise by the competition authorities. For instance, remedies whose implementation and/or effects are virtually impossible to monitor and supervise after their imposition through the competition authority perfectly fit the interests of the norm addressees. In particular, complex remedies may additionally be suited to hide their lack of effectiveness and/or enforceability to the authorities. Thus, it may not be accidental that especially remedies in merger control appear to increase in complexity with the increasing involvement of the merging companies in the remedy-finding process. Similarly, it may be difficult to monitor and supervise whether cartel members really face an inability-to-pay problem when confronted with the cartel fine and consecutive charges.<sup>22</sup> Quite unambiguously, any convicted cartel member will be wanting to reduce the fine as much as possible.

It needs to be kept in mind that a rational company will only engage in a deal with the competition authority if it receives a benefit in comparison to the unilateral rule execution by the authority. This implies that any voluntary information offering in the course of a deal negotiation must contribute to a strategic benefit. Such a benefit can be (i) achieving the same level of competition by more efficient remedies, (ii) achieving less effective remedies and benefiting from continuing anticompetitive rents or (iii) creating trust from the authority (information offer as a signaling device) which may yield benefits in other areas (like perhaps in the E.ON deal). While (i) would involve unbiased but strategically incomplete information (information hinting at additional, so far undetected anticompetitive concerns will not be disclosed) and be beneficial in welfare terms, (ii) would involve biased information and is clearly welfare-reducing. And (iii) is most probably also welfare-reducing even though it may involve rather unbiased (but probably incomplete) information disclosure.

Even if possibility one is viewed to be of empirical relevance<sup>23</sup>, a sensitive question is whether competition authorities can reliably discriminate between (i) and (ii). This basically refers to the competence of the competition authority to assess and evaluate the quality and the accuracy of the information offered by the norm addressees. Firstly, the competition authority can employ its own economic expertise, for instance in terms of using calibrated models of the relevant markets to assess the plausibility of the companies' information (Budzinski & Ruhmer 2010). The European Commission – as well as many other European antitrust agencies – has considerably increased the number of (industrial) economists in its staff during the last

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<sup>22</sup> Public cartel fines imposed by competition authorities are usually followed-up by private damage claims by the victims of the excessive cartel prices. The often unclear number of victims, the lengthy nature of the proceedings as well as national peculiarities like the triple damage principle in the U.S. contribute to the virtual impossibility of seriously assessing the total financial burden on a cartel convict at the time of issuing the fine. These factors further increase information asymmetries since the company in question will have superior information on prospective follow-up claims than the competition authority.

<sup>23</sup> We are not aware of any study providing empirical information on this topic.

decade and implemented a chief economist office, headed by a renowned economist (Röller & Buigues 2005).<sup>24</sup> In addition to this inhouse competence, the Commission frequently relies on expertise of external and independent economists. Secondly, information from insiders with contrary interests – competitors, suppliers and consumers of the investigated parties – help to evaluate the received insider information by balancing out oppositional biases. Thirdly, the competition authority can monitor remedies and - depending on the legal order – may re-intervene if the consensually arranged remedies fail to live up to their promises. However, the legal scope for this is rather limited in Europe and there are several practical difficulties (e.g. identification of failures in case of complex remedies, high costs of ex post unbundling, etc.). Fourthly, systematic ex post evaluation of competition policy decisions may help to improve future decisions (Davies & Ormosi 2010; Budzinski 2011b) – even though they cannot correct wrong decisions of the past. These instruments lessen the extent of strategic behavior due to information asymmetries. Notwithstanding, they still leave considerable scope for the norm addressees to use their information advantage in an anticompetitive sense.

### **3.2. Transparency, Accessibility, and Discrimination**

Transparency and accessibility are notorious problems when it comes to consensual arrangements. Firstly, deals usually take place in secrecy and details about the settlement process and the result of the deals are usually not published. For instance, it is an explicit element of the new cartel sanction settlement practice in European competition policy that details about the deal and the underlying competition law violation are kept secret among the arrangement parties as part of the deal. Secondly, participation in the consensual arrangements is usually not comprehensive, i.e. some parties that are affected by the deal are not part of the negotiations and the arrangement. While competitors and/or industrial suppliers and customers sometimes are part of the deal and sometimes not, consumers most typically are not and have to rely of the competition authority advocating their interest instead. Although the latter should be viewed to be the task of the competition authority, the economics of bureaucracy point to a related principal-agent problem and, thus, to the self-interest of the authority (see in more detail section 3.4). If the self-interest of the competition authority trumps its consumer's advocate role and/or if other affected parties are not part of the deal, arrangements at the expense of third parties (customers, consumers, small- and middle-sized businesses, companies from outside Europe, the general public, etc.) are likely to result. Like with lobbying, in particular parties consisting of many heterogeneous individuals or units are

