International Developments

The Application of General Principles of Law in a Competition Law Setting: A Glance at Contemporary Turkish Practice

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I. Introduction

The general principles of law can be traced back to the idea of *pacta sunt servanda* (Latin for 'agreements must be kept'), arguably one of the oldest and most deeply rooted principles of law.[1] Certain authors have linked the existence and operation of these principles to the idea of natural law resting in the 'conscience of mankind', while others have based their views on the fundamental notion of equity, which can be traced back to the arbitral compromises of the 19th century.[2] Some authors, following the renowned jurist Grotius's lead, have argued that '*the fundamental principles of morality and justice*',[3] as well as more specific principles from civil law codes and from the Anglo-Saxon common law of judicial precedents, should be included within the scope of the general principles of law.[4] What is certain about the general principles of law is that they have been a matter of substantial legal and philosophical controversy, due to the natural law elements that are inherent in the very notion itself,[5] which arguably comprise '*principles of justice implanted by nature in the breast of each human being, discoverable by their own unassisted reason-principles which form the ideal standards of right conduct*'.[6]

Key Points:

- General principles of law have been a matter of substantial legal discussion especially with regards to applicability and function as a source of law in different fields of law.
- Turkish Competition Board recognises general principles of law as a source of competition law in its investigations and in various other matters that come before it.
- In this article, we will particularly focus on *ne bis in idem* and attorney client privilege and use these two principles as starting points for extrapolating to what extent general principles of law are applied as a source under Turkish competition law regime.

Having said that, it is not our purpose in this article to pick a side in this archaic battle, but merely to hold the mirror up to the application of the general principles of law to contemporary issues and fields of law, and to competition law in particular. This is due to the fact that the majority of the contemporary theoretical discussions on the general principles of law is focused on their applicability and function as a source of public international law,[7] though other fields of law are also capable of inviting similar questions and raising parallel discussions. When it comes to competition law, which is a *sui generis* area of law, it can be seen that enforcement authorities are generally equipped with extensive investigative and administrative powers and also possess the power to impose significant monetary fines on investigated undertakings. Therefore, although discussions concerning the

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1 Hans Wehberg, 'Pacta Sunt Servanda' (1959) 53 American Journal of International Law 775.
2 Vladimir-Djuro Degan, 'General Principles of Law' (1992) 3 Finnish Yearbook of International Law 1, 2.
3 Charles Fenwick, *International Law* (4th edn Appleton-Century-Crofts 1965) 87, as cited in Ibid.
4 Ibid.
5 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Second Phase, Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 250.
6 Charles Grove Haines, 'The Law of Nature in State and Federal Judicial Decisions' (1916) 25 Yale Law Journal 617 as cited in Frances T. Freeman Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations—A Study' (1963) 10 UCLA Law Review 1041, 1071.
7 This may stem from the fact that Article 38(1)(c) of the Statute of the International Court of Justice explicitly refers to the 'the general principles of law recognized by civilized nations'. Thus, theoreticians tend to argue about what should be understood by this phrase and what constitutes the general principles of law recognised by *civilised* nations.

application of the general principles of law in matters relating to competition law usually focus on the dual nature of the competition authorities (*i.e.*, possessing both prosecutorial and adjudicatory powers), and despite the fact that the sanctions imposed on undertakings can be considered as criminal penalties (even though competition law is considered to be a subcategory of regulatory and administrative law),[8] in the end, the issue boils down to a trade-off between the effective enforcement of competition law rules and the safeguarding of procedural guarantees arising from fundamental rights and the general principles of law.

With this in mind, we have selected two particular principles, which have recently come to the scenery of Turkish competition law. Among an abundance of general principles to choose from, in this article, we aim to focus on *ne bis in idem* and attorney-client privilege and explore the extent to which these principles can be applied to matters of competition law. By expanding on application of these two principles, we are aiming to extrapolate broader conclusion with respect to the role attributed to general principles of law by the Turkish Competition Board ('TCB') in its practice.

II. General principles of law: a source for Turkish competition law?

As a source of law, the general principles of law are said to derive their validity and legitimacy from '*the very nature of the law as an institution*'.[9] In this sense, despite the fact that the black letter of the law (comprising texts of statutes, regulations, etc.) constitutes a source of *formal* validity, the general principles of law that are unwritten fundamental concepts pertaining to the theory of law can constitute a further source of *material* validity,[10] a *raison d'etre* for the legal rules to a certain extent.[11] This may stem principally from the fact that such general principles are inherent to the idea of the law itself. Indeed, the general principles of law as a source of law are independent of the text of written laws and legal customs and aspire to form or contribute to a desirable legal system by virtue of their rationality and '*the "ideal element" or mere aspiration*' they attribute to law.[12]

What are the general principles of law? Although there is no single agreed-upon definition that is universally adopted in the legal scholarship and literature, when we talk about the general principles of law, we commonly refer to principles '*that are "intrinsic to the idea of law and basic to all legal systems*", *which are implicit in or generally accepted by all legal systems and are necessary based on the logic of the law*'.[13] According to Cheng, the general principles of law are not '*peculiar to any legal system but are inherent in, and common to, them all. They constitute the common foundation of every system of law*'.[14] Therefore, the rules of legal reasoning and logical maxims, such as the rule of *lex specialis* (Latin for 'law governing a specific subject matter', meaning that a specific law supersedes a general law) and *lex posterior* ('later law', which embodies the legal doctrine that, in the case of an inconsistency or conflict between two laws, the most recently enacted will govern), can be counted among such general principles.[15] However, listing all the general principles of law in an exhaustive manner is not possible, due to both their theoretical foundations and to their natural law characteristics.

Under Turkish law, the basis of the applicability of the general principles of law can be traced back to Article 2 (asserting the principle of '*the state being governed by the rule of law*') and Article 138[16] (setting forth the principle of '*the independence of the judiciary*') of the Constitution. Accordingly, in Turkey, judges of the high courts,

8 Donald Slater, Sébastien Thomas and Denis Waelbroeck, 'Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need for Reform?' (2008) The Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/08, 14-15, <https://www.coleurope.eu/sites/default/files/research-paper/gclc_wp_04-08.pdf> accessed 6 December 2018.

