promoting law & justice
European lawyers
CCBE
pour le droit & la justice
Les avocats européens

Le Président
The President

Via facsimile to:
The Office of Examination of Anti-Monopoly Act Investigation Procedures
Cabinet Office
Government of Japan
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Brussels, 8 July 2014

Re: Attorney-Client-Privilege in Japan

To whom it may concern,

I am writing to you on behalf of the Council of Bars and Law Societies of Europe (CCBE) which represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

The CCBE acts as the liaison between the EU and Europe's national bars and law societies. The CCBE has regular institutional contacts with the relevant interlocutors within the European Commission, the European Parliament and the Council of the EU. It also liaises with the Court of Justice of the European Union and the European Court of Human Rights, both of which have accepted the CCBE as an intervener in cases to represent the interests of the legal profession in Europe.

The Japan Federation of Bar Associations (JFBA) has recently drawn the CCBE's attention to the work of an expert group - formed by the Japanese Prime Minister's Cabinet Office earlier this year - which has been considering the due process of investigations under the Anti-Monopoly Act including 'attorney-client privilege'. Currently all lawyers, including foreign lawyers practicing in Japan, are subject to professional duties of confidentiality. However, clients do not have the right to communicate confidentially with lawyers, including foreign lawyers practicing in Japan. In addition, legal advice is not excluded from document production orders and authorities may use the contents of legal advice as evidence to prove a breach of law, for example.

It has also been pointed out to the CCBE that in response to a recent consultation on issues discussed by the expert group, the Japan Fair Trade Commission, which is the government agency in charge of enforcing the Anti-Monopoly Act, has argued, *inter alia*, that the recognition of 'attorney-client privilege' impedes fact findings.

The business community in Japan and the JFBA have expressed their concerns about the lack of 'attorney-client privilege' and the current discussions, as well as the views which were put forward by the Japan Fair Trade Commission.

In this respect, the CCBE would like to submit a number of comments which are set out below. With regard to the fact that current discussions in Japan also affect European lawyers practicing in Japan, the CCBE believes it important that Japanese authorities are aware of the legal situation in Europe.

Professional secrecy/legal professional privilege (PS-LPP) is one of the core values of the European legal profession. (It is important to point out in this context that there are distinctions between common law concepts of legal professional privilege and continental concepts of professional secrecy, but in essence these concepts provide for the same protection.) It is a common understanding that if the right of the citizen to safeguard confidentiality, i.e. the right of the citizen to be protected against any divulging of his/her communication with his/her lawyer, would be denied, people may be denied access to legal advice and to justice. PS-LPP is thus seen as an instrument of how access to justice and the maintenance of the rule of law can be achieved.

There is abundant jurisprudence by the European courts both in Luxembourg and Strasbourg that deals with PS-LPP and highlights the importance of this principle. European legal instruments have also enshrined PS-LPP. Additionally, all EU Member States recognise PS-LPP as one of the major objectives and principles of regulation for the legal profession, the violation of which constitutes in some EU Member States not only a professional violation, but also a criminal offence. Moreover, the CCBE in its own CCBE Charter of Core Principles of the European Legal Profession, the CCBE Code of Conduct for European Lawyers and numerous other documents stipulates PS-LPP as one of the core values of the European legal profession. Key decisions of the European courts, relevant European legal instruments as well as the CCBE's own documents are referred to in more detail below.

A. CASE LAW AND EUROPEAN LEGAL INSTRUMENTS

- **Court of Justice of the European Union (CJEU)**

General principles on the scope of LPP

The investigative powers of the European Commission (Commission) in competition matters – in particular, concerning on-site inspections and requests for information – may interfere with the companies' fundamental right to the confidentiality of certain communications with legal counsel. Regulation 1/2003, which establishes the procedural framework for the Commission's enforcement of the EU competition rules, contains, like its predecessor Regulation 17/62, no provision dealing with the protection of written lawyer-client communications.

Scope of legal privilege: the *AM&S* and *Hilti* cases

In the AM&S v. Commission case, the Court of Justice of the European Union (CJEU) acknowledged that the maintenance of confidentiality as regards certain communications between lawyer and client constitutes a general principle of law common to the laws of all Member States and, as such, a fundamental right protected by EC law.[1] The Court held that "*any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it*", and that, therefore, the confidentiality of certain lawyer-client communications must be protected.[2] LPP can be relied upon not only by natural persons, but also by companies that may be subject to a Commission investigation, regardless of their legal form. It covers all documents in the hands of the lawyer or the client and applies to communications originating from either.

[1] Case 155/79, *AM & S / Commission*, 1982 ECR 1575, paras 16 and 18.