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<sup>24</sup> The position is currently held by Kai-Uwe Kühn ([http://ec.europa.eu/dgs/competition/economist/role\\_en.html](http://ec.europa.eu/dgs/competition/economist/role_en.html); accessed 19.07.2012), succeeding Lars-Hendrik Röller and Damien Neven.

likely to get discriminated due to their comparatively low degree of ability to organize powerful influence groups (Olson 1965).<sup>25</sup>

The non-disclosure of evidence against cartels as part of the settlement deal among the EC and cartel members offers a telling example since the non-availability of this evidence to deal-outsiders considerably complicates and handicaps the legal enforcement of private damage claims of these deal outsiders. Both the statement of objections and the final decision are significantly shortened whereby less information about the cartel is published (Dekeyser & Roques 2010: 830-831, 838).<sup>26</sup> Thus, outsiders receive considerably less information about the damaging effects of the cartel or the accrued welfare losses (Holmes & Girardet 2011: 8). The settlement procedure itself even remains completely confidential so that the public cannot understand, for instance, in how far the EC approached the companies or which party accepted the compromise. Thereby, it is explicitly possible that certain incriminating investigative results regarding the consensual arrangements do not become known to the public at all. According to Dekeyser & Roques (2010: 830-831, 838), this constitutes a significant part of the incentives for cartelizing companies to participate in the settlements.

Furthermore, the EC provides some kind of 'advance payment' during such negotiations since it discloses its evidence and the cartelizing companies are granted access to the state of the investigation right from the beginning, even before an agreement is conceivable (Dekeyser & Roques 2010: 835). Since this information cannot be retracted if the settlement negotiations fail, cartel members may use the information from the failed negotiations to advance and arm their defense against a (non-consensual) EC decision.

The secrecy element of the (successful) settlement deal, on the other hand, causes negative side effects on the follow-up private damage claim suits. Basically, they must rely on the facts which have been detected by the federal investigation since private persons do not have the investigative power and means to detect and produce their own evidence against the cartel. Thus, the fewer information are available the harder it is for the victims of the cartel to receive compensation through private enforcement (Holmes & Girardet 2011: 7-8). This is problematic from an economic point of view because, in addition to the public sentence, the impending compensation claims represent an essential deterrence element with regard to the

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<sup>25</sup> Size and importance of companies may matter in terms of influencing the shape of a deal. It may be speculated, for instance, whether merger projects by comparatively small airlines (e.g. Olympic/Aegean Airlines and Ryanair/Air Lingus) were, inter alia, prohibited because their deal lobby was not as strong as in cases of bigger airlines (Lufthansa/SN and particularly Lufthansa/Austrian Airlines) that managed to get a conditional clearance with consensually arranged remedies.

<sup>26</sup> This does not, however, simply apply to the negotiation of remedies in merger control decisions. In this case, the commission publishes a detailed reasoning which at least offers limited insights into the negotiation process.

participation in illegal cartels (Rüggeberg & Schinkel 2006; Truli 2009; Lande & Davies 2010).<sup>27</sup> Similarly, the prosecution of the cartel in question in other jurisdictions that have experienced damages from the cartel is impeded. This particularly hurts small and less-developed jurisdictions which lack the investigative power and financial means to enforce competition rules of the EU or the U.S. (and therefore rely on their findings) and are often a prime target of international cartels (again 'deals at the expense of third parties').<sup>28</sup>

Again, instruments such as the detailed publication of consensual arrangements and the systematic evaluation of past competition policy decisions can *ex post* contribute to the mitigation of problems. From an economic perspective, however, it must be considered that both parties – companies and competition authorities – experience a strong common interest to sell any done deal as being a success. The competition authority in particular will have little incentive to harm its own reputation through a negative *ex post* evaluation of the deal.

