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the legal profession

The Office of Examination of
Anti-Monopoly Act Investigation Procedures,
Cabinet Office,
Government of Japan
Japan

09 July 2014

Subject: Attorney-Client Privilege (ACP) in Japan

Dear Sirs,

As the co-chairs[1] of the International Bar Association's Litigation Committee we welcome the opportunity to make submissions to you in response to your recent invitation.

The International Bar Association represents legal practitioners, bar associations and law societies from all over the world. It is the largest organisation representing lawyers internationally and aims to be the global voice of the legal profession. The International Bar Association has a membership of 55,000 individual lawyers and 206 bar associations and law societies, spanning all continents. We look forward to our annual conference in Tokyo later this year, which will be attended by thousands of lawyers from all over the world.

The work of the International Bar Association's Litigation Committee focuses on the legal, practical and procedural issues involved in litigation in jurisdictions around the world. We have a particular emphasis on international litigation.

Our members believe that it is fundamentally important that individuals (and corporations) should have the right to obtain independent legal advice and communicate in confidence. This right has been widely recognised and respected by Governments and Courts in many jurisdictions, and we regard such access to independent confidential legal advice as a basic right in a democratic society.

The right to obtain independent, confidential, legal advice is recognised in numerous common law and civil jurisdictions including our own jurisdictions (Ireland and Australia) and jurisdictions from which many International Bar Association Committee members come, including, for example, major civil law European and South American states, and also in common law states such as England, Canada and the USA.

[1] Michael Hales and Liam Kennedy are partners in leading Australian and Irish law firms respectively (Minter Ellison and A&L Goodbody),

Legal professional privilege is recognised as a fundamental human right in the jurisprudence pursuant to Article 8 of the European Convention on Human Rights and Article 12 of the Universal Declaration on Human Rights. In the cases under those articles it is clear that legal advisors are not only justified in withholding privileged information received from clients but are bound to do so.

For example, in ***Sorvisto*** v ***Finland*** (application no 19348/04), the seizure of a client's correspondence with a lawyer was found by the European Court of Human Rights to deprive the client of a minimum level of protection to privacy, guaranteed in the law of the democratic society.

Similarly, in ***Michaud*** v ***France*** (application no 12323/11) the European Court of Human Rights stressed that Article 8 afforded strengthened protection to exchanges between lawyers and their clients. Such protection was justified by the fact that lawyers were assigned a fundamental role in a democratic society. The European Court of Human Rights recognised that lawyers could not carry out their work if they were unable to guarantee that their exchanges with clients would remain confidential.

We believe that these and other decisions at national level, evidence the widespread international acceptance that the right to privacy extends to the right to get independent legal advice; involving full and frank communications between lawyer and client to this end. It would inhibit the objective of effective legal representation if a person cannot speak frankly and candidly with their lawyer.

In many jurisdictions, particularly those strong democratic traditions, the right to obtain independent confidential legal advice is regarded as a fundamental right and part and parcel of the commitment to rule of law and of "access to justice". Lawyers owe a professional duty of confidentiality to their clients and in most jurisdictions, confidential communications between a lawyer and client cannot be revealed to a third party without consent. Nor (save for limited exceptions) can such communications be used as evidence in legal proceedings or investigations without the client's consent.

In common law jurisdictions such as Ireland, England, Australia, New Zealand, Canada and the USA the terminology varies but the key types of legal privilege include;

1. Lawyer-Client privilege: which protects from disclosure confidential communications between lawyers and their clients where the communications are for the dominant purpose of seeking or providing legal advice.
2. Litigation work Product privilege: attaches to documentation or confidential communications created for the dominant purpose of enabling a party to defend apprehended or threatened proceedings.

The rationale for Lawyer-Client privilege is as described in the early-nineteenth century case of ***Greenough*** v ***Gaskell***[2] as essential to promote free and frank consultation of legal advisors and observed that;

> ***"If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case"***

Those comments remain applicable today.

Lawyer-Client privilege is also recognised in most civil law countries as well although there are differences as to the extent of such protection.

We note in your letter the suggested reasons to limit Attorney Client Privilege. Based on our international experience, we would not agree that such points could justify such a serious encroachment on a basic right. Regulatory bodies similar to the JFTC in many other jurisdictions (including the US and the European Union) operate effectively and discharge their functions while respecting parties' right to obtain confidential legal advice. Under the Law of the European Union, privilege is not accorded to communications between a company and in-house counsel in EU Competition proceedings, (i.e. lawyers employed by the company itself) and we understand that a similar distinction between employed and independent legal advisors applies in other civil law jurisdictions. However, privilege is afforded under EU law to communications between the company and their external legal advisers. Furthermore, the fact that privileged documents may not be disclosed to such regulators has not, in practice. prevented such regulators from effectively exercising their regulatory jurisdiction throughout Europe and in many other jurisdictions.

Regulators in other jurisdictions face similar investigatory challenges to those faced by the JFTC, but there does not appear to be any factor which is peculiar to Japan which would justify the continued denial to Japanese citizens and businesses of something that elsewhere is recognised as a human right. A client's right to obtain confidential legal advice should not be subordinated. Such rights can co-exist with the regulator's objective. The regulatory objective can be achieved in other, less disproportionate, ways, for example, by placing a legal obligation on the client to disclose certain matters to regulators

We would be concerned that an encroachment on the right to obtain legal advice in confidence could actually be counter productive. The effect of such a measure may be to discourage a client from confiding in either their lawyer or the regulator, which would be contrary to the desired goal. Furthermore, if communications with lawyers in Japan are not protected by privilege then clients may be incentivised to ensure that any

[2] Greenough v Gaskell (1833) 1 My. & K. 98, 39 Eng. Rep. 618 (Ch.) Lord Brougham LC at 103

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such communications take place outside the jurisdiction. We would have thought that from a public policy perspective it was undesirable to place such obstacles which might discourage clients from obtaining legal advice locally, and that access to local legal advice on a confidential basis should be encouraged by policymakers was desirable in order to ensure compliance with the local regulatory regime.

Many jurisdictions, for example, the USA and Ireland, encourage or require cooperation with the regulator and such cooperation is a factor considered when penalties for any contravention are imposed. A client who makes voluntary disclosure is usually subject to a lighter sanction. In our view, a client should not be deemed uncooperative for exercising their right to obtain confidential legal advice. We note that it has been suggested that the incentives for such voluntary co-operation are weak in Japan. If that was the case it appears to us that it would be appropriate to reinforce the incentives for co-operation (following the model from many other jurisdictions) rather than impinging on the client's access to confidential legal advice

For the reasons outlined above, we would strongly encourage the recognition of Attorney Client Privilege in Japan. We think that the clear benefits that Attorney Client Privilege would bring far outweigh the risks that are envisaged (but which cannot be proven). We would be happy to provide you with further information on the different jurisdictional privilege policies if you so require.

Yours sincerely,

Eve Moore

Michael Hales
(Co-Chair, IBA Litigation Committee)

Liam Kennedy
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