[2] *Ibid*. Although *AM&S* was concerned with inspections, it has been generally acknowledged that the principles established in that case also apply to Commission's requests for information. AM&S originated in a dispute about the confidentiality of a series of documents which were found at the premises of AM&S - a UK company - during an investigation into a cartel. The company withheld some of the documents on grounds that they were privileged written communications between lawyer and client. The European Commission issued a decision requiring AM&S to produce these documents.

The CJEU's decision was of particular importance, and still is, since it confirmed the protection of privileged communication (which was disputed up until 1978[3]) and it defined the scope of legal privilege and its practical implications. The CJEU noted that PS-LPP is closely linked to the concept of the lawyer's role as collaborating in the administration of justice by the courts[4]. The CCBE intervened in the case in support of the applicant.

In *AM&S* the CJEU defined the scope of LPP in the European Community system, on the basis of the legal traditions common to the Member States. It interpreted Regulation 17 as protecting the confidentiality of written communications between a lawyer and his or her clients, subject to two conditions, incorporating such elements of that protection as were found to be common to the Member States' laws in 1982, namely that such communications: (i) are made for the purposes and in the interests of the client's rights of defence, and (ii) emanate from independent lawyers who are qualified to practice in an EEA country[5].

(i) With regard to the first requirement, the CJEU emphasized that it must be ensured that the rights of defence may be exercised in full in the context of the Commission's investigation proceedings, and that the protection of the confidentiality of written lawyer-client communications is an essential corollary to the rights of defence. It therefore recognized that all written communications exchanged after the initiation of the proceedings must be protected. However, since the Commission can commence an investigation before the formal initiation of proceedings, the Court held that – in order not to discourage any undertaking from taking legal advice at the earliest opportunity – the protection of LPP extends to any earlier written communications that have a relationship to the subject-matter of that procedure[6]. Legal advice is regarded as a "preparatory" step in the undertaking's defense[7].

Moreover, in the later *Hilti* case the General Court of the European Union (GCEU), adjudicating at first instance, established that *any internal documents of the company being investigated, which reported the content of communications and legal advice received by independent external lawyers and were distributed within the undertaking for consideration by managerial staff*, are still covered by LPP, too.[8]

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[3] In 1978, following a written question by MEP Cousté (No. 63/78), the Commission stated that even though Regulation No 17 did not provide for any protection of legal papers, "the Commission […] follows the rules in the competition law of certain Member States and is willing not to use as evidence of infringements of the Community competition rules any strictly legal papers with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defence."

[4] Case 155/79, para 24: A*s regards the second condition, it should be stated that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer' s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a conception reflects the legal traditions common to the Member States and is also to be found in legal order of the community, as is demonstrated by article 17 of the protocols on the statutes of the court of justice of the EEC and the EAEC, and also by article 20 of the protocol on the statute of the Court of Justice of the ECSC.*

[5] The European Economic Area (EEA), established in 1994, comprises three of four member states of the European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway),and 27 of the 28 Member States of the European Union, with Croatia provisionally applying the agreement pending its ratification by all EEA countries.

[6] The Court seemed to adopt a rather broad interpretation of the concept of "earlier written communication" by establishing that communications exchanged six years prior to the initiation of the Commission's proceedings were in fact sufficiently connected to the subject-matter of those proceedings. It follows that advice given by legal counsel prior to the initiation of an investigation, concerning the legal assessment of a company's conduct, including the likelihood of prosecution and fines, or advice given in relation to potential interim measures, should be covered by LPP.

[7] Fordham International Law Journal, Volume 28, Issue 4, page 1009, 2004.

[8] Case T-30/89 *Hilti/Commission* 1990 ECR II-163, para 18 (stating that "*the principle of the protection of written communications between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes, which are confined to reporting the text or the content of those communications*").

(ii) Pursuant to the second requirement established in *AM&S*, LPP applies only to written communications emanating from independent lawyers who are entitled to practice their profession in one of the Member States, regardless of whether this is the same Member State in which the client resides.[9] This means that, by definition, communications involving lawyers qualified in third countries such as the United States will not be privileged, even if those lawyers are based in the EC.

Moreover, the notion of "independent lawyer" does not encompass, in the Court's view, any legal expert who is bound to his or her client by a relationship of employment[10]. The Court found that this requirement, as to the position and status of a legal adviser, is based on the "*conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs*".[11] Despite its reference to "*the rules of professional ethics and discipline which are laid down in and enforced in the general interest by institutions endowed with the requisite powers for that purpose*" as being the counterpart of the protection of LPP, the Court held in *AM&S* that, based on common criteria found in the national laws of the Member States, a document containing legal advice and exchanged between a lawyer and his or her client is protected against disclosure only if the lawyer is 'independent', "*that is to say one who is not bound to his client by a relationship of employment*".[12]

The exclusion of in-house lawyers from the scope of application of the LPP as confirmed in the *Akzo Nobel* case