In the literature on consensual arrangements in environmental policy, a proposed solution to the problem of accessibility and discrimination is represented by the roundtable idea of bringing all affected interests together to ensure that all legitimate interests are represented in the final deal. Apart from obvious organizational problems (organizing dispersed interests, decreasing probability of achieving consensus with the increasing number of diverse interests, identification of all affected parties, etc.), however, we should keep in mind that we are talking about competition policy here, i.e. a policy seeking to protect the coordination mechanism competition from being replaced by inter-company coordination or monopolistic structures. Calling for a remedy deal in a merger case that is comprehensive (i.e. includes all affected parties in a roundtable decision) obviously violates the fundamental goal of this policy since it represents an – indeed comprehensive! – replacement of competition as a coordination mechanism in itself. The same is true for cartel and market power abuse cases. Thus, making deals even more comprehensive most clearly does not represent a sensible strategy in the name of the protection of competition.

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<sup>27</sup> In their analysis of the optimal fine discount for settlements, Ascione and Motta (2010: 75) argue that “[s]ettlements may affect firms’ exposure to private litigation by accelerating the initiation of such actions, and by making them more likely.” However, this ignores that settlements also considerably reduce the quantity and quality of published information about the cartel, thus significantly aggravating (and not promoting) follow-on private damage claims. This would most probably significantly alter their results. Generally, it is often overlooked in the literature that an accelerated exposure to private damage claims due to a settlement is overcompensated by rendering these follow-on suits virtually impossible because of the limitation of published information.

<sup>28</sup> Dekeyser & Roques (2010: 831) even highlight this fact as an advantage: “Having the opportunity to limit exposure to litigation in other jurisdictions by getting to know and discuss the objections before the SO is issued may also be a particularly attractive benefit for parties [...]”.

### 3.3. Acceptance and Cost

One of the major advantages of consensual arrangements is their high acceptance level. The parties involved in the deal (the insiders) are more likely to accept and, therefore, 'live' the deal. So, consensual arrangement can be realized more effectively as they rest on consent. On the other hand, it is obvious that companies strategically only offer such 'commitments', whose realization are not or only hardly controllable *ex post facto* – and therefore will not destroy their anticompetitive rents. Insofar that this is the case, acceptance is either easy (absence of potentially effective remedies) or merely cheap talk (absence of effectively enforceable remedies).

Another advantage of 'deals' might be lower costs.<sup>29</sup> For instance, the settlement policy regarding cartel fines increases procedural efficiency due to the acceptance of the EC's decisions by ex-cartel members (Dekeyser & Roques 2010: 828-830, also for the following). A couple of resource-intensive procedural steps are eliminated. For instance, the translation of all case documents in multiple languages can be omitted because the companies, as a part of the settlement, agree to that. The fact that in settlement cases the EC's statement of objections is already consensually agreed among norm enforcer and norm addressees implies that no replies by the parties are to be expected and processed. Instead, oral hearings are held. Eventually, the consensual arrangement implies that both the statement of objections and the final decisions can be written significantly shorter and more streamlined because appeals are unlikely. Thus, the risk of lengthy and resource-intensive legal proceedings is minimized to virtually zero and, consequently, legal fees and procedural costs can be substantially reduced as well as proceedings considerably shortened.

A counter-argument is that additional resources need to be expended to operate and arrange the settlement negotiations. Should these costs be systematically lower than the procedural savings, then the net procedural effort can be reduced through deals.<sup>30</sup> Such a cost reduction would be beneficial since the resources saved could be used to intensify the fight against anticompetitive arrangements and conduct, i.e. for a more efficient competition policy.

Another significant advantage for the companies and therefore an important incentive to engage in consensual settlements is the fact that potential reputational damage through the publication of cartel participation can be reduced to a minimum or at least kept within a limit. In return for acknowledging the facts and for accepting the sentence the EC not only warrants a lessened sentence but also re-

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<sup>29</sup> In the law-and-economics literature, this often represents a central motivation for settlements (inter alia, Posner 1973, Shavell 1993, Spier 2007).

<sup>30</sup> Whether this is indeed the case constitutes an empirical question. Unfortunately, we are not aware of any empirical studies confirming net cost reductions through deals.

duces the amount and the extent of its publication about the cartel and about the unlawful actions of the involved companies (Dekeyser & Roques 2010: 830). Moreover, the cartelizing companies gain a considerable influence on the EC's decision by entering into a consensual settlement arrangement. This can very well lead to the situation that some allegations are dropped in the course of arranging a compromise between the EC and the cartel members (Dekeyser & Roques 2010: 830-831). In their settlement submissions, which the companies submit after the bilateral deal negotiations with the EC, the companies acknowledge 'only' the facts which were mutually agreed upon as well as the resulting liability (and blame). They also indicate a maximum fine that they would accept (Dekeyser & Roques 2010: 837-838)!