9 Jain (n 9).

10 Ibid. The Austrian Civil Code of 1811, which '*authorizes the judge to decide the case before him on the basis of "the principles of natural law" (nach den natürlichen Rechtsgrund-sitzen), if neither the wording nor the analogy of a Code provision throw some light on the problem and its correct solution*', the Spanish Codigo Civil of 1888, which '*refers the court to the "general principles of law" (los principios generales del derecho)*', and the Egyptian Civil Code of 1948, which provides that '*in the absence of a provision of a law that is applicable, the judge will apply the principles of natural justice and the rules of equity*' can all be given as examples where the validity and applicability of the general principles of law has been recognised by state constitutions (Werner Lorenz, 'General Principles of Law: Their Elaboration in the Court of Justice of the European Communities' (1964) 13 American Journal of Comparative Law 1).

11 Sir Gerald Fitzmaurice stated in his Hague Academy Lecture in 1957 that '*A rule answers the question "what": a principle in effect answers the question "why"*'. (Gerald Fitzmaurice, 'The General Principles of International Law considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours de l'Academie de Droit International 7 as cited in Steven Reinhold, 'Good Faith In International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40, 41.)

12 Charles De Visscher, *Theory and Reality in Public International Law* in Percy Ellwood Corbett (ed), (Princeton University Press 1957) 356–57, as cited in Jalet (n 6) 1050.

13 Oscar Schachter, *International Law in Theory and Practice* (Springer 1991) 53–4, as cited in Jain (n 9).

14 Harold C. Gutteridge, 'The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice' (1952) 38 Transactions of the Grotius Society 125, 129 as cited in Jalet (n 6) 1041.

15 Schachter, 54, as cited in Jain (n 9).

16 '*Judges shall be independent in the discharge of their duties; they shall make their judgments in accordance with the Constitution, laws, and their personal convictions conforming with the law*' (Article 138 of the Turkish Constitution).

namely the Court of Cassation,[17] the Constitutional Court,[18] and the Council of State, all refer to the general principles of law in their evaluations of the cases before them, and apply these principles as a source of Turkish law in addressing the lacunae in the law.[19] Hence, various general principles of law, such as the principle of equal treatment, the principle of non-retroactivity, the preservation of attained/vested rights,[20] *ne bis in idem* (*i.e.*, 'no one shall be tried or punished twice for the same offence'), good faith, *pacta sunt servanda*, and *lex specialis derogat legi generali*,[21] have all been frequently referred to and applied in decisions by the courts in Turkey as an inherent part of the concept of 'rule of law'.[22] It should be noted that the implementation and interpretation of the general principles of law may differ between different fields of law in Turkey. For instance, certain academic commentators[23] have argued that, when compared to private law disputes, applying general principles of law in public law matters should be considered as more significant, despite the existence of various inconsistencies and incoherencies in these applications.

As a field of law that emerged under administrative law, competition law has come to grow criminal law characteristics due to heavy penalties imposed by enforcement agencies in recent years. As such, also reflecting this development, Turkish competition law doctrine incorporates both administrative and criminal law aspects and therefore can be considered as a field of 'administrative criminal law'.[24] The Turkish legal system considers and treats the monetary fines levied by the TCB as administrative in nature, as set forth in Articles 16 and 17 of the Law No. 4054 on the Protection of Competition ('Law No. 4054'). However, bearing in mind that Turkey is also a signatory to the European Convention on Human Rights ('ECHR') and therefore, naturally subject to the criteria[25] put forth by the European Court of Human Rights ('ECtHR') in *Engel*,[26] and the evaluations made in the *Jussila*,[27] *Lily France*,[28] and *Menarini*[29] cases, the sanctions imposed by the TCB should also be considered as criminal in nature. Thus, our answer to the question on whether general principles of law should be applied to competition law matters is affirmative as we induce that the general principles of law that are applied in administrative and criminal law cases in Turkey should also be applicable to Turkish competition law proceedings. In this regard, we observe that in Turkish competition law practice, various bedrock principles such as legality, equal treatment, *nulla crimen sine lege*, non-retroactivity, the principle of 'innocent until proven guilty', and equality of arms,[30] among others, have been discussed and employed in various cases. These recent years have been a witness to the state-of-the-art interpretation and evaluation method of the TCB as it had the opportunity to focus on particular two general principles of law, namely *ne bis in idem* and attorney-client privilege.

III. The principle of *ne bis in idem* before the TCB

A. Overview

Ne bis in idem, which means '*not twice in the same*' in Latin, is an immemorial and fundamental principle of law, which can be traced back to Greek, Roman, and Biblical

17 In one decision, the Assembly of the Court of Cassation's Civil Chambers explicitly stated that the State had the obligation to follow and execute the procedures determined by the general principles of law, the Constitution, and the laws. (See Court of Cassation, Assembly of Civil Chambers 20 April 2011 E. 2011/13-37, K. 2011/198.)

18 In a large number of decisions, the Constitutional Court relied on general principles of law as a source of Turkish law and therefore built its reasoning on applicability of the general principles as a source of law under Turkish law. See, *e.g.*, Decision numbered 1999/2 E., 2001/2 K., and dated 22 June 2001; Decision numbered 2013/95 E., 2014/176 K., and dated 13 November 2014; Decision numbered 2016/195 E., 2017/158 K., and dated 16 November 2017.

19 See generally D. Çiğdem Sever, 'İdare Hukukunda Hukukun Genel İlkelerinin Uygulanışı [Application of General Principles of Law in Administrative Law]' in Nami Çağan (ed), *Prof. Dr. Tunçer Karamustafaoğlu'na Armağan [Liber Amicorum published in honor of Prof. Dr. Tunçer Karamustafaoğlu]* (Adalet Publishing 2010).

20 Ibid.

21 Çiğdem Serra Uzunpınar, 'Anayasa Yargısında Hukukun Genel İlkeleri [General Principles of Law in Constitutional Judicial Review]' (Master thesis, Ankara University 2009), 115 et al.

22 In fact, the Turkish Constitutional Court took it one step further and stated its views on precedence of general principles of law over the constitution in various instances. See, *e.g.*, Decision numbered 1999/2 E., 2001/2 K., and dated 22 June 2001; Decision numbered E. 1985/31., K. 1986/1, and dated 17 March 1986 as cited in Decision numbered 1999/2 E., 2001/2 K., and dated 22 June 2001.

23 Sever (n 21).

24 Gözde Karabel, 'Rekabet Hukukunda Ne Bin in Idem İlkesi [The Principle of Ne Bin in Idem in Competition Law]' (Competition Expert thesis, Turkish Competition Authority) 5 <https://www.rekabet.gov.tr/Dosya/uzmanlik-tezleri/142-pdf> accessed 6 December 2018.

25 The criteria relied on by the ECtHR are as follows: (i) the classification of the offence under domestic law, (ii) the nature of the offence, and (iii) the nature and severity of the penalty (see *Engel and Others v. The Nederlands* App no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) ('Engel', paragraph 82).

