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ABSTRACT

La destination finale et le but ultime mis en avant dans notre article est la nécessité pour l'Autorité de la Concurrence Turque de prendre en considération l'innovation dans son contrôle des concentrations en adoptant des outils dynamiques. Ainsi, nous soutenons que l'Autorité de la Concurrence Turque devrait "tracer son parcours à Ithaca" et viser à atteindre "l'état idéal" dans son application des règles de la concurrence. L'Autorité de la Concurrence Turque devra tenir compte du fait que, indépendamment de la longueur, de la difficulté et des épreuves de ce voyage, chaque pas suivi dans ce chemin la rapprochera de l'Ithaca et l'aidera à atteindre les objectifs fondamentaux de l'application des règles de concurrence. Sans entreprendre cet aventureux, difficile et long voyage, il ne sera pas possible de parvenir à la destination finale.

The final destination and the ultimate goal that we put forth in our article is that the Turkish Competition Board should include innovation considerations in its merger control analyses by employing dynamic tools. Accordingly, we contend that the Turkish Competition Board should "set its course to Ithaca" and aim to reach its "ideal state" in its enforcement of competition rules. The Turkish Competition Board should bear in mind that, regardless of how long, arduous and full of hardship the journey may be, each step taken on this path brings it closer to Ithaca and helps it to achieve the fundamental goals of competition enforcement. Without undertaking this adventurous, challenging and lengthy voyage, it is not possible to reach the final destination.

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Turkey: Dynamic efficiency considerations in merger control analyses

*"As you set out for Ithaca
hope the voyage is a long one,
full of adventure, full of discovery."*

Constantine P. Cavafy, 1911¹

I. Introduction

1. Innovation is the driving force of evolution and economic growth in world history.² It is vital for helping to address global challenges, such as climate change and sustainable development,³ as well as confronting urgent developmental challenges such as providing access to drinking water, eradicating neglected diseases, reducing hunger, tackling poverty and improving health.⁴ The build-up of innovation capacities has been critical to increasing long-term economic growth⁵ and advancing the growth dynamics of successful developing countries.⁶ These countries have often "*recognized that innovation is not just about high-technology products and that innovation capacity has to be built early in the development process in order to possess the learning capacities that will allow 'catch up' to happen.*"⁷ To that end, one can argue that a successful development strategy has to be built on extensive innovation capacities to foster growth.⁸

1 C. P. Cavafy, *Collected Poems*, translated by E. Keeley and P. Sherrard, edited by G. Savidis, revised edition, Princeton University Press, 1992.

2 P. A. Zawislak and L. M. Marins, Strengthening Innovation in Developing Countries, 2 *Journal of Technology Management & Innovation* 4 (2007), 44; World Bank, *Innovation Policy: A Guide for Developing Countries*, World Bank Publications No. 2460 (2010), 6, <https://openknowledge.worldbank.org/bitstream/handle/10986/2460/548930PUB0EPI1C10Dislosed061312010.pdf> (last accessed February 10, 2018).

3 Organization for Economic Co-Operation and Development (OECD), *Innovation and Growth: Rationale for an Innovation Strategy* (2007), 5, <http://www.oecd.org/sti/innno/39374789.pdf> (last accessed February 10, 2018).

4 OECD, *Innovation for Development: A Discussion of the Issues and an Overview of Work of the OECD Directorate for Science, Technology and Industry* (2012), 4, <http://www.oecd.org/innno/innno/50586251.pdf> (last accessed February 10, 2018).

5 Press Release, Global Innovation Index 2016: Switzerland, Sweden, UK, U.S., Finland, Singapore Lead; China Joins Top 25, Remarks of Francis Gurry, WIPO Director General, at presentation of the Global Innovation Index 2016 in United Nations Office at Geneva (August 15, 2016), http://www.wipo.int/pressroom/en/articles/2016/article_0008.html (last accessed February 10, 2018).