A game-theoretic perspective on the acceptance effects of deals reveals important further insights. If deals occur frequently and/or deals are the results of multistage negotiations (as it is the case in merger control regarding phase-II remedies), then effects derived from the economics of repeated games apply. In repeated games, the players tend to build up mutual trust and a reputation for being a reliable partner through the repeated interaction. According to Dekeyser & Roques (2010: 834, 836) such a "common view through bilateral settlement discussion rounds" is an explicit aim of cartel settlements. In theory, this could lead to the companies internalizing competitive principles and, as a consequence of their modified norm fundament, lead them to act rather procompetitively and in compliance with competition rules in the future. This internalization of competitive principles would then improve the deterrence effect of competition policy and, thus, the overall protection of competition.

However, there is also a less competitive story that, unfortunately, may be more plausible in the real world. Through the negotiation rounds and the repeated interaction, it may be the competition authority which adapts and 'internalizes' the views of the companies that violate competition rules. Firstly, in the worst case, the authority in charge may *de facto* lose its independence as a regulatory body because it does not apply criteria and suggest solutions anymore but negotiates them.<sup>31</sup> Secondly, as the rule content and interpretation becomes negotiable, rules may lose their efficiency because every deal may result in a new interpretation. This significantly erodes the acceptance and thus the deterrence effects of competition rules and competition policy.<sup>32</sup> Thirdly, particularly in the case of big mergers of national interest (in the broadest sense) with supposedly strong involvement of the media, it can be assumed that the competition authorities attend to the interests of

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<sup>31</sup> ...with a simultaneously existing information asymmetry at the expense of the authority.

<sup>32</sup> Compliance to as well as public acceptance of competition rules are shaped through the serious, consistent, transparent and (therefore) anticipatable application of the rules (Kovacic 2010) – which is the core of the concept 'rule-based competition policy'. The prospect of individual deals and arrangements stands in sharp contrast to this reasoning.

'their' companies more closely; a development which might result in a rather benevolent assessment of merger plans compared to a purely competitive assessment. Eventually, the systematic application of consensual elements is likely to lead to multiple deals. The result is the emergence of a 'give-and-take' situation. In terms of game theory, cooperatively repeated games are likely to dominate the relation of norm addressees and authority. For the settlement policy with cartel members, for instance, it is explicitly stated that "a non-cooperative equilibrium [is substituted] with a dynamic, cooperative one" (Dekeyser & Roques 2010: 821). A dynamic and cooperative game contains consensual political solutions ('deals') which are in the common interest of both negotiating parties (competition authority and norm addressees) and inevitably provide a compromise for which both partners have to make concessions. Necessarily, the competition authority, thereby, at least partly must side with the companies' anticompetitive interests. Moreover, both partners have a common interest to present their consensual arrangement as a success.

In summary, there is vital danger that competition authorities and anticompetitive companies become 'partners in crime'.<sup>33</sup> The competition authority runs into a situation where it weighs the effects of competition with the interests of the companies, interests it increasingly shares, and against the background of the compromises it has done for past deals. Accepting anticompetitive arrangements and conduct – instead of fighting it – then may become the daily business of the competition authority.

Eventually, this involves a trade-off. With the increasing acceptance of the consensually arranged competition policy decisions, acceptance of the competition rules decreases. So does also the acceptance of the general competition policy in the sense of deterrence of anticompetitive behavior (Polinsky & Rubinfeld 1988; Franzoni 1999; Edwards & Padilla 2010: 673-674; Choné et al. 2012). If anticompetitive companies – be they involved in a cartel, an anticompetitive merger or abusive strategies – can realistically hope for a deal, then the incentive for these companies increases to risk more and more anticompetitive arrangements/conduct and test out the rules. Since the deterrence effect of competition policy – companies relinquishing anticompetitive arrangement and conduct because they anticipate they will not get through with it – accounts for the largest part of the positive welfare effect of protecting competition, this loss of acceptance of competition rules and their enforcement might actually be the most damaging consequence from an increased deal policy in the long run.

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<sup>33</sup> In other words, competition authority and anticompetitive companies form a cartel.