26 Ibid.

27 *Jussila v. Finland* App no. 73053/01 (ECtHR, 23 November 2006).

28 *Lilly France v. France* App no. 53892/00 (ECtHR, 14 October 2003).

29 *A. Menarini Diagnostics S.R.L. v. Italy* App no. 43509/08 (ECtHR, 2 June 2011).

30 The principle of equality of arms asserts that, during a civil or criminal trial, both sides must have equal access to the courts and neither side should be procedurally disadvantaged. For two very recent instances where the TCB evaluated this principle, see *Luxottica* (17-08/88-38; 23 February 2017) and the *Izmir ready-mixed concrete* investigation (17-27/452-194; 22 August 2017).

sources.[31] As Demosthenes first stated: '*the laws forbid the same man to be tried twice on the same issue*'.[32] The principle originally emerged from the field of criminal law and prohibits persons from being tried or punished twice for the same offence.[33]

This elemental legal principle constitutes an essential component of both the principle of 'legal certainty' and the concept of the 'rule of law'. Therefore, it has been included as a fundamental human right in numerous international and domestic legal instruments and documents, including major human rights agreements. These documents include the ECHR, the International Covenant on Civil and Political Rights, and the EU Charter on Fundamental Rights.[34] By virtue of these documents and namely Protocol No. 7 of the ECHR,[35] we are in a position to conclude the place of *ne bis in idem* principle in the hierarchy of norms of Turkish law since with ratification of Protocol No. 7 of the ECHR by Turkey, *ne bis in idem* principle has come to have the force of law as a norm.[36]

In terms of application of *ne bis in idem* principle under Turkish law, we note that a distinction must be made between the *procedural* and *substantive* aspects. This is due to the fact that application of this principle can present itself in two-fold especially with regards to criminal law: The prohibition against double prosecution is a procedural rule, whereas the prohibition against double punishment is a substantive rule.[37] This distinction is important from the point of view of Turkish law as the procedural rule originating from the principle of *ne bis in idem* is regulated under the law of criminal procedure, where it is stated that '*if there is a previously rendered judgment or a pending case against the same defendant arising from the same conduct, the [second] case will be dismissed*.'[38] On the other hand, the Turkish Criminal Code provides a substantive law rule that indicates that a person who has committed several crimes with a single act will be punished for the crime that carries the highest or most severe punishment.[39] In practice, given that this rule does not change the nature and the fact that a person has violated several laws and rules, it enables that person to be sanctioned only once. Therefore, we can induce that this rule of concurrence can be interpreted as a reflection of *ne bis in idem* in spirit and therefore prevents a person from being tried and punished twice.

B. *Ne bis in idem* in competition law

Although *ne bis in idem* principle was initially intended to be used solely as a tool of criminal law, as administrative monetary fines have increased over time, the principle has gradually become applicable to administrative law sanctions as well.[40] The applicability of this principle to EU competition law matters has been long accepted and recognised by the Court of Justice of the European Union[41] ('CJEU'), although it should be noted that certain points and ideas are still controversial as to its application in particular contexts.[42]

Under Turkish law, the manifestation of the *ne bis in idem* principle for administrative monetary fines can be found in the Misdemeanour Law No. 5326 ('Misdemeanour Law') which states that if several misdemeanours have been committed with a single act—and where the law imposes only administrative monetary fines for these misdemeanours—then the most severe administrative monetary fine should be applied.[43] This section of the Misdemeanour Law should be interpreted as an indication of substantive aspect of *ne bis in idem* as it relates solely to the prohibition against double

31 Gerard Conway, 'Ne Bis in Idem in International Law' (2003) 3 International Criminal Law Review, 217, 221–2.

32 Demosthenes I, *Speech against Leptines* (355 BC) (James H. Vince ed, Harvard University Press 1962) as cited in Willem Bastiaan van Bockel, 'The ne bis in idem principle in EU law: A conceptual and jurisprudential analysis' (DPhil thesis, Leiden University 2009) 1 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/13844/000-diss-VanBockel-26-05-2009.pdf?sequence=1> accessed 6 December 2018.

33 Przemysław Kamil Rosiak, 'The ne bis in idem Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law' (2012) 5(6) Yearbook of Antitrust and Regulatory 113 < https://www.yars.wz.uw.edu.pl/yars2012_5_6/The_ne_bis.pdf> accessed 6 December 2018.

34 Carl Lundeholm, 'The Principle of ne bis in idem' (Master thesis, Lund University Faculty of Law 2011), 32 <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2343939&fileOId=2596320> accessed 6 December 2018; Alessandro Rosanò, 'Ne Bis Interpretatio In Idem? The Two Faces of the Ne Bis In Idem Principle in the Case Law of the European Court of Justice' (2017) 18 German Law Journal 38, 41.

35 See Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, As amended by Protocol No. 11, Strasbourg, 22 November 1984. This protocol has been approved by Turkish Cabinet of Ministers with its Decision numbered 2016/8717, dated 28 March 2016. The approved protocol was published in the Official Gazette numbered 29678, dated 8 April 2016 and entered into force for Turkey on 1 August 2016.

36 Under Turkish law, by virtue of Article 90, paragraph 5, international agreements that are duly put into effect have the force of law. In this regard, since Protocol 7 of the ECHR has been ratified and duly put into effect by Turkey, it shall be considered to have the force of law, in terms of hierarchy of norms.

37 van Bockel (n 43).

38 Article 223(7) of the Law No. 5271 on Turkish Criminal Procedure.

39 Article 44 of the Turkish Criminal Code.

40 Karabel (n 34) 1.

41 See, *e.g.*, Case C-617/17 *Powszechny Zakład Ubezpieczeń na Życie*, EU:C:2019:283; Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, EU:T:2003:195, paragraphs 85–6, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01, and T-252/01 *Tokai Carbon and Others v Commission*, EU:T:2004:118, paragraphs 130–1, as cited in Rosiak (n 44) 120.

42 For discussions regarding the problems faced with respect to the harmonisation of the *ne bis in idem* principle in the EU, see generally Joakim Nergelius and Eleonor Kristoffersson, *Human Rights in Contemporary European Law* (Bloomsbury Publishing 2015).