6 OECD, *supra* note 4, at 5.

7 Id.

8 Id.

2. Accordingly, the Turkish government has included the goal of increasing its innovation capacities as a development priority in its 10th Development Plan (2014–2018).⁹ Science and innovation enforcement policies (together with industrial development and other regional policies) are considered to be important tools for promoting innovative entrepreneurship in Turkey as they are the main drivers of increased productivity.¹⁰ In this sense, Turkey has adopted a comprehensive policy framework, which includes and incorporates various incentive schemes for an innovation-enabling environment.¹¹ With that said, Turkey is categorized among moderate innovators¹² as a large and middle-income country.¹³ Although Turkey shows relative strength in terms of firm investments in innovation, an innovation-friendly environment, and its innovators,¹⁴ it is still considered to be performing well below the average of the EU.¹⁵ Therefore, it is strategically necessary for Turkey to make bigger sound moves in order to effectively carry out its development plan.¹⁶

3. Competition policy, as an important tool for increasing overall productivity through the realization of innovation, comes to the forefront of this discussion. Given that mergers¹⁷ can positively affect the innovation capabilities of firms,¹⁸ merger control policies in Turkey especially have the potential to influence the future of innovation in the marketplace, and therefore, to affect the fulfillment of Turkey's development agendas. Indeed, mergers can lead to an increase in the innovation capabilities of the merged undertakings by (i) combining their complementary assets, (ii) allowing firms to share the risks of an R&D investment and to better tolerate the financial risks of such investments due to the larger size and more extensive financial resources of the combined firm, (iii) enabling firms to better fund R&D activities, (iv) creating synergies that would lead to increased innovation, among others.¹⁹

4. With that in mind, in this article we will take a look at Turkey and review to what extent innovation is taken into consideration in the Turkish competition law enforcement with a particular focus on merger control analyses.

II. Dynamic efficiencies in Turkish merger control analyses

5. In Turkey,²⁰ innovation has been taken into consideration mainly in terms of the current dominance test,²¹ which is applied in the evaluation of mergers.²² Moreover innovation is also recognized as an important factor in creating or increasing competitive pressure on the competitors of the merging undertakings, and therefore revealing itself as a critical competitive force in a given market.²³

6. Similar to other efficiency claims, the dynamic efficiency claims of the merging parties would be evaluated by the Turkish Competition Board (TCB) in its competition law assessment, and if such claims are found to be (i) beneficial to consumers, (ii) merger-specific, and (iii) verifiable,²⁴ they can be used as a valuable tool to convince

9 Approved by the Turkish National Assembly (Decision No. 1041, dated July 2, 2013) and published in the *Official Gazette* No. 28699 on July 6, 2013.

10 See 10th Development Plan, *supra* note 9, ¶ 423.

11 See *id.*, ¶ 425.

12 See European Commission, European Innovation Scoreboard 2017, 26 https://www.rvo.nl/sites/default/files/2017/06/European_Innovation_Scoreboard_2017.pdf (last accessed February 10, 2018).

13 The Innovation Policy Platform, Turkey, <https://www.innovationpolicyplatform.org/content/turkey> (last accessed February 10, 2018).

14 See European Innovation Scoreboard 2017, *supra* note 12, at 76.

15 *Id.* at 5.

16 F. Bakırçı, Knowledge and Innovation Economy: An Evaluation of Turkey, 38, in F. Bakırçı et al. (eds.), *German-Turkish Perspectives on IT and Innovation Management*, FOM – 1st edition (2018).

17 For the purposes of this article, the term “merger” shall be used to refer to both mergers and acquisitions.

18 E. Cefis et al., Do Mergers of Potentially Dominant Firms foster Innovation? An Empirical Analysis for the Manufacturing Sector, *Utrecht School of Economics Tjalling C. Koopmans Research Institute Discussion Paper Series* 07-20 (2007).

19 M. L. Katz and H. A. Shelanski, Mergers and Innovation, 74 *Antitrust Law Journal* 1 (2007), 50. R. Solow, D. I. Waked and M. Trattner support the idea that dynamic efficiencies add more value to the total welfare, when compared to static efficiencies (see generally M. Trattner, Assessment of Anti-innovative Mergers in High Technology Markets, 13 (Master Thesis, Lund University Faculty of Law (2016); J. F. Brodley, The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress, 62 *NYU Law Review* 1020, 1025 (1987), as cited in D. I. Waked, Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices, 38 *Seattle University Law Review* 3 (2015), 945, 966).

