From the President

The Law Society
of England and Wales

The Reviewing the Surcharge System Unit
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To whom it may concern

Comments on reviewing the surcharge system

Thank you for inviting our comments on the work of the expert group formed by the Japanese Prime Minister's Cabinet Office which has been considering the due process of investigations under the Anti-Monopoly Act including attorney-client privilege (ACP), which is known as 'legal professional privilege' (LPP) in England and Wales.

We understand that clients in Japan do not have the right to communicate confidentially with lawyers, including foreign lawyers practising 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. The Japan Fair Trade Commission has argued that attorney-client privilege impedes fact findings. We appreciate the view of the Advisory Panel that in Japan there is no cultural history of prioritising the interests of the individual over the interests of society as a whole. It is therefore understandable that a move towards the introduction of LPP is resisted. However that may be overcome it is understood that the availability of LPP improves the integrity of the legal system as a whole and as such is of invaluable benefit to society in general.

We have seen the CCBE's letter of 8 July 2017 to the Cabinet Office which sets out the extensive relevant case law from the Court of Justice of the European Union and the European Court of Human Rights.

The Law Society is the membership body for solicitors in England and Wales, with over 170 000 members. There are several branches of the legal profession in England and Wales, but the position on LPP is common to all lawyers, although our guidance is aimed at solicitors specifically.

The Law Society has issued guidance to its members on LPP through a Practice Note Legal Professional Privilege and much of this letter is drawn from that Practice Note available online: https://www.lawsociety.org.uk/support-services/advice/practice-notes/legal-professional-privilege/.

Two other Practice Notes which are relevant are:

1. Responding to a financial crime investigation
   http://www.lawsociety.org.uk/support-services/advice/practice-notes/financial-crime-investigations

2. Representing Clients at Serious Fraud Office interviews
   https://www.lawsociety.org.uk/support-services/advice/practice-notes/representing-clients-at-section-2-cja-interviews/

I set out our responses to your questions below.

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1. ***Does your jurisdiction respect ACP and, if so, what are the purposes behind ACP? Do you foresee disadvantages to clients if ACP is not recognized?)***

The article by Kimitoshi Yabuki published in Competition Law International Vol 11 No 2 October 2015 "The Case for An Attorney-Client Privilege in Japan" (copy attached) provides an interesting overview of the case for privilege in Japan.

As summarised in the article, arguments for APC include:

- *Clients seeking legal advice should be able to speak openly and candidly with their lawyers secure in the knowledge that their communications with their lawyer will not be disclosed without their consent. This effectuates complete and well-informed legal advice and a greater compliance with the law;*
- *ACP may facilitate thorough investigations, identification of wrongdoing and increased self-reporting;*
- *In light of the increasing trend for international cooperation amongst authorities, denying privilege protections in Japan could result in privilege protections being lost in other jurisdictions where privilege is recognised. Potentially, this may discourage companies from self-reporting to Japanese authorities.*

Please also refer to the article by Scott Hammond entitled "Dispelling the Perception that Legal Privilege impedes Antitrust Enforcement", in the same publication, (copy attached) for further arguments.

LPP is respected and is recognised as a fundamental common law and human right enjoyed by clients and underpins the administration of justice in England and Wales. As was stated by Lord *Brougham in Greenough v Gaskell* (1833): "The foundation of this rule is not difficult to discover… It is out of regard to the interests of justice, which cannot be upholden, and the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one 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. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous." In other words the integrity of the legal system which serves society by facilitating litigants in using it is impossible to attain without LPP.

Privilege belongs to the client and not to the lawyer *(R v Derby Magistrates' Court, ex p B).*

Without the protection of LPP, people and corporations may be denied access to legal advice and therefore to justice.

Common law justification for legal professional privilege in English law goes back to *Pearse v Pearse (1846) 1 De G & Sm 12.* Subject to decisions of the courts, LPP can only be limited by unambiguous statutory provision.

In addition to the common law, there are definitions of LPP in statute for specific purposes (for example, section 10 of the Police and Criminal Evidence Act 1984; section 330(10) of the Proceeds of Crime Act 2002; section 413 of the Financial Services and Markets Act 2000).

A lawyer does not need to be qualified in England or another EU member state for privilege to be claimed under English law (*IBM Corp v Phoenix International (Computers) Ltd ([1995] 1 All ER 413).*

Confidentiality is essential to privilege, so if a document has been made public then confidentiality will be lost and therefore privilege with it.

Privilege may be waived by the client, either expressly or impliedly.

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Legal advice privilege

Legal advice privilege arises in relation to the giving or receiving of legal advice, or where communications form part of a continuum that aims to keep client and lawyer informed so that advice may be given as required.

In *Three Rivers (No. 6) [2005] 1 AC 610,* Lord Carswell stated [111]:

> *"...all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client".*

Confidential communications between a lawyer and a client, and all material forming part of the continuum of those communications (*Balabel v Air India* [1988] 1 Ch 317) will attract legal advice privilege if they relate to public or private rights, liabilities, obligations or remedies or are otherwise made in a 'relevant legal context' (in *Three Rivers (No 6)*).