### 3.4. The Political Economics of Competition Authorities

From a political-economic perspective, competition authorities must be expected to also pursue their own interests ('economic theory of bureaucracy'; Niskanen 1968). These interests can be maximizing the budget, the number of employees or the political social weight. Additionally, they also include a good public image and reputation, both as a means to increase the budget and as a value on its own. For a competition authority, these self-interest factors can be boiled down to (i) demonstrating activity by frequent interventions, and (ii) showcasing interventions as being a success. It should be kept in mind that in real-world agencies, the self-interest factors will be mixed in the utility function with 'objective' target factors, here: the protection of competition.

Consensual arrangements offer considerable potential to serve the self-interest factors of competition authorities. Firstly, competition authorities may benefit from more complex regulations that significantly go beyond the 'simple' application of rules. Deals offer ample scope for increasing the complexity of regulation since rule-based competition policy gets more and more driven towards individual case handling with a high degree of intervention. For instance, merger control proceedings increase in complexity when prohibition decisions and comparatively clear-cut divestment obligations become substituted by multistage negotiations among the authorities, the merging companies and maybe even their main competitors about the future market structure. The phase-II merger decision sample that we discuss in section 2.2 offers several examples where prohibition decisions (safeguarding the pre-merger number of competitors) was replaced by an arrangement allowing the merger accompanied by complex structural and behavioral interventions attempting to recreate the pre-merger structure without blocking the merger (even including the authority-supported creation of 'artificial' new entry into the market). Generally, the trend towards more complex and more 'constructive'<sup>34</sup> interventions into the market structure and situation in the course of the remedy deals becomes rather obvious. The EC has gone a long way from 'just' being a watchdog, limiting its merger control interventions to preventing anticompetitive combinations towards being an active player in (re-)designing and configuring markets in cooperation with big business companies of the respective markets. While this trend fits economic theories of regulatory authorities, it may not be welfare-maximizing. And certainly neither does it fit the idea of rule-based competition policy, nor the concept of limiting intervention into competitive markets in order to restrict the authority to the task of preventing the self-erosion of competition by anticompetitive arrangements and conduct. Eventually, the perspective of economic theory raises doubts as to whether the competition authority – with or without cooperation of

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<sup>34</sup> ,Constructive' in the sense of actively designing and moulding the new structures.



the industry in question – possess sufficient knowledge and competence to design and configurate competitive markets (*Hayek* 1945, 1948, 1968, 1975).

At a first glance, however, the resource-extending effect of deals seems to stand in contrast to the procedural efficiency gains stated in the preceding section. And, indeed, deals like consensual cartel procedure settlements (and also remedy deals) shift the resource-intensity away from post-decision legal proceedings towards pre-decision negotiations (deal-making). Without an empirical analysis, the net effect on resource-usage and, thus, on budget maximization remains unclear – and it may be subject to dynamic changes: it might be that an efficiency gain in the short-run is (over-)compensated by increasing procedure complexity in the longer-run. However, the political-economy perspective reveals that this shift serves the self-interest of competition authorities anyway.

Secondly, consensual arrangements serve the reputational goal of the competition authority while post-decision legal proceedings do not. Post-decision legal proceedings – namely, complaints and appeals of the norm addressees in front of the courts – are not only resource-intensive, they are also potentially image-damaging. Every time a court of appeal repeals decisions by the authority and/or criticizes the authority decision, it publicly inflicts a ‘defeat’ on the authority. In particular in the administration system, where the competition authority decides cases on its own and courts are limited to the role of being appellation bodies (like it is in European competition policy)<sup>35</sup>, the competition authority cannot win much by post-decision legal proceedings. In the best case, the authority decision is confirmed by the court, which, however, is often viewed to be the ‘normal’ case and does not add reputation. If the court revokes or modifies the authority decision, then this is usually viewed to be a defeat of the authority with negative reputation effects<sup>36</sup>. Consensual arrangements, on the other hand, significantly reduce the probability of appellations by the norm addressees, so that courtroom defeat becomes less likely. Furthermore, the anticompetitive companies and the authority share a common interest to sell their deal as a success to the public (‘partners in crime’), so that positive reputation effects may be reaped. That this may come at the expense of consumer welfare and competition will often be less public due to the dispersed character of the negative effect and the low organizational structure of the disadvantaged players (consumers, small businesses, taxpayers, foreign players, etc.). Therefore, the shifting of resources from post-decision legal proceedings towards pre-decision negotiations is advantageous for the agency even if total resource intensity remains

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<sup>35</sup> This differs from the (for instance, U.S.-style) court system where the competition authority needs to seek a court decision and plays the role of a state attorney (see on the phenotype systems Budzinski 2009: 372-373). Note, however, that deals are also a frequent element of court systems (Reindl 2010; Rubinfeld 2010; Wood 2010).