43 Article 15(1) of the Misdemeanour Law.

punishment, which means that the *ne bis in idem* is only applicable in terms of the determination of the administrative monetary fine amount, and thus, there is no rule under that law that would prohibit or prevent double prosecution.[44] Accordingly, one naturally arrives at the conclusion that, under the Turkish legal system, only the substantive effects of the *ne bis in idem* principle are applicable with respect to administrative sanctions.[45]

Under the Turkish legal system, competition law violations are classified as misdemeanours, and consequently, the administrative monetary fines imposed by the TCB are subject to the Misdemeanour Law.[46] Hence, the *ne bis in idem* principle is only applicable in competition law matters in terms of the determination of the administrative monetary fine to be imposed on the investigated undertaking,[47] as there is no rule precluding the Turkish Competition Authority ('TCA') from conducting several investigations with respect to a single act that leads to an alleged competition law violation.[48]

Competition law violations can occur in various ways, and thus, a single act might very well comprise a violation of different provisions of the competition law. For example, an agreement between competitors might contain provisions on both price-fixing and territory allocation, or an action might constitute abuse of dominance and a vertical restraint at the same time. Thus, this leaves us with the critical problem of the identification and classification of the investigated behaviour, since one might consider and handle such actions as a single violation or as separate violations. The Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition and Abuse of Dominant Position ('Regulation on Fines') sets forth that a three-pronged assessment is required in order to determine whether the behaviours in question constitute a single violation or separate violations. The three factors to be evaluated in such assessments are: (i) the market in which the behaviours took place, (ii) the nature of the relevant behaviours, and (iii) the chronological process (*i.e.*, timeline) of the relevant behaviours.[49]

Furthermore, the TCB's practice on the matter can be divided into two main categories: (i) when the relevant behaviour constitutes a violation of different sections of the same provision of the Law No. 4054 and (ii) when the relevant behaviour constitutes a violation in terms of both Article 4[50] and Article 6[51] of the Law No. 4054.[52] Under the first category, the TCB considers and treats the behaviour as a single act if the violation was committed by several undertakings in a horizontal relationship,[53] whereas the TCB identifies multiple competition law violations in case the action constitutes both vertical and horizontal violations.[54] That being said, it should be emphasised that the TCB treats the relevant behaviour as a single violation when it constitutes a violation in terms of both Article 4 and Article 6 of the Law No. 4054.[55]

Indeed, this approach is consistent with the relevant provision set forth in the Regulation on Fines, which can be clearly observed in the TCB's 2010 decision, *Izocam*.[56] In this case, the TCB concluded that the investigated behaviour violated both Article 4 and Article 6 of the Law No. 4054, yet chose to impose a single administrative monetary fine on the undertaking.[57] Furthermore, this approach was explicitly confirmed by the TCB in its recent

44 Karabel (n 34) 15.

45 Another appearance of the *ne bis in idem* principle in Turkish law can be observed in Article 15(3) of the Misdemeanour Law. The relevant provision notes that (i) if a particular action constitutes a crime and a misdemeanour at the same time, then the action will be subject to sanction only for being a crime, and (ii) if the action is not subject to a sanction for being a crime, then it can be punished as a misdemeanour. However, for the purposes of this article, we will not delve into the details of this subject and focus our attention only on cases in which several misdemeanours have been committed with a single act.

46 Karabel (n 34) 15.

47 As per the application of the *ne bis in idem* principle in the context of competition law, one can also review the cases where several misdemeanours take place that fall under the jurisdiction of different administrative authorities. However, for the purposes of this article, we will not explore the details of this subject and only focus on several misdemeanours that fall under the jurisdiction of the TCA.

48 Karabel (n 34) 15.

49 See Article 4 of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition and Abuse of Dominant Position. The English convenience version of Article 4 reads as follows: '*Base monetary fine shall be applied separately for each behaviour, if multiple behaviours are detected that are independent from each other in terms of market, nature and chronological order, and prohibited as per Article 4 and Article 6 of the Law*'.

50 Under the Turkish competition law regime, restrictive horizontal and vertical agreements, concerted practices and decisions are governed by Article 4 of the Law No. 4054, which is akin to, and closely modelled after, Article 101 of the Treaty on the Functioning of the European Union ('TFEU').

51 Under the Turkish competition law regime, abuse of dominant position is prohibited as per Article 6 of the Law No. 4054, which is akin to, and closely modelled after, Article 102 of the TFEU.

52 Karabel (n 34) 48–9.

53 See, *e.g.*, *Samsun Driving Courses* (13-28/387-175; 15 May 2013), where the undertakings were involved in price-fixing and had a quote-determination agreement and the TCB concluded that there was only a single violation and imposed a single administrative monetary fine on the undertakings (Karabel (n 34) 48–9).

54 See, *e.g., Cement* (02-06/51-24; 1 February 2002), where the undertakings were involved in a price-fixing agreement while simultaneously hindering their dealers' trade activities and the TCB determined that separate administrative monetary fines should be applied for each competition law violation (Karabel (n 34) 48–9).

55 Karabel (n 34) 48–9.

56 *Izocam* (10-14/175-66; 8 February 2010).

57 See also *Frito Lay* (13-49/711-300; 29 August 2013) and *Turkcell* (11-34/742-230; 6 June 2011), where the TCB imposed a single fine on the investigated undertakings even though the investigations focused on and found violations of both Article 4 and Article 6 of the Law No. 4054.

decisions (*Mars*[58] and Booking.com[59]) where the TCB noted that it is not contrary to the *ne bis in idem* principle to launch an investigation within the scope of both Article 4 and Article 6 of the Law No. 4054, as long as the undertaking is not imposed separate or multiple administrative monetary fines as a result. This approach of the TCB can be considered to be in line with the relevant provisions of the Guidelines on Fines, as the examined behaviours are not differentiated from each other in terms of their nature, chronological processes, or relevant markets.[60]

The TCB's recent decision concerning Mey İçki (*Vodka and Gin*[61]) may very well set a landmark precedent and mark a turning point in terms of the interpretation of the *ne bis in idem* principle under the Turkish competition law regime. In that seminal decision, the TCB reviewed whether Mey İçki (which is a subsidiary of Diageo plc, a British multinational alcoholic beverages company) had violated Article 6 of the Law No. 4054 by abusing its alleged dominant position in the vodka and gin markets in Turkey. The investigation revolved around the allegation that Mey İçki had excluded its competitors from the relevant product market with its discount and visibility practices (*i.e.*, rebate schemes, cash payment supports, visual arrangements, etc.), which it had applied to its sales points from 2014 to 2016. The most important aspect of this case is the fact that Mey İçki had already been fined by the TCA in its previous decision[62] on the *rakı*[63] market on the grounds that Mey İçki had abused its alleged dominant position in the *rakı* market by way of its discount and visibility practices, which had been implemented from 2014 to 2016. The administrative monetary fine imposed on Mey İçki in the *Rakı Decision* had been calculated by taking into account the company's entire turnover (*i.e.*, including its revenues from other products, such as vodka, gin, wine, whiskey, etc.), and amounted to approximately 4.2 per cent[64] of Mey İçki's annual turnover for the financial year from July 2015 to June 2016. This fine is considered to be one of the highest penalties imposed on an undertaking in the history of Turkish competition law enforcement.