20 The relevant legislation setting the ground for the applicable competition law principles, the Law No. 4054 on the Protection of Competition, does not directly incorporate the discussions on dynamic efficiencies. Therefore, dynamic efficiencies are actually addressed through reinforcing guidelines, which are akin to (and generally follow the principles of) EU merger regulations. The Guidelines on the Assessment of Horizontal Mergers and Acquisitions (HMG) and the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions (NHMG) illuminate how the TCB evaluates dynamic efficiencies.

21 The substantive test that is currently applied to mergers under the Turkish merger control regime is a typical dominance test: the TCB evaluates and determines whether a concentration would create or strengthen a dominant position or significantly diminish competition in a relevant product market within the whole or part of Turkey.

22 The HMG asserts that “[a]s a result of creating or strengthening dominant position in a given market, one or more undertakings would be able to (...) diminish or delay innovations” (see ¶ 6 of the HMG) and “[f]actors that are likely to create competitive concerns (...) are: ... (b) Some of the merging parties are innovators, though this has not been reflected in the market shares yet” (see ¶ 11 of the HMG). Similarly, the NHMG provides that “[m]ergers which create a dominant position in the market or strengthen an existing dominant position, pose the risk of significantly reducing competition (...) as a result of such mergers, one or more undertakings can profitably increase prices while reducing (...) innovation” (see ¶ 11 of the NHMG).

23 The relevant part of the HMG reads as follows: “In markets where innovation is an important competitive force, a merger may increase the merged undertaking’s ability and incentive to bring innovations to the market, which may result in creating competitive pressure on competitors to offer innovations in that market or increase the current pressure. Alternatively, a merger between two innovators may significantly impede competition by creating or strengthening a dominant position. Similarly, an undertaking with a relatively small market is regarded as an important competitive force if it has promising products in progress” (see ¶ 37 of HMG). Therefore the HMG actually enable merging parties to argue that a transaction would increase the combined undertaking’s ability and incentive to bring fresh innovations to the market and thereby create/impose greater competitive pressures on its competitors to innovate.

24 See ¶ 76 of the HMG. The NHMG also explicitly refers to the criteria set out in the HMG and provides that these criteria shall also be applicable in terms of the efficiency claims put forth in non-horizontal mergers (see ¶ 53 of the NHMG). To that end, for the purposes of this article, we will not separately introduce or evaluate the criteria for non-horizontal mergers, but rather use the criteria referred to in ¶ 76 of the HMG for the assessment of innovation claims in both non-horizontal and horizontal mergers.

the TCB to approve the transaction.²⁵ The criteria sought by TCB echo the equivalent standards adopted by the European Commission (Commission).²⁶ However, unlike the relatively broad and extensive case law of the Commission,²⁷ the TCB's jurisprudence does not contain many instances in which the issue of innovation in mergers was comprehensively evaluated. Indeed, the reasoned decisions of the TCB on mergers generally tend to consist of merely 2–5 pages; hence, our review of the TCB's approach to innovation in merger analyses is constrained by the explanations put forth in the brief texts of the decisions.

7. In terms of the TCB's jurisprudence, certain approval decisions refer to the parties' arguments that the transaction would enable them to develop innovative products and encourage innovation in the future.²⁸ However, it is not possible to determine from the reasoning of these decisions whether the TCB actually considered these arguments when granting its approval to the proposed merger. On the other hand, in *Cisco Systems/IBM*,²⁹ the TCB itself acknowledged that the transaction would benefit consumers with the development of innovative applications, and therefore concluded that the transaction would not increase the concentration level or significantly lessen competition in the relevant market, despite Cisco's increased post-merger market share in the router market. Although the innovative applications that would be produced as a result of this transaction appear to have been considered as one of the grounds for the approval decision of the TCB, we are unable to deduce how much significance was actually attached to this innovation factor by the TCB from the wording of the decision.

