Optimal Settlement and Commitment in Optimal Antitrust Enforcement

Fatih Cemil Özbuğday[1]

Abstract

Since Becker (1968) and Posner (1976), the optimal antitrust enforcement policy consists of a penalty scheme and investigative effort that maximizes social welfare. The optimality requires the balancing of total costs and benefits of antitrust enforcement. This continual cost-benefit analysis necessitates the update and modernization of competition law. The Turkish competition law is expected to be updated soon in which elements of settlement and commitment are introduced. In this study, I argue that the competition authority should optimally employ settlement and commitment devices by weighing their benefits and costs. The relevant benefits could be speed, decrease in administrative costs and legal certainty. However, losses in deterrence and the elimination of positive externalities of final decisions are significant costs to consider. I also discuss the conditions under which settlement and commitment bring about the desired benefits. I finally propose that settlement and commitment are not the substitutes but the complements of the antitrust devices that the competition authority has (e.g., leniency programmes). The central message of the study is that settlement and commitment should also be used optimally in optimal antitrust enforcement.

Keywords: Optimal antitrust enforcement; competition law; settlement; commitment; Turkey

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[1]**Corresponding Author** Department of Economics, Ankara Yıldırım Beyazıt University, Ankara, Turkey. fcozbugday@ybu.edu.tr

1. Introduction

Since Becker (1968) and Posner (1976), the optimal antitrust enforcement policy consists of a penalty scheme and investigative and prosecution efforts that maximize social welfare. The optimality requires the balancing of total costs and benefits of antitrust enforcement. Antitrust authorities have limited resources. They cannot investigate, detect and eventually punish each competition infringement. Therefore, it is desirable for antitrust authorities to allocate their limited resources on antitrust investigations that are likely to the revealing, punishing and remedying the most damaging competition infringements. If a case is to be finalized through entirely adversarial proceedings, competition authorities have strong incentives to choose cases for which violations are the most serious (Wils, 2008). The fundamental principle here is to deter unlawful anti-competitive behavior in the most effective way and to implement competition policy in the most cost-effective form. Thus, this continual cost-benefit analysis for optimality necessitates the update and modernization of competition law.

In the last 15-20 years, the European Community (EC) competition law has received its share from modernization. According to Gerber (2007), two types of modernization of the EC competition law can be identified: substantive modernization and procedural modernization. Substantive modernization included, *inter alia*, the adoption of neo-classical economics for defining the goals and norms for the EC competition law and using its methods for antitrust analysis. Procedural modernization, on the other hand, consisted of institutional and procedural changes in the implementation of competition law in Europe (e.g., replacing the old system of mandatory notification by an ex-post repression regime, decentralizing some of the antitrust enforcement rules to member states). All these modernization reforms came into force on May 1, 2004, as Regulation 1/2003 was passed on December 16, 2002. The regulation also introduced the commitment procedure, as inspired by the American system.

The Turkish competition law, which is derived from the EC competition law, is expected to be updated soon in which elements of settlement and commitment are introduced. Thus, it is essential to present an overview of the literature on the optimal use of these procedures. In this study, I argue that the competition authority should optimally employ settlement and commitment devices by weighing their benefits and costs. The relevant benefits could be speed, decrease in administrative costs and legal certainty. However, losses in deterrence and the elimination of positive externalities of final decisions are significant costs to consider.

I also discuss the conditions under which settlement and commitment bring about the desired benefits. I finally propose that settlement and commitment are not the substitutes but

the complements of the antitrust devices that the competition authority has (e.g., leniency programmes). The central message of the study is that settlement and commitment should also be used optimally in optimal antitrust enforcement.

2. Economic Benefits of Settlement and Commitment

Antitrust cases are mostly disposed of through adversarial proceedings which take lengthy investigations and harsh court battles. This is against the interests of enterprises investigated and competition authorities with scarce resources for which opportunity cost is very high. The public interest is also hurt, as market competition might have been reduced in the meantime as these lengthy proceedings continue.

Settlement and commitment can offer significant contributions to optimal antitrust enforcement in terms of speed and cost. Competition authorities get results way earlier and terminate ongoing violations sooner. Enterprises resort to appeal mechanism less. Administrative expenditures decrease, and accordingly, competition authorities can channel their scarce resources to other investigations.

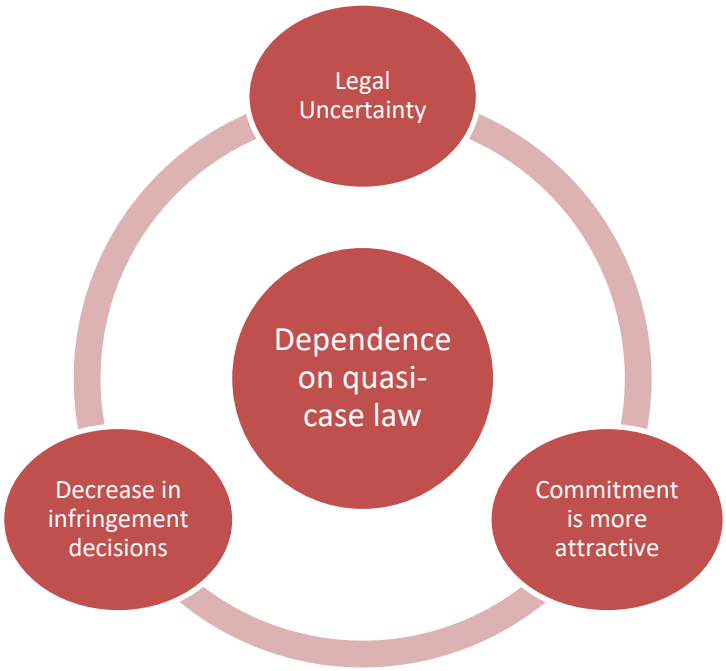
Defendant enterprises benefit from settlement and commitment procedures, too, so long as they are willing to participate in these. Should they cooperate with competition authorities, defendant enterprises save lawyers' costs and the opportunity cost of management's time. Legal certainty is also another trophy for these organizations. These are all desired from the perspective of optimal antitrust enforcement.