Naturally, Mey İçki argued that it would violate the *ne bis in idem* principle to impose a second penalty on Mey İçki's practices in the vodka and gin markets, as Mey İçki had already been fined for its commercial behaviours during the same period in the *rakı* market on the basis of its entire turnover, which obviously included its revenues from the vodka and gin markets.[65] The TCB declared that abuse of dominance findings are assessed on the basis of relevant product markets, and that, findings of competition law violations must therefore be assessed separately for the *rakı*, vodka, and gin markets.[66] In light of this 'separate assessments for separate markets' approach, the TCB concluded that Mey İçki had abused its alleged dominant position in the vodka and gin markets for the period between 2014 and 2016. That being said, with respect to the calculation of the administrative monetary fine, the TCB noted that the structure and practice of Mey İçki's discount system in the vodka and gin markets had overlapped with its discount system in the *rakı* market; thus, the TCB concluded that the discount practices in the three separate markets (*i.e.*, *rakı*, vodka, and gin) were part of a general strategy and could not be differentiated from each other.[67] As a result, the TCB concluded that there was no need to impose a separate administrative monetary fine on Mey İçki in this case, as (i) Mey İçki was already subject to an administrative monetary fine that was based on its entire turnover (*i.e.*, the turnover subject to the fine had been calculated without making any distinction between product types) and (ii) the nature and duration of the practice of Mey İçki in the vodka and gin markets were the same as its commercial behaviour in the *rakı* market, and thus, the behaviour constituted a unity (*i.e.*, a single act) as part of Mey İçki's general strategy.[68] The TCB in the *Vodka and Gin Decision* also referred to Article 15(1) of the Misdemeanour Law and noted that if several misdemeanours are committed with a single act, then the most severe administrative monetary fine should be applied.[69]

Upon review of the reasoned decision, one naturally arrives at the conclusion that the TCB considered Mey İçki's practices in different markets as separate competition law violations, even though it determined

58 *Mars* (18-03/35-22; 18 January 2018).
59 Booking.com (17-01/12-4; 5 January 2017).
60 Karabel (n 34) 48–9.
61 *Mey İçki Vodka and Gin* (17-34/537-228; 25 October 2017) ('Vodka and Gin Decision').
62 *Mey İçki Rakı* (17-07/84-34; 16 February 2017) ('Rakı Decision').
63 *Rakı* is an aniseed-based traditional Turkish spirit, similar to the Greek ouzo.
64 The TCB originally decided to impose an administrative monetary fine corresponding to 5.6% of Mey İçki's annual turnover; however, it then reduced the fine by 25% due to Mey İçki's compliance efforts, as the TCB determined that Mey İçki had fulfilled and carried out the Investigation Team's recommendations during the investigation period even before the final decision (*Rakı Decision* (n 73), paragraph 381).
65 *Vodka and Gin Decision* (n 72), paragraph 651.
66 Ibid., paragraphs 653–4.
67 Ibid., paragraph 657.
68 Ibid., paragraph 659.
69 Two of the members of the TCB delivered a dissenting opinion in this case, arguing that separate fines should be imposed for separate behaviours since Mey İçki's violations had occurred in different markets. The dissenting opinion made this argument by referring to Article 15(2) of the Misdemeanour Law in particular, where it is stated that if the same misdemeanour is committed several times, then separate administrative monetary fines should be imposed for each misdemeanour.

that these practices had been implemented concurrently and constituted the general strategy of Mey İçki, and despite the fact that they were considered to fall within the same scope in terms of competition law enforcement. That being said, it should be noted that the TCB did not explicitly evaluate Mey İçki's behaviour within the scope of Article 4 of the Guidelines on Fines.[70] However, the wording of the decision seems to suggest—although does not explicitly assert—that the TCB evaluated these practices as separate violations due to the fact that the relevant product markets differed from each other. However, this approach (*i.e.*, identifying separate competition law violations based on distinct relevant product markets) seems to depart from certain past decisions, as the TCB had previously considered similar behaviours of the undertakings to constitute a single violation even if the violation had occurred in different markets.[71] In that sense, the crucial question of whether separate violations should be assessed on the basis of separate relevant product markets unfortunately remains unanswered. Nevertheless, it is indeed promising and reassuring to observe that the TCB has started to explicitly refer to the *ne bis in idem* principle in its recent decisions, and attached noteworthy significance to it in terms of delivering its final judgment in the abovementioned cases.

In this regard, we would invite and urge the TCB to incorporate this fundamental principle into its assessments to an even greater extent, both in terms of identifying competition law violations in the first place and in terms of determining the amount of the monetary fine to be applied to the investigated undertaking if a violation is discovered. Although current EU practice would serve as a beneficial guiding spirit to the TCB in this context, especially in terms of providing much improved legal certainty to competition law practice and enforcement, one should err on the side of caution. This is due to the fact that, the three-pronged test under the EU legal system[72] (which is comprised of identifying (i) the identity of the facts, (ii) the unity of the offender, and (iii) the unity of the legal interest protected[73]) is not without its controversies and still under much dispute.[74] However, one cannot deny that adopting this test to the Turkish competition law enforcement context may prove helpful in terms of eliminating the inconsistencies with respect to the role of the relevant product market in the TCB's decisions.

IV. Attorney-client privilege under Turkish competition law

Dating back to ancient Rome,[75] the attorney-client privilege is a bedrock legal principle, and it has long been recognised as a 'legal professional privilege' that can be asserted in different forms during legal proceedings. The two main rights that are encompassed by the attorney-client privilege are: (i) professional secrecy or the right to confidentiality and (ii) non-interference with the communications between clients and their legal advisers. Legal

70 The dissenting opinion, on the other hand, refers to this provision and contends that there were separate competition law violations in this case, based on Article 4 of the Guidelines on Fines.