8. The TCB, in another relevant decision, stated that the transaction in question would affect other markets as well, when it was reviewed from a “dynamic efficiency perspective.”³⁰ While it is not actually clear from the text what the TCB meant by “dynamic efficiency perspective” the TCB nevertheless concluded that, in light of the transaction's rationale,³¹ the merger would not cause any competitive concerns under a “dynamic assessment.” Although one might plausibly argue that this decision suggests that the TCB takes dynamic efficiencies into account while analyzing the competitive concerns arising as a result of a transaction, the relevant part of the decision is unfortunately too vague to allow further discussions on the TCB's perspective. Furthermore, this decision can hardly be considered as an example of the TCB using dynamic efficiency considerations to offset competitive concerns, since, according to the decision, there were no horizontal or vertical overlaps between the parties' activities.

9. Another potentially relevant case is the recent *UN Ro-Rol/Ulusoy* decision,³² where the TCB acknowledged that a merger in theory could lead to (i) cost efficiencies through economies of scale or dynamic efficiencies, or (ii) demand efficiencies by creating increased R&D investments or bringing about improved products. Although the decision does not elaborate on the dynamic efficiencies (given that the merging parties had only invoked static efficiencies in their application), the decision is still highly relevant as it provides a valuable insight into the TCB's classification of dynamic efficiencies.

10. In theory, the legal framework in Turkey allows undertakings to employ dynamic efficiencies as a defense by arguing that the transaction would increase the undertaking's ability and incentive to innovate. However, as indicated above, in practice innovation considerations are rarely taken into account in the TCB's merger decisions.³³ Undoubtedly, this may also be related to a lack of eagerness (even willingness) on the part of the merging parties to put forth arguments on the transaction's effects on their incentives to innovate, because we observe that the reasoned decisions in the TCB's existing jurisprudence mostly do not indicate that the applicants in merger cases pursued any dynamic

25 See Section 6 of the HMG.

26 According to the EU Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), it is possible for the parties to raise efficiency claims. The parties are required to show that the efficiencies would benefit consumers, are merger-specific and are verifiable. These conditions must be cumulatively satisfied (see EU Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) OJ C 31, 5.2.2004, pp. 5–18, ¶ 78).

27 For instance, see *Medtronic/Covidien* (Case No. COMP/M.7326) Commission Decision [2014] OJ C82; *Novartis/GlaxoSmithKline Oncology Business* (Case No. COMP/M.7275) Commission Decision [2015] OJ C95; *GE/Alstom* (Thermal Power - Renewable Power & Grid Business) (Case No. COMP/M.7278) Commission Decision [2015]; *Pfizer/Hospira* (Case No. COMP/M.7559) Commission Decision [2015] OJ C324; *Dow/DuPont* (Case No. COMP/M.7932) Commission Decision [2017] OJ C356.

28 In *Johnson and Johnson/Mentor*, parties stated that they saw the transaction as an outstanding business opportunity that would increase and foster innovation (January 8, 2009; 09-01/10-8); in *Ticketmaster/Live Nation*, the parties argued that the merger would lead to more innovation (June 11, 2009; 09-27/572-133); in *Syngenta/Monsanto's Sunflower Seed Business*, the parties stated that they were aiming to produce new (innovative) products with the transaction (October 1, 2009; 09-43/1097-277); in *Atlas Elektronik/Advanced Lithium Systems*, the parties indicated that they were expecting the transaction to enable and promote innovation in the long term (April 21, 2011; 11-25/476-145); in *Metair/Mutlu Holding* (November 21, 2013; 13-64/901-381), the parties indicated that one of their grounds for the transaction was to keep up with the technological developments in a dynamic market such as the battery market; in *Novartis/GlaxoSmithKline Oncology Business* decision, the parties argued that they were aiming to achieve a better position in terms of innovation with the transaction (November 4, 2014; 14-43/796-357); in *Apax-Accenture/Duck Creek*, parties argued that they would together invest in innovation activities following the merger (June 9, 2016; 16-20/330-149); in *Linde/Praxair*, parties argued that the transaction would lead to the development of innovative products (October 10, 2017; 17-31/520-224).