<sup>36</sup> This stands in accordance with more general theoretical insights by Perloff et al. (1996) as well as with Temple Lang (2006).

the same, i.e. the marginal reduction of resources for post-decision legal proceedings equals the marginal increase of resources for pre-decision negotiations. If the former is lower than the latter, then it would be optimal for the authority since both self-interest factors (budget maximization and reputation effects) are improved. Vice versa, the total incentive effect is unclear since the disadvantage of reducing total resources comes with an improved reputation effect.

The EC suffered several setbacks due to unfavorable court decisions during the last decade. In merger control, three prohibitions in a row as well as one clearance decision were revoked, including outspoken criticism of the EC's practices and decision quality through the judges.<sup>37</sup> Along with unfavorable media coverage, this put considerable pressure on the EC and certainly was perceived to harm the EC's reputation as a competition authority. Additionally, implicitly and unintentionally increased thresholds for evidence in the context of new economic investigation techniques de facto weakened the EC's position in court (Budzinski 2010). Altogether, therefore, the enhanced tendency towards consensual arrangements may actually reflect the EC's desire to save its reputation despite its weakened position of power. Then, the remedy deal policy may be viewed as a second-best policy by the EC, attempting to maintain its reputation in the face of 'objective' enforcement problems in merger control (Budzinski 2010) without completely giving up on its competition protecting goals. However, such a view ignores existing alternatives to the avenue of consensual arrangements – alternatives that admittedly would involve a more rule-based and less complex-interventionist approach and, thus, may demand fewer resources.<sup>38</sup>

Regarding cartel sanctions, the EC has made similar experiences. Though EC decisions on cartels have not been revoked, there have been several cases where the cartel fine imposed by the EC has been considerably reduced by the appellation bodies. Furthermore, evidentiary thresholds have become more ambitious when it comes to calculating the appropriate fine. Consequently, the consensual settlement arrangements comprising agreement on the facts of the case as well as on the appropriate fine may pay off a double dividend for the EC. Firstly, although the cartelizing companies formally keep the right to do so, they tend to be less likely to repeal the EC's decision. Secondly, even in case of an appeal, the position of the EC in court is considerably improved because the companies accepted the facts of the case and the fine beforehand (Dekeyser & Roques 2010: 829-830).

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<sup>37</sup> See the cases Tetra Laval/Sidel, Schneider/Legrand, and Airtours/First Choice (all: Christiansen 2010) as well as Sony/BMG (Aigner et al. 2007). Additionally, the court – even though confirming the prohibition decision – heavily criticized the EC in the case GE/Honeywell (Baxter et al. 2006).

<sup>38</sup> Focusing on strong and economics-based 'rebuttable presumptions' represents one such alternative (Baker & Shapiro 2008; Farrell & Shapiro 2008; Budzinski 2010: 466-471)

In summary, consensual arrangements are well-suited to the self-interest of competition authorities, in particular if the threat of unfavorable court decisions is prevalent. Thus, if a competition authority does not act completely altruistic and unselfish, it should be prone to enter such arrangements. An institutional consequence would be to institutionally limit the scope for the competition authority to go for deals, for instance by pinning down a more rule-based competition policy.

#### 4. Conclusion

European competition policy seems to be on its way towards a political bargains-driven case-by-case approach rather than a rule-based policy, which aims at protecting competition. Non-competition reasoning and goals play an increasing role in this realigned competition policy. Deals sealed between competition authorities and infringing companies represent an expression of this policy. Consensual arrangements as an instrument of competition policy have been analyzed and evaluated regarding their pros and cons in this paper from an economics perspective. The analysis supports some of the claimed benefits like procedural efficiency gains of efficiency through minimizing appellation procedures. Furthermore, deals fit in with the self-interest of competition authorities, in particular when facing enforcement problems in front of the law courts.