The more recent *Akzo* case gave the EU Courts another opportunity to deal with the issue of the protection of confidentiality of communications between lawyers and clients vis-à-vis the Commission's exercise of its powers of investigation, in particular the question of whether LPP also extends to in-house counsel. In an order delivered on October 30, 2003, the President of the GCEU seemed to suggest that the Court might be prepared to review the scope of legal privilege under EU competition rules and extend it to communications with in-house counsel.[13]

However, both the GCEU and the CJEU on appeal did not follow this view and basically confirmed the previous case law on LPP, according to which in-house lawyers do not satisfy the requirement of independence established by the judgment in *AM&S*.[14] As stated by the CJEU, the concept of independence of lawyers "*is determined not only*

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[9] Case 155/79, para 25. The limits of this protection are to be determined by reference to the rules on the practice of the legal profession as set forth in Council Directive 77/249/EEC of March 22, 1977, to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78/17) and Directive 98/5/EC of the European Parliament and of the Council of February 16, 1998, to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ L 77/36).

[10] Some European countries allow for lawyers – registered with a Bar or Law Society – to work in-house for a company. These lawyers are subject to the same professional and ethical rules as outside lawyers.

[11] Case 155/79, paras 24 and 27.

[12] *Ibid.*

[13] Joined Cases T-125 and 253/03 R, *Akzo Nobel Chemicals and Akcros Chemicals / Commission*, 2003 ECR II-4771. The President suggested that, although the Member States do not unanimously recognize LPP for communications between in-house counsel and their employers, the *AM&S* judgment, which was based on an interpretation dating from 1982 of the principles common to the Member States, may be outdated. "*[T]aking into account developments in [EU] law and in the legal orders of the Member States since the judgment in AM & S ... it cannot be precluded that the protection of professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis*". He opined that it appeared *prima facie* possible that the role assigned to independent lawyers of collaborating in the administration of justice by the courts "*is now capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct*". In his view, the EU legal order could follow an increasing number of legal orders of the Member States which no longer presume "*that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts if, in addition, the lawyer is bound by strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status*": *Id.*, paras 121-126.

[14] Joined Cases T-125 and 253/03 *Akzo Nobel Chemicals and Akcros Chemicals / Commission* 2007 ECR 3523, and Case 550/07 P *Akzo Nobel Chemicals and Akcros Chemicals / Commission*, 2010 ECR I-8301.

positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship".[15] Due to the employment relationship, "*an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client*" and, as a consequence, he or she cannot "*ensure a degree of independence comparable to that of an external lawyer*".[16] The CJEU took the view that the evolution of the laws of Member States and EU competition rules did not make it necessary to reconsider the judgment in *AM&S*, noting that "*no uniform tendency can be established in the legal systems of the Member States towards the assimilation of in-house lawyers and lawyers in private practice*", given that many Member States still exclude correspondence with in-house lawyers from LPP protection or do not allow in-house lawyers to be admitted to a Bar or Law Society.[17] Nor do the amendments to the rules of procedure introduced by Regulation 1 – along with the increased need for in-house legal advice – justify a change in the case law, since Regulation 1 "*does not aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege, but aims to reinforce the Commission's powers of inspection*".[18] Finally, in light of the different degree of professional independence of in-house and outside lawyers, the CJEU confirmed that the differential treatment of the two categories of lawyers cannot be considered to amount to a breach of the principle of equal treatment.[19]

Impact of the CJEU's case law on Member State procedural rules

It is important to note that many Member States have introduced the concept of legal professional privilege in their competition proceedings in light of the aforementioned Court's jurisprudence[20].

- **European Court of Human Rights (ECHR)**

Judgments of the ECHR have also recognised a right to confidentiality of communications between lawyer and client on the basis of either Article 8 'Right to respect for private and family life' or Article 6 'Right to a fair trial'[21] of the European Convention on Human Rights.

Article 8 is of particular interest since it clearly establishes the right of everyone to respect for his correspondence. It protects the confidentiality of communications whatever the content of the correspondence concerned and whatever form it may take. Any interference must be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society to achieve the aim concerned[22]. The latter has been considered by the Court in numerous decisions.

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[15] Case C-550/07 P, para 45.

[16] *Id.,* paras 45 and 46. Indeed, according to the Court, an in-house lawyer "*occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence*" (*id.*, para 47).

[17] *Id.*, paras 71-73.

[18] *Id.*, para 86.

[19] *Id.,* paras 54-59.

[20] See Jean-François Bellis, *Legal professional privilege: An overview of EU and national case law*, October 2011, e-Competitions, No39467.