29 *Cisco Systems/IBM* (May 2, 2000; 00-16/160-82).

30 *Showa Shell/Idemitsu Kosan* (August 25, 2016, 16-29/482-216).

31 The transaction's underlying rationale is redacted from the decision; therefore, it is not possible to provide assessment of the parties' stance in this case.

32 *UN Ro-Rol/Ulusoy* (November 9, 2017; 17-36/595-259).

33 There are also a limited number of other decisions that provide engaging and helpful insight as to the evaluation of dynamic efficiencies, though these decisions are not related to merger transactions. For example, the *Congresium* decision (October 27, 2016, 16-35/604-269) reviews the allegations regarding abuse of dominance through excessive pricing and refusal to supply. While analyzing whether the undertaking's actions caused harm to consumers, the decision asserts that, just like cost or allocative efficiencies, Turkish competition policy also takes into account dynamic efficiencies that lead to technological developments and innovations. The decision explicitly states that a short-term price decrease is not the sole indicator of consumer welfare and that any potential negative effects on static efficiencies should also be evaluated by considering dynamic efficiency gains. The *Congresium* decision clearly demonstrates that the TCB is, at least in theory, prepared to make a trade-off between static and dynamic efficiencies; yet, we are unable to observe that this approach is actually implemented in practice. This viewpoint was reiterated in *TTNET* (November 19, 2008, 08-65/1055-411) and *Teleon* (September 26, 2005; 05-61/900-243), neither of which were merger decisions.

efficiency arguments in their defenses. However, and needless to say, we do not have sufficient information to determine whether the parties refrained from raising these defenses or whether the TCB simply ignored or excluded such defenses from its analyses, given the lack of detailed elaboration in published decisions.

11. From a practitioner's point of view, experience enables us to conclude that merging parties indeed tend to avoid asserting dynamic efficiency claims in their filings. To that end, we observe that merging parties in Turkey rather tend to submit remedies³⁴ or advance traditional arguments derived from (i) market concentration, (ii) countervailing buyer power, (iii) new entries to the market, and (iv) potential entry barriers to the market, in order to address and alleviate competition concerns, instead of resorting to dynamic efficiency arguments. The primary reason for this approach may stem from the fact that the relevant product markets subject to merger control generally concern traditional products and services, which can be reviewed under static measures, and therefore, dynamic efficiency gains may not be possible in such markets in the first place. It is true that mergers that are realized in dynamic markets (which are driven by ongoing investments in R&D and characterized by an emphasis on constant creativity and inventiveness, giving rise to new intellectual property rights) are more inclined to generate dynamic efficiencies compared to traditional markets.³⁵ Another important reason may be that as stated above, the TCB requires the merging parties to fulfill certain criteria—namely (i) benefitting to consumers, (ii) being merger specific, (iii) being verifiable. As such, the TCB requires the merging parties to present solid and verifiable data on innovation, which is by definition forward-looking and presumptive,³⁶ and therefore difficult to measure with static methods; whereas more traditional arguments allow the parties to use the readily available data to support their claims. For this reason, dynamic efficiency arguments are rather treated and utilized as merely ancillary and supportive tools.

12. Moreover, considering that most merger transactions require multijurisdictional filings and are highly time-sensitive, parties generally prefer not to exhaust their time or effort with dynamic efficiency claims, especially when they have the opportunity to submit remedies or present their competition law arguments based on market characteristics and readily available data, which would face the competition concerns of the TCB head-on. When all of these factors are taken into account, together with the fact that innovation is very difficult to quantify,

it is not surprising that merging parties—aiming to consummate the transaction by the closing date and hence facing substantial time pressure—opt to proceed with the less time-consuming approach and submit traditional arguments based on the market characteristics and market data that are more concrete and known to be more welcomed by the TCB.