3. The Overuse of Settlement and Commitment

Nevertheless, if defendant enterprises face milder punishments or no punishment at all or less-binding commitments because of settlement or commitment, then competition authorities experience antitrust enforcement loss. Therefore, if defendant undertakings are conferred these additional rewards for settlement or commitment, then the benefits brought about by speed, and the decrease in administrative costs should compensate enforcement losses, so that settlement and commitment are desirable from an optimal antitrust policy perspective (Wils, 2008). For instance, the settlement procedure in cartel cases in Europe provides a reduction of the fine by 10%, which implies a 10% reduction in deterrence. In this case, there should be at least 11% increase in the number of cartels detected or in the fines for cartel participants by using resources saved owing to the settlement procedure.

Another drawback of overusing commitment decisions in antitrust enforcement is the decrease in the number of litigated cases that define boundaries of competition law (Wagner-von Papp, 2012). Commitment might be more attractive for defendant enterprises in the infringement procedure since it provides legal certainty. However, the resulting decrease in the number of violation verdicts brings further uncertainty, which, in turn, leads to higher demand for commitment in antitrust cases. Therefore, a strong reliance on quasi-case law emerges and legal uncertainty increases where parties are left with previous commitment decisions that include non-binding guidelines. The law and economics literature has also considered the positive externalities of adjudication and warned that these externalities are lost if defendants settle cases taking their private interests into account (Wagner-von Papp, 2012; Fiss, 1984).

Figure 1: How Commitment Creates Dependence of Quasi-Case Law and Brings More Legal Uncertainty



Another drawback of the overuse of settlement and commitment procedures is that it increases competition authorities' likelihood of settling the wrong cases. These cases include infringements on a new theory of harm or new remedies. Competition authorities might shy away from finalizing the case through an entirely adversarial procedure in these cases, as the

likelihood of judicial review after the final verdict is high. By opting for commitment, competition authorities can avoid uncertain and costly judicial review process.

These "wrong" cases might also include complex technological matters or advanced economic models, which make commitment option more attractive. In the words of Wagner-von Papp (2012), competition authorities "*discount hyperbolically the benefit of the precedential value that consists in resolving the novel legal issue for future cases.*" Accordingly, an authoritative verdict with positive spillovers is not made on the novel complex issues.

4. The Conditions for Desired Benefits

Settlement and commitment should not be offered as a right to undertakings. Instead, antitrust authorities should have broad discretion as to whether or not these procedures will be followed. Thus, the perception of these procedures as fine reductions will be prevented.

A second required condition for the desired benefits of settlement and commitment procedure is the "credible reputation" of the enforcement authority for finalizing the cases in a fully confrontational way. The stronger the reputation, the more likely that defendants will be willing to settle in the "correct" cases without the expectation of substantial rewards.

The third condition relates to the timing of the settlement. The antitrust enforcement authority should not settle a case before it has fully understood its extent and seriousness (Wils, 2008). Otherwise, it is likely to confer a settlement award to the undertakings.

More importantly, the settlement or commitment agreements should be voluntary, and the enterprises should not be victims of the misrepresentation of the enforcement authorities. The undertakings should not be coerced through bluffing or threats. They should not be tempted by promises unrelated to the investigation, either. Furthermore, the defendant undertakings must be given enough time and must have access to legal counseling to reach a wise settlement or commitment decision.

Finally, settlement and commitment policies should periodically be assessed, and ex-post analyses should be conducted as to the accuracy and effectiveness of settlement or commitment decisions made.

5. The Optimal Use of Settlement and Commitment

In the optimal antitrust enforcement policy which maximizes welfare subject to a resource constraint, settlement and commitment decisions in competition investigations should also be used optimally. These procedures have many benefits in terms of speed, costs, and legal certainty. However, these benefits must be compared to the costs of these procedures such as enforcement loss, the elimination of positive externalities of the final verdicts, and the reduction in deterrence.

To optimally utilize settlement and commitment decisions in antitrust cases, it is also necessary to understand the conditions under which these procedures bring about the desired benefits. A "credible" competition authority should settle the "correct" cases and avoid settling the "wrong" ones.

Finally, it should be borne in mind that these procedures are not substitutes of the other elements of the antitrust policy such as leniency programmes or exemptions. They complement each other in optimal antitrust enforcement policy.

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