71 See, *e.g.*, *Citroen* (10-60/1274-480; 23 October 2010), where the TCB explicitly stated that '*the price-fixing activity in the market for Citroen-branded car sales (including accessories) and the market for spare parts, maintenance and repair services for Citroen-branded cars' aftersales are classified as a single behaviour, as they are considered to be united in terms of their characteristics and chronological processes, even though the price fixing occurred in different markets. In this case, the fact that the violation occurred in two different markets will not have any effect as to the determination of the monetary fine*'; *Izocam* (n 67), where the TCB concluded that there had been a single behaviour in terms of the market, the nature of the behaviour and the chronological process as per Article 4 of the Guidelines on Fines, even though the relevant product markets were defined as '*the market for insulating material made from rock wool*' and '*the market for insulating material made from glass wool*'. See also *12 Banks* (13-13/198-100; 8 March 2013), *Efes* (11-42/911-281; 13 July 2011), *Tüpraş* (14-03/60-24; 17 January 2014), and *Sanofi* (09-16/374-88; 20 April 2009), where the TCB imposed a single administrative monetary fine, although it identified multiple relevant product markets.

72 Nergelius and Kristoffersson (n 53) 151; Rosiak (n 44) 127; Andreas Scordamaglia, 'Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling Effective Enforcement and Adequate Protection of Procedural Guarantees' (2010) 7 Competition Law Review 5, 48.

73 There are also discussions on the application of the *ne bis in idem* principle to competition law in terms of the risk of double jeopardy or multiple sanctions for the same behaviour in different jurisdictions. The criterion of 'legal interest under protection' is especially relevant in these discussions in the EU. For detailed information, see (n 85).

74 The main discussions revolve around the reliance on the three-fold test by the CJEU, arguing that the 'legal interest protected' test, which is applied chiefly with regards to competition law matters should be dropped altogether and instead the Court's two-fold criterion of the sameness of facts and offender should be applied just like in other areas of EU law. In this regard, Advocate General Kokott and later on Advocate General Wahl, both urged the Court to leave the test employed in Case 14/68 *Wilhelm and Others,* EU:C:1969:4, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6 and Case C-17/10 Toshiba Corporation and Others, EU:C:2012:72 (hereinafter referred to as 'Toshiba'). Although the Court had a chance to resolve these discussions in its most recent decision on application of ne bis in idem in April 2019, Case C-617/17 Powszechny Zakład Ubezpieczeń na Życiei EU:C:2019:283 (hereinafter referred to as 'PZU'), it abstained from shedding a clearer view on this controversy and instead found it sufficient to state that two sanctions (one on the basis of national law and the other, EU law) are possible but must be proportionate to the nature of the infringement. For arguments in favour of the two-fold test, see Advocate General Kokott's opinion in *Toshiba* and Advocate General Wahl's opinion in *PZU*.

75 It is commonly thought that the attorney-client privilege dates back to the prosecution of Gaius Verres (former Roman Governor of Sicily), when Cicero was prevented by the law from calling Verres' advocate (Hortensius) to the witness stand. (See Gamini L. Peiris, 'Legal Professional Privilege in Commonwealth Law' (1982) 31 International & Comparative Law Quarterly 609); Andrew Stuart Murray, 'Expert Evidence and the Problem of Privilege' (DPhil thesis, University of Sydney 2018) 24.

professional privilege in either form allows and enables clients to obtain legal advice and assistance from their lawyers confidentially and without fear of external interference; hence, this privilege is fundamental to the rule of law and to the proper functioning of a free and fair legal system.

In Turkey, the manifestation of this essential principle can be found in the Law No. 5271 on Turkish Criminal Procedure ('Criminal Procedure Law') and in the Legal Practitioners Law No. 1136. With these laws, Turkish lawmakers (i) oblige attorneys to keep their clients' secrets,[76] (ii) enable attorneys to claim legal professional privilege with regards to documents relating to the legal professional relationship between attorneys and their clients, and (iii) protect attorneys from having to testify against their clients.[77]

Though the legal professional privilege is generally praised as 'a time-honoured sanctuary'[78] in common law and is found to be prevalent (to a certain extent) in the EU,[79] its application transcends the borders of domestic law and is asserted in various forms in different jurisdictions around the world.[80] Indeed, various international courts and judicial bodies have already come face-to-face with issues surrounding attorney-client privilege.[81] Among these international judicial bodies, the CJEU's case law[82] regarding the legal professional privilege constitutes an important source of interpretation and guidance for the TCB. Indeed, as the black letter of the law (*i.e.*, written statutes and regulations) are not sufficiently clear as to what extent the legal professional privilege applies to communications between attorneys and their clients in the competition law context, the CJEU's application of this privilege to competition law cases has set the boundaries that were subsequently adopted and incorporated by the TCB into its landmark decisions and precedents.

In *Sanofi*, the TCB scrutinised legal professional privilege for the first time and declared that the attorney-client privilege is a 'universal principle of law'[83] by referring specifically to the CJEU's *AM&S*[84] and *Akzo Nobel*.[85] Accordingly, the TCB noted that the EU case law and practice on the matter is guiding for Turkish competition law practice, even though Turkish competition law legislation does not actually include any explicit regulation recognising an absolute right to legal professional privilege.[86] In this sense, the TCB's approach in *Sanofi* indicates that communications and/or documents between attorneys and their clients may benefit from the legal professional privilege, provided that the relevant correspondence (i) is created within the scope of the 'rights of defence' of the client and (ii) takes place between the client and an independent counsel who is not engaged in an employee-employer relationship with the client.[87] Accordingly, the TCB concluded that any correspondence between an in-house counsel and employees of that company would not benefit from the attorney-client privilege.[88]

Following *Sanofi*, the TCB had an opportunity to analyse the scope and limits of the legal professional privilege in more depth in yet another decision in 2009 (*CNR*).[89] CNR, the largest fair organisation company in Turkey, argued that some of the documents that had been collected by the case handlers during the on-site inspec-

76 See Article 36 of the Legal Practitioners Law No. 1136.

77 See Article 130 ('search and seizure of attorneys' offices and seizure of mail') and Article 46 ('refraining from testimony due to legal professional privilege') of the Law No. 5271 on Turkish Criminal Procedure.

78 Lonnie T Brown, Jr., 'Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox' (2006) 34 Hofstra Law Review 897, 899 as cited in Stephen A. Calhoun, 'Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It' (2008) 87 Texas Law Review 235, 235.

79 Case C-155/79 *AM&S Europe Limited v Commission of the European Communities,* EU:C:1982:157 as cited in Calhoun (n 89) 240.

80 See DLA Piper, *Legal Professional Privilege Global Guide* (4th edn, 2017), <http://www.dlapiperlegalprivilege.com/#handbook/world-map-section> accessed 7 December 2018. According to this guide, legal professional privilege can be considered as universal, even though its scope and limitations can vary from jurisdiction to jurisdiction. The Global Guide includes and reviews the legal systems of the following 55 jurisdictions: Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, England and Wales, Estonia, EU, Finland, France, Georgia, Germany, Greece, Hong Kong, Hungary, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Saudi Arabia, Scotland, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, and the United States.