13. Indeed, our review of the TCB's merger decisions suggests that, in practice dynamic efficiencies play very little role in the TCB's assessment. In theory, this is rather a practical handling issue; as the legal framework clearly allows the TCB to take into account the dynamic efficiencies. On the other hand, from the TCB's point of view, dynamic efficiencies can prove to be rather complex and difficult to tackle, as innovation claims bear a high level of uncertainty and the prospects of success are always doubtful as innovation is "*by definition a risky and uncertain venture*."³⁷ In other words, innovation is "*intangible, uncertain, unmeasurable, and often even unobservable, except in retrospect*."³⁸ Therefore, due to innovation's "*stochastic nature*,"³⁹ which means that it has a random probability pattern that may be analyzed statistically but may not be predicted precisely, the merging parties do not and—by the very nature of innovation—cannot "promise" or "commit" to fully realize their innovation goals in the future. Hence, the TCB is unable to implement any monitoring measures for innovation in order to check in periodically and determine whether the parties' innovative efforts actually bear fruit in the end, unlike, for instance, in case of remedies.

14. Whatever the reason might be, this situation represents quite a conundrum, and even a rather vicious cycle: the TCB appears not to take the dynamic efficiency arguments of the merging parties into account; therefore, the parties tend to lose their motivation for even bringing forth such arguments in the first place. Thus, the TCB does not even get the chance to consider dynamic efficiency claims, which further discourages merging parties from advancing such claims, and the cycle goes on and on.

34 Though, in terms of foreign-to-foreign transactions, remedies which have an effect in markets in Turkey, and therefore address the TCB's competitive concerns, are generally submitted to different competition authorities (as well as the TCB) as a cross-border remedy package in order to effectively address the competitive concerns arising in certain jurisdictions. Therefore, in terms of foreign-to-foreign transactions, submitting remedies can be perceived as part of advocacy strategies and business plans with respect to the multi-jurisdiction filings.

35 J. Galloway, Driving Innovation: A Case for Targeted Competition Policy in Dynamic Markets, 34 *World Competition* 1 (2011), 73–96.

36 See R. T. Rapp, The Misapplication of the Innovation Market Approach to Merger Analysis, 64 *Antitrust Law Journal* 1 (1995), 19, 27, as cited in M. A. Carrier, Two Puzzles Resolved: Of the Schumpeter–Arrow Stalemate and Pharmaceutical Innovation Markets 93 *Iowa Law Review* (2008), 393, 400.

37 C. R. Fackelmann, Dynamic Efficiency Considerations in EC Merger Control: An Intractable Subject or a Promising Chance for Innovation? The University of Oxford Centre for Competition Law and Policy, *Working Paper* No. 09/06 (2006), 25.

38 Fackelmann *supra* note 37, at 24.

39 *Id.*, at 24–25.

III. Innovation as a merger “defense”: A road map for the Turkish merger control regime

15. Recognizing dynamic efficiencies as a valid merger argument is a challenge not just for the Turkish merger control regime, but for all jurisdictions. Compared to claims about static efficiencies, the evaluation of dynamic efficiencies in merger control analysis is considerably more complex and requires the adoption of an entirely different set of tools. The standards already used by the competition authorities (including the Turkish Competition Authority (TCA)) to evaluate and verify the static efficiency claims of the parties are not fully compatible for use in a dynamic setting.

16. The standards adopted for evaluating dynamic efficiencies in different jurisdictions (regardless of their development state),⁴⁰ usually include (i) whether the efficiencies are merger-specific, (ii) whether some of the benefits of the efficiencies will be passed on to consumers, (iii) whether the efficiencies will lower fixed costs or variable costs for the merging parties, (iv) whether the efficiencies will have effects in other markets, and (v) to what extent the claimed efficiencies are quantifiable, substantial, and timely.⁴¹

17. Although these standards may prove to be useful in terms of distinguishing valid and factual claims from false promises, they can also be subject to criticism in terms of their treatment of dynamic efficiencies. Indeed, one can use proxies, such as the development of a new product or continuing investments in R&D programs, as a reference point in order to measure innovation.⁴² However, innovation is not the same thing as (or equivalent to) research and sometimes may not even result from it.⁴³ Quantifying and verifying innovation arguments beyond these benchmarks and properly evaluating efficiency claims without invoking speculation and uncertainty is extremely difficult, especially in terms of dynamic settings.⁴⁴