However, on the downside, consensual arrangements always imply a reduction of the protection of competition compared to non-cooperatively executed competition laws. If there was nothing to gain for the infringing norm addressees, it would not make sense to them to participate in the deal. Therefore, consensual arrangements may only deliver a net benefit in the face of severe enforcement problems. If a competition authority is rarely able to execute the competition laws, perhaps due to institutional flaws, then going for consensual arrangements may represent some kind of a second best policy to maintain some level of competition. However, if a competition authority faces severe enforcement problems, it also weakens its bargaining power, implying that the protection of competition will be more compromised in the consensus equilibrium. Add to that information asymmetries as well as the partners-in-crime effect and the prospects for a constrained welfare-optimizing second-best policy vanish. This scepticism is reinforced by the availability of alternatives to deal with experienced enforcement problems (see section 3.4.). Furthermore, empirical studies about the effectiveness and efficiency of remedies in merger control confirm that complex concession arrangements underperform (European Commission 2005; Seldeslachts *et al.* 2009). According to these studies, merely prohibitions represent an effective instrument both with regard to the protection of competition and particularly with reference to the deterrence effect of competition policy (frustrating anticompetitive arrangements and conduct).

With respect to European competition policy, we need to issue a note of caution. As long as consensual arrangements do not play a considerable role and, consequently, do not display substantial effects, the weakening of competition will be marginal. Even though we found indication that consensual arrangements play a role and an increasing one, this does not imply that European competition policy is predominantly characterized by deals. However, from an economic perspective, it must also be noted that an expansion of consensual elements<sup>39</sup> necessarily walks hand in hand with a continual weakening of the protection of competition. Consumer welfare will not benefit from expanding the role and importance of consensual arrangements as a means of European competition policy. Therefore, we think that any extension of consensual arrangements in European competition policy should be met with skepticism and caution. Instead, we recommend to consider a more rule-based competition policy approach well grounded in economic theory. In contrast to recent trends, however, the insights from economics should be codified into rules (Breyer 2009) that subsequently can be applied without offering scope for deals and consensual arrangements driven by the politics and interests of the day.

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<sup>39</sup> However, some authors note driving-forces for such an expansion. Wils (2006) expects in particular commitment decisions to entail considerable risks for excessive use because they meet a common interest of infringing companies and competition authorities. Edwards & Padilla (2010: 672) conclude from their economic model that an excessive use of settlements necessarily surfaces if competition authorities focus on short-term welfare – which is the official target in European competition policy case decisions (focusing on an effects-horizon of no more than two years after the decision).

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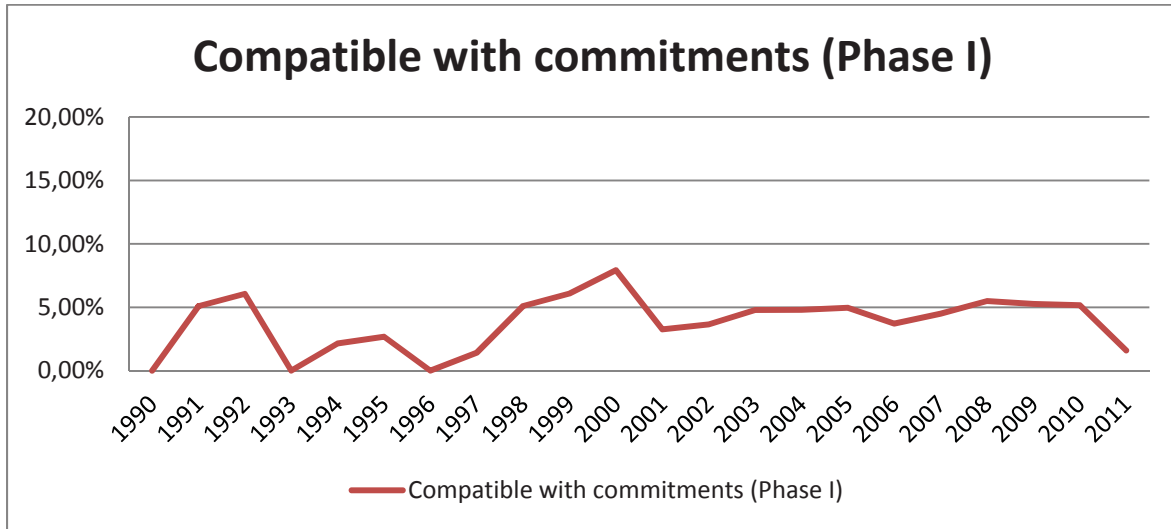
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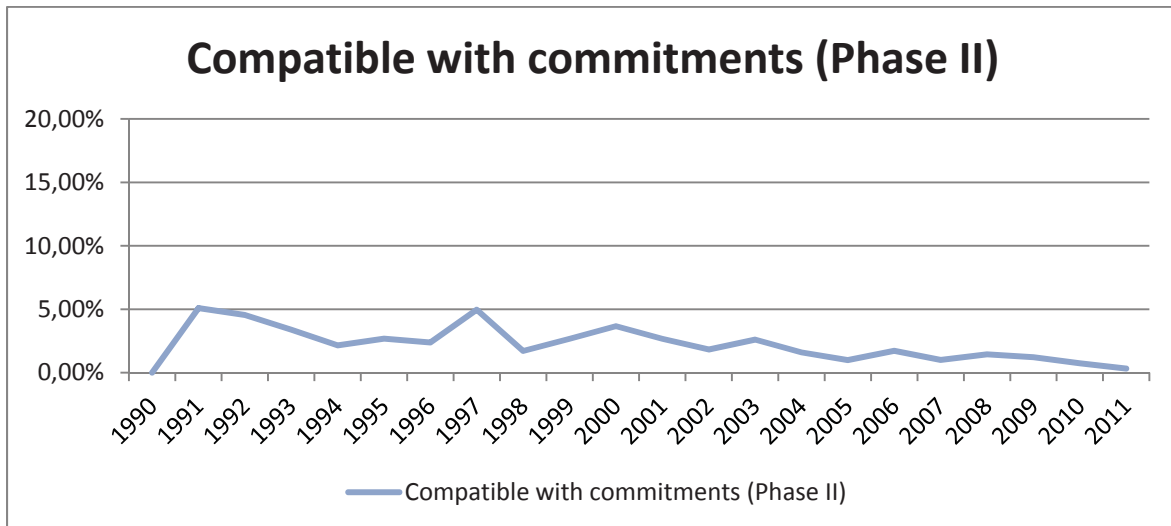
## Appendix