81 There are certain cases in international law that indicate that this privilege transcends national borders and can justifiably be considered as a universally recognised principle of law. For the purposes of this article, we will not review the cases of international law in which the legal professional privilege was evaluated by an international court or by an arbitral body under international law. (See generally *Dr Horst Reineccius et al v Bank for International Settlements* (2002) PCA Procedural Order No. 6) (Order with Respect to the Discovery of Certain Documents for Which Attorney-Client Privilege Has Been Claimed); *Questions Relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v Australia*) (Memorial of the Democratic Republic of Timor-Leste dated 28 April 2014); International Centre for the Settlement of Investment Dispute *Libananco Holdings Co. Limited v. Republic of Turkey* (2008), Decision on Preliminary Issues). See also Rules of the International Criminal Tribunal for the former Yugoslavia, where legal professional privilege has been successfully invoked (Richard M Mosk and Tom Ginsburg, 'Evidentiary Privileges in International Arbitration' (2001) 50 International & Comparative Law Quarterly 345, 351).

82 Case C-155/79 *AM&S Europe Limited* (n 90) and Joined Cases T-125/03 and Case T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, EU:T:2007:287.

83 *Sanofi* (n 82), paragraph 2990.

84 See Case C-155/79 *AM&S Europe Limited* (n 90).

85 See Joined Cases T-125/03 and Case T-253/03 *Akzo Nobel* (n 93).

86 *Sanofi* (n 82), paragraph 2970.

87 Ibid.

88 Ibid., paragraph 2990.

89 *CNR* (09-46/1154-290, 13 October 2009)

tion were protected by legal professional privilege and that these documents had been illegally obtained without abiding by certain procedural rules.[90] CNR further claimed that it had not been informed or notified of its rights by the case handlers during the on-site inspection and that its employees had felt under pressure by the case handlers, who apparently told them that they would be subject to a monetary fine if they obstructed or impeded the on-site inspection.[91] CNR referred to Article 90 of the Criminal Procedure Law, which states that the police should immediately inform the relevant persons of their legal rights and further contended that the relevant provisions should be applicable to competition law practice and enforcement as well.[92]

The TCB first evaluated the case in terms of the procedures followed during the on-site inspection and concluded that the case handlers had not been involved in any procedural missteps or errors with respect to the 'sealed envelope' procedures.[93] In reaching this decision, the TCB noted and relied on the fact that no objection had been raised by the representatives of CNR during the on-site inspection, despite the fact that its attorneys had been present during the inspection as well.[94] Accordingly, the TCB noted that the relevant legislation (*i.e.*, Article 130 of the Criminal Procedure Law) clearly requires the attorney to raise an objection for the sealed envelope process to be instigated, even in case of a search at attorneys' office, and therefore, this rule (*i.e.*, an attorney to raise objections) should be *a fortiori* applicable to the on-site inspections at the premises of an undertaking, which was the case at hand. Thus, the TCB decided that there was no obligation for the case handlers to remind or inform CNR's employees or its attorneys of the existence of this right or the proper method for asserting such rights.[95] The TCB further noted that, in any case, Article 90 of the Criminal Procedure Law does not specify which rights will be communicated or notified to the investigated party or its representatives.[96]

As to the content of the documents in question, the TCB first pointed out that the relevant correspondences had been conducted between an outside counsel and CNR, which would theoretically make them eligible for the attorney-client privilege.[97] However, the TCB also found that the content of the documents was not related to the exercise of the 'rights of defence', since the parties in question were engaged in a pre-arranged sham behaviour for the purpose of evading and avoiding their legal obligations.[98] Although CNR argued that the correspondence in question did not constitute a competition law violation in and of itself, the TCB nevertheless concluded that the documents were intended to mislead the TCA, and that therefore, they would not benefit from the legal professional privilege.[99]

Dow Turkey[100] was the third significant precedent on the issue of legal professional privilege in Turkish competition law enforcement. This landmark decision clarified the procedural steps that must be taken during on-site inspections. Similar to the factual background of *CNR*, representatives of the investigated undertaking in this case failed to raise any legal professional privilege objections with respect to the collection of documents at the time of the on-site inspection.[101] That said, although the undertaking in question raised its objections with a separate application, the TCB took account of the objections that were raised subsequently. In this regard, the TCB reviewed the content of the documents that arguably fell under the legal professional privilege and ultimately ruled that some of the documents should be returned to the undertaking as they benefitted from legal professional privilege, whereas the remainder of the documents did not enjoy such privilege and therefore were not required to be returned to the undertaking.[102] In its decision, the TCB reiterated its position in *CNR* and *Sanofi* and clearly stated that the fulfilment of two criteria (*i.e.*, the correspondence should be (i) between the undertaking and independent outside counsel, and (ii) it should be related to the exercise of the client's rights of defence) is required in order for a document/correspondence to be covered by legal professional privilege.[103] Furthermore, the TCB also noted that the undertakings should raise their objections

90 Ibid., 21.
91 Ibid., 28.
92 Ibid.
93 According to Article 130 of the Criminal Procedure Law (entitled '*Search and Seizure in Attorneys' Offices, and Seizure of Mail*'), attorneys' offices shall only be searched with a court decision and only with regards to conduct that is indicated in that decision. Accordingly, in case of an on-site inspection that is held at the attorney's office, if the attorney raises the objection that the relevant documents contain confidential client information, then those items shall be put in a separate envelope or a package and be sealed to be opened and reviewed by a judge who would then decide whether these documents concern the professional attorney-client relation. If so, these documents shall be immediately returned to the attorney in question. By virtue of Article 130, the case handlers are to apply the same procedure during dawn raids even if they are not carried out at the offices of an attorney and at the premises of an undertaking.
94 *CNR*, 27.
95 Ibid.
96 Ibid., 29.
97 Ibid., 27.
98 Ibid., 28 and 30.
99 Ibid., 31.
100 *Dow Turkey* (15-42/690-259; 2 August 2015)
101 Ibid., paragraph 4.
102 Ibid., paragraph 9.
103 Ibid., paragraph 7.

during the on-site inspection by providing information on: (i) who prepared the relevant document, (ii) for whom it was prepared, (iii) the duties and responsibilities of each party, and (iv) the purpose of the preparation of the document.[104]

These cases indicate that, the TCB proceeded to evaluate the objections of the investigated parties to the collection of some of the documents, even though these objections had not been voiced during the on-site inspection but were only raised subsequent to the on-site inspection with a separate application. In other words, although the TCB still requires such objections to be raised during the on-site inspection, it nevertheless takes account of separate applications asserting attorney-client privilege claims with respect to such documents. Furthermore, the TCB's approach in the *Dow Turkey* indicates that the TCB required the parties to provide additional information with respect to the documents for which the legal professional privilege was claimed in order to determine whether the confidentiality claims had any merit and whether the attorney-client privilege should be granted. To that end, although the TCB allowed subsequent applications regarding legal professional privilege claims, the attorneys and representatives of an investigated undertaking should be well-informed about the procedural steps that must be taken regarding privileged documents and ensure that all objections are properly (*i.e.*, inclusive of all of the required additional information) and timely raised during the on-site inspection, in written form, if possible.