18. However, the competition authorities' approach to innovation is more attentive and inviting when an observable or calculable R&D process exists and is presented as part of the dynamic efficiency claims in a particular filing. This is especially true for evaluating innovation claims in certain sectors, such as the pharmaceutical industry, where visible pipeline products can be subject to close scrutiny.⁴⁵ On the other hand, when innovation is harder to observe in the absence of a pipeline product, competition authorities tend to become more skeptical toward dynamic efficiencies, overlooking the fact that, while innovation considerations are less observable in these cases, they nevertheless exist. Unfortunately, this state of affairs can be compared to the joke about the person who loses his or her keys in a dark corner of a street and then, perhaps instinctively, searches for the keys under the light of a faraway street lamp, as it is the only visible part of the street. Obviously, this would not be the right approach to either finding the missing keys or to evaluating dynamic efficiencies as competition authorities would be looking only where they can see, whether or not what they are looking for is located there. Just as the person may have lost his or her keys anywhere in the street, far away from where the person is searching for them, innovative efficiencies in merger cases may emerge from anywhere, and may be difficult to perceive without knowing where to look, particularly in dynamic industries. The owner of the lost keys should consider searching where he or she actually dropped the keys, and competition authorities should consider evaluating innovation claims in merger cases in their own context, even if it does not fit very well with their preconceived notions and traditional standards, particularly in the case of dynamic efficiencies in high-tech industries.

19. Overall, innovation is not something to be guarded or promoted only by static measures. Rather, it should be spurred through active fostering of its potential. This can be achieved by way of making the deliberate choice of approaching the matter delicately, by taking “baby steps,” instead of implementing draconian enforcement measures. Indeed, an overarching philosophy of adopting and executing finely tuned, small and specific reforms in terms of policy choices and competition enforcement can pave the way toward the ultimate goal of allowing and recognizing the use of innovation as a merger argument.

20. In this sense, current case law in Turkey can serve as a useful example of how an enforcement authority falls short on enabling merging parties to use innovation claims as a merger argument, despite recognizing dynamic efficiency considerations in the legislation and expressing its willingness to evaluate dynamic settings and efficiency

40 Virtually all OECD jurisdictions require parties to provide evidence on the existence and adequacy of their merger defense (OECD, *Dynamic Efficiencies in Merger Analysis*, Policy Roundtables DAF/COMP (2007) 41, 10, <http://www.oecd.org/competition/mergers/40623561.pdf>, (last accessed February 10, 2018).

41 Id.

42 Fackelmann *supra* note 37, at 24.

43 World Bank *see supra* note 2, at 4.

44 Fackelmann *supra* note 37, at 24–25. This can also be supported by the fact that it is often not possible to predict or determine the source of innovation before it occurs. For instance, experiments on refrigerator gases led to the discovery of Teflon; research on wound dressings led to the discovery of a breathable, waterproof fabric; finally, a machine that was developed to analyze brain chemistry is now used to identify the components of fruit juices (see D. Carlton and R. Gertner, *Intellectual Property, Antitrust and Strategic Behavior* (A. B. Jaffe et al., eds., 2003), *Innovation Policy and the Economy*, Vol. 3, 42, as cited in Carrier, *supra* note 36, at 400).

45 For instance, in terms of the EU Commission's innovation evaluations, its jurisprudence rests mainly upon its examinations in cases involving pharmaceuticals and pesticides. *See generally supra* note 27.

gains in its merger decisions.⁴⁶ As evident from the Turkish example, unless innovation is considered and treated as a priority in terms of competition enforcement policy, merely having a legislative framework in place is not sufficient to spur innovation and to build a successful development strategy based on fostering growth through extensive innovation capacities.

21. For these reasons, we invite and encourage the TCB into adopting a more “experimental” approach in its review process by exploring different options with respect to the evaluation of innovation claims in mergers, and thereby taking a step closer to incorporating dynamic predictions into its decisions. Accordingly, we recommend adopting a case-by-case analysis method, which puts innovative concerns at the forefront of merger analyses by considering the particular characteristics of each transaction as well as each market.