[21] Regarding case-law of the ECHR and European Human Rights Commission supporting the criminal charges classification of competition proceedings, see 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?*, Research Papers in Law - Cahiers juridiques, No 5 / 2008, College of Europe

[22] **Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The jurisprudence of the ECHR is very rich as far as the confidentiality of lawyer-client communication is concerned and has increasingly developed over the years. Reference is made here to a few key decisions laying down general principles to be observed when it comes to the lawyer-client relationship:

- *"(…) If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (…)."* (§48, S. v. Switzerland, 1991)

- *"(…) it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention. (…)"* (§37, Niemietz v. Germany, 1992)

- *"Above all, in practice, it is, to say the least, astonishing that this task should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge, especially in this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defence."* (§74, Kopp v. Switzerland, 1999)

In the case Foxley v. The United Kingdom (2000), which is of particular interest as far communications between lawyers and clients are concerned, the Court ruled that Article 8 was violated by the interception of correspondence of the applicant with his solicitors. The Court highlighted in this case the need for effective safeguards to ensure minimum impairment of the right to respect for correspondence and also recalled that the lawyer-client relationship is, in principle, privileged and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature:

> *"43. The Court recalls that the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" regard may be had to the State's margin of appreciation (see the Campbell v. the United Kingdom judgment of 25 March 1992, Series A no. 233, p. 18, § 44). It further observes that in the field under consideration - the concealment of a bankrupt's assets to the detriment of his creditors - the authorities may consider it necessary to have recourse to the interception of a bankrupt's correspondence in order to identify and trace the sources of his income. Nevertheless, the implementation of the measures must be accompanied by adequate and effective safeguards which ensure minimum impairment of the right to respect for his correspondence. This is particularly so where, as in the case at issue, correspondence with the bankrupt's legal advisers may be intercepted. The Court notes in this connection that the lawyer-client relationship is, in principle, privileged and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature (the above-mentioned Campbell judgment, pp. 18-19, §§ 46 and 48)".*

- **Council of Europe Recommendation Rec(2000)21 of 25 October 2000**

In addition to the abundant jurisprudence of the European Courts regarding privileged communications, it is also important to mention the Council of Europe[23] Recommendation Rec(2000)21 of 25 October 2000 concerning the freedom of exercise of the profession of lawyer in Europe which provides that *"All measures should be taken to ensure the respect of confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law."* (Principle I, paragraph 6) and that *"Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions."* (Principle III, paragraph 2)

B. CCBE documents

The CCBE attaches great attention to the core values of the legal profession in Europe, including PS-LPP. This is also why it is working at this very moment 'Towards a model code of conduct' which will serve as guidance for national Bars and Law Societies when reviewing their own national rules. The model code will deal, amongst others, with confidentiality and take into account the existing jurisprudence of the European courts.

The CCBE has two key documents which address confidentiality.

- First, the **CCBE Charter of Core Principles of the European Legal Profession**, which was adopted on 24 November 2006, and contains a list of ten core principles common to the national and international rules regulating the legal profession. Principle (b) of the Charter provides:

  "Principle (b) – the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy:

  It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle - observing confidentiality is not only the lawyer's duty - it is a fundamental human right of the client. The rules of "legal professional privilege" prohibit communications between lawyer and client from being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. Principle (b) encompasses all these related concepts - legal professional privilege, confidentiality and professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act."

  It is important to note that the CCBE Charter is not conceived as a code of conduct. It is, however, aimed at applying to all of Europe, reaching out beyond the member, associate and observer states of the CCBE. The Charter aims, *inter alia*, to help bar associations that are struggling to establish their independence; and to increase understanding among

[23] The Council of Europe is the continent's leading human rights organisation. It includes 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. For more information on the Council of Europe, click here.

lawyers of the importance of the lawyer's role in society; it is aimed at lawyers, decision makers and the general public.

- Second, the **CCBE Code of Conduct for European Lawyers**, which dates back to 28 October 1988 and was last reviewed in 2006, also contains a provision on confidentiality:

"2.3. Confidentiality

2.3.1. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality."

Contrary to the Charter, the Code is a binding text on all CCBE Member States meaning that all lawyers who are members of the bars of these countries (whether their bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.

- Research

The CCBE also carries out regular research into PS-LPP. The most recent research was undertaken in 2014. Results of previous research are publicly available and listed below:

- CCBE Comparative Study on Governmental Surveillance of Lawyers' Data in the Cloud, 4 April 2014

- Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions - John FISH , 27 February 2004

- Update of the Edward's Report on the professional secret, confidentiality and legal professional privilege in Europe, 30 September 2003

- Report on The professional secret, confidentiality and legal professional privilege in the nine member states of the European Community - D.A.O. EDWARD, QC, 29 October 1976

The above shows that the confidentiality of communications between clients and lawyers is given particularly high attention by the European courts and relevant European bodies. Confidentiality is not only seen as the lawyer's duty, but as a fundamental human right of the client. Without the certainty of confidentiality there cannot be trust, which is key to the proper functioning of the administration of justice and the rule of law.

We are happy to answer any questions or provide further information or clarification.

Yours sincerely,

Aldo Bulgarelli
CCBE President