### Appendix 1: Share of Phase-I-Clearances-with-Commitments from all Decisions



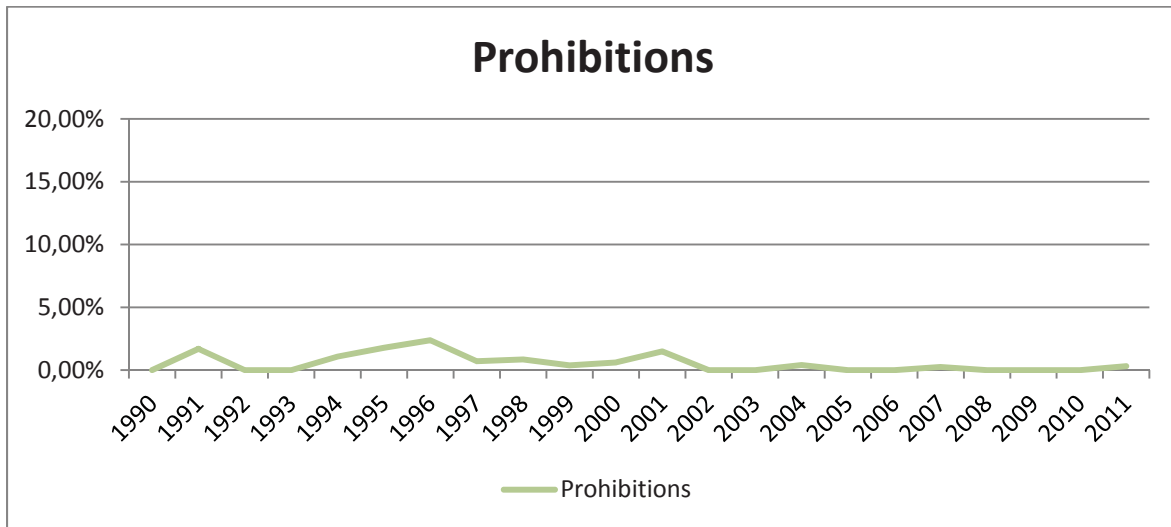
Source: own illustration based on data by the European Commission (August 4, 2012 <<http://ec.europa.eu/competition/mergers/statistics.pdf>>)

### Appendix 2: Share of Phase-II-Clearances-under-Obligations from all Decisions



Source: own illustration based on data by the European Commission (August 4, 2012 <<http://ec.europa.eu/competition/mergers/statistics.pdf>>)

### Appendix 3: Share of Prohibitions from all Decisions



Source: own illustration based on data by the European Commission (August 4, 2012 <<http://ec.europa.eu/competition/mergers/statistics.pdf>>)

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