22. In order to break this cycle of the non-inclusion (although not the explicit exclusion) of innovation claims in the merger control regime, we also invite the TCB to begin to voluntarily seek, on its own accord, evidence to substantiate and verify the innovation claims of the merging parties. In this sense, we contend that the TCB should utilize resources provided by the Economic Analysis and Research Department of the TCA, and seek to obtain its expert opinion and analysis in order to further examine the relevant market, as well as the dynamic efficiency claims put forth by the parties in a given case. Moreover, further cooperation and coordination between the TCA and the merging parties would enable the TCB to better understand the functioning and the structure of their innovation arguments. In this sense, the TCB should always presume that there might be more to the innovation claims of merging parties than meets the eye, and take a cautious, step-by-step approach, as the “*I know it when I see it*”⁴⁷ principle does not really apply in dynamic settings.

23. The TCB should play its assigned role and actively foster the potential of dynamic efficiencies. Accordingly, we believe that reasoned decisions should include detailed analyses on innovation arguments, so that the TCB can guide and lead the merging parties in their future merger filings by way of providing useful insights into its decisional practice and its approach to handling dynamic efficiencies. In this sense, the TCB should be more instructive in its reasoned decisions, which it can achieve by providing concrete assessments on a case-by-case basis. For instance, even if the TCB does not find the parties’ innovation arguments to be valid (i.e., quantified and/or verified) in a particular case, the TCB should still include a detailed assessment of the claims and elaborate on the standards that these claims should (but failed to) meet. Bearing in mind the practical difficulties that the TCB faces in its practice, which have also been outlined in this article, we are certainly aware that this is rather a daunting task, and a challenging goal to achieve. However, as a start, what we are hoping to see from the TCB is at least a trace of an evaluation of innovation considerations in its reasoned decisions.

IV. Conclusion

24. In conclusion, we observe that promoting growth through innovation corresponds to (and properly situates) an antitrust policy within a broader development agenda, which is more suitable for success than pursuing static efficiency-based goals.⁴⁸ In this sense, innovation is a brand-new frontier for competition enforcement, and it requires careful, step-by-step handling by the competition authorities.

25. Turkey, in an effort to fulfill its agenda of achieving continuous development and growth needs to dynamically promote innovation to the greatest extent possible. In this sense, it is necessary, indeed crucial, to make a deliberate choice in favor of a competition policy that actively fosters and cultivates the potential of dynamic efficiencies. After all, the TCA can succeed in the endeavor to reach its “Ithaka” one day by making well-designed policy choices and actively utilizing dynamic tools in its competition analysis, in favor of integrating dynamic efficiency considerations into its merger control regime. Only then will the competition law regime, and the Turkish economy as a whole, be able to reach its true potential.

*“Keep Ithaka always in your mind.
Arriving there is what you are destined for.
But do not hurry the journey at all.”*

Constantine P. Cavafy, 1911⁴⁹ ■

46 In this sense, the TCB’s approach in *Sasa Polyester* (November 3, 2016; 16-36/608-271) can be considered as rather promising. Although the decision is related to abuse of dominance through refusal to supply, the TCB indicated that “*although it is not possible to verify the technical accuracy and real world feasibility of the R&D arguments (...); it is observed that the applicant has made efforts to produce an innovative product. Therefore, a potential refusal to supply act could harm this effort and indirectly prevent an innovative product or by-product from being released to the market that all consumers would benefit from.*” Although the decision is not closely related to innovation defenses raised in merger files, it is still highly relevant as the TCB clearly acknowledges that it “*observes*” the undertaking’s efforts to innovate and attaches some value to this effort, although it is not possible to prove the accuracy and feasibility of such an argument with 100% certainty.

47 This principle was introduced by Justice Potter Stewart’s concurring opinion in *Jacobellis v. Ohio* (see *Jacobellis v. Ohio*, 378 U.S. 184 (1964), p. 197).

48 Waked, *supra* note 19, at 945.

49 See Cavafy, *supra* note 1.

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