Finally, the scope and limits of legal professional privilege under the Turkish competition law regime was recently scrutinised by an administrative court in the case concerning Enerjisa.[105] Within the scope of a preliminary investigation, the case handlers had conducted an on-site inspection at the premises of Enerjisa (a Turkish energy company whose main lines of business are electricity distribution and sales) and had collected certain documents. However, during the on-site inspection, the representatives of the undertaking had raised objections to the collection of some of the documents on the basis of legal professional privilege, arguing that the documents included a report prepared by an outside counsel in its capacity as a legal consultant to the undertaking.[106] Accordingly, the case handlers seized and removed the relevant documents within a sealed envelope.[107] Upon review of the collected documents, the TCB determined that these documents were not related to the exercise of the client's rights of defence; hence, the TCB rejected the request of the undertaking for the return of these documents. Naturally, Enerjisa appealed this decision before the Administrative Courts and requested an annulment of the TCB's decision. The Ankara 15th Administrative Court ('Court') noted that the '*Enerjisa Audit Report*' was related to a mock competition law audit that had been conducted by outside counsel in different cities and that was intended to detect and identify potential competition law violations and provide recommendations to the undertaking in order to ensure its compliance with competition law rules. In this respect, the Court ruled that the document in question fell within the scope of legal professional privilege and hence annulled the *Enerjisa Decision I*.

Upon examining the relevant decisions of the TCB, one can deduce that the TCB primarily requires and seeks two conditions to be met in order to grant legal professional privilege to a particular document or correspondence. First, the document must be prepared by an independent outside counsel who is not working under the payroll of the client company, and second, the document must include a legal opinion that is prepared within the scope of the client's rights of defence. The critical factor with respect to the second criteria is that the legal advice should not include any direction or guidance for violating competition law rules. Correspondences that are not directly related to the client's use of its rights of defence, or aims to facilitate/conceal a competition law violation, is not protected by the attorney-client privilege, even when they are related to a pre-investigation, investigation, or inspection process. For example, while an independent attorney's legal opinion on whether an agreement violates the Law No. 4054 can be protected under the attorney-client privilege, any correspondences between an independent attorney and the undertaking on how the client can violate Law No. 4054 would fall outside the scope of this privilege and would not receive any legal protection.

On the other hand, the evaluation of compliance programs in this context draws significant attention from practitioners and commentators; as such programs are (by their nature) highly connected with a client's rights of defence. Nowadays, undertakings are increasingly implementing and employing compliance programs, which can be seen as an effective tool to detect, uncover,

104 Ibid., paragraph 8.

105 The TCB's decision concerning Enerjisa (16-42/686-314; 6 December 2016) ('Enerjisa Decision I') was later annulled by the Ankara 15th Administrative Court (E. 2017/412, K. 2017/3045; 16 November 2017) ('Enerjisa Decision II').

106 *Enerjisa Decision I* (n 116), paragraph 5. The relevant report (titled '*Enerjisa Audit Report*') was obtained from the Head Legal Counsel's e-mail inbox, according to the *Enerjisa Decision II*.

107 *Enerjisa Decision I* (n 116), paragraph 5.

and identify potential competition law risks and to increase competition law awareness within the company. Although the TCB initially found these types of programs to fall outside the scope of legal professional privilege, the Court's approach in *Enerjisa Decision II* indicates that such programs should be considered as an extension of the client's rights of defence and should therefore benefit from attorney-client privilege. We agree with the approach taken by the Court in *Enerjisa Decision II*, especially since undertakings are in dire need of guidance with respect to the identification and detection of potential competition law violations, as well as supervision of efforts to rectify potential competition law issues, both of which can be provided by effective compliance programs operating under the protection of attorney-client privilege.[108]

V. Conclusion

The application of the general principles of law to legal decisions is a subject that has stirred a considerable amount of controversy under Turkish law. The Turkish legal system provides a lawful basis for the judiciary and administrative bodies to recognise and incorporate such general principles as a source of law under Articles 2 and 90 of the Turkish Constitution and pursuant to the judicial decisions of the high courts in Turkey. With that said, the question of how these principles should be applied in practice and which tools should be used by the competent authorities in their decisions remain as vexing issues that are yet to be analysed and resolved on a case-by-case basis.

With each new precedent, the TCB develops new methods of interpretation of the general principles of law, fine-tunes its standards, and signals its institutional analysis of the law to the rest of the Turkish legal system. Turkish statutes and regulations (*i.e.*, the black letter of the law), as well as the precedents of the high courts in Turkey, are illuminating the path for the TCB in this context, and they are fostering enhanced and more useful discussions on the application of the general principles of law in the framework of Turkish competition law.

Due to the very fact that the Turkish legal system has already embodied certain general principles of law in various written laws and regulations, we are not able to infer whether these principles constitute a distinct source of competition law because they are already included in the black letter of law or because the general principles of law are deemed as inherent to the rule of law and functioning of a well-founded legal system and accordingly are recognised by a wide range of judicial systems. That being said, regardless of the reason, the precedents of the TCB reveal that, as a competent quasi-judicial body that adheres to the principle of legality, which is enshrined in the Turkish Constitution, it deliberates on and recognises certain general principles of law as a source of competition law in its investigations and in various other matters that come before it. In this context, we find it promising and ensuring that the TCB operates in a similar fashion to its counterparts throughout Europe and in other civilised and developed nations and that TCB has acknowledged and incorporated certain general principles of law that have been internationally recognised by other competition authorities as well.

108 Although the Regional Administrative Court has just recently annulled the *Enerjisa Decision II* (see 8th Administrative Chamber of Ankara Regional Court Decision numbered 2018/658 E., 2018/1236 K., and dated 10 October 2018), it should be noted that this decision is appealable before the Council of State.

doi:10.1093/jeclap/lpz042