Legal advice privilege will arise not only where the communications directly concern the seeking or giving of legal advice, but may also arise where the communications consist of facts and are part of what the courts have called a 'continuum of communication' between client and lawyer 'aimed at keeping both informed so that advice may be sought and given as required' *(Three Rivers (No 6))*.

In *Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2015] EWHC 3187 (Ch) Snowden J noted that lawyers are often tasked with investigating relevant information, and must be able to provide clients with candid factual briefings secure in the knowledge that such communications (and any records thereof or of decisions taken in consequence thereof) can only be disclosed with the client's consent.

Litigation privilege

Litigation privilege applies in relation to confidential communications between legal advisers or their clients and any third party if they are made for the sole or dominant purpose of conducting existing or reasonably contemplated litigation which is adversarial rather than investigative (the meaning of each of these component terms has been tested before the courts).

Litigation includes adversarial criminal and regulatory processes, including competition regulation (*Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6).

The limits of LPP – the 'iniquity exception'

Under the 'iniquity exception' LPP cannot arise where a lawyer's assistance has been sought to further a crime or fraud, or any other equivalent conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice (*Williams v Quebrada* [1895] 2 Ch 751, 755; *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 554, 565; *Barclays Bank v Eustice* [199 The reason why LPP is not available where the communication between the client and lawyer was for the purposes of furthering any crime or wrongdoing flows from the simple fact that it is no part of the business of a lawyer to facilitate wrongdoing of any kind. In doing so he or she would not be carrying out anything that falls within the proper remit of a lawyer - see *R v Cox and Railton (1884).*

5] 1 WLR 1238, 1249; and *BBGP v Babcock & Brown* [2011] Ch 296 at [62]).

It is irrelevant whether the lawyer is aware of the client's iniquitous purpose or was unwitting.
The iniquity exception will not arise in the 'ordinary run of cases' where a lawyer is instructed to defend a client of a criminal charge: they would still be performing their proper professional role where the client is doing no more than using the lawyer to advance what the client knows to be an untrue case (*Ablyazov* at [93]).

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Nor does the iniquity exception apply where the client seeks legal advice on avoiding the commission of a crime or where a lawyer warns a client that their proposed actions could amount to the commission of a crime (*Bullivant v Attorney General of Victoria* [1901] AC 196; *Butler v Board of Trade* [1971] Ch 680.

The limits of LPP – corporations and internal investigations

Although legal as well as natural persons attract legal advice privilege, there are limitations on the availability of LPP to the former. First, not all employees of a corporation are considered 'the client' for LPP purposes (*Three Rivers District Council v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474); previously it was assumed that the legal person of the company was the client and that any employee was the company's agent.

Privilege can be claimed in respect of communications with both qualified English in-house counsel and external lawyers (whether barristers or solicitors) but only for work that is performed by them as a lawyer, rather than in a management or compliance role.

Communications between a corporate client and in-house counsel are not privileged for the purpose of investigations by EU institutions (as explained in the CCBE's letter) following *Akzo Nobel Chemicals Ltd v European Commission* [2010] 5 CMLR 19).

Questions do arise about the extent to which LPP applies to communications made in connection with internal investigations by corporations, and the extent to which LPP applies to information and material considered and generated in the course of such internal investigations, particularly when there are parallel external investigations conducted by law enforcement agencies and regulators.
These questions arose very recently in *The Director of the Serious Fraud Office and Eurasian Natural Resources Corporation Ltd* http://www.bailii.org/ew/cases/EWHC/QB/2017/1017.html

In this case the court took a narrow view of the scope of legal advice privilege and litigation privilege. The apparently perverse outcome of the SFO's success in the case is that corporations will now be less likely to co-operate with the SFO's self-reporting regime. This is because the narrow approach to LPP adopted in the case is likely to discourage corporate clients from obtaining legal advice id there is a concern that their communications with their lawyers may be made available to the prosecuting authorities. There is also the danger, for the same reason that corporations would be less likely to take 'self - report' because of a fear of consulting a lawyer as to whether self reporting is advisable.

Permission to appeal has been sought and the Law Society will be considering intervening in the appeal because it is concerned that the case will undermine LPP. That concern is shared by many firms and a number of other organisations both in the UK and elsewhere.

Privilege and competition law

In UK competition law, the Competition and Markets Authority (CMA) is the enforcement authority. The CMA has extensive powers to investigate infringements of UK and (at least up until the time of Brexit) EU competition law. The CMA has powers to require the production of documents, but a CMA official conducting an investigation has no right to see documents that are protected by legal professional privilege (sections 30, 65A and 65J, Competition Act 1988).

Similarly, the CMA's powers when conducting criminal investigations do not extend to information and documents that are subject to legal professional privilege (section 196, Enterprise Act 2002).

As mentioned above, under English law communications with in-house counsel are privileged (unlike the position in the EU, as explained in the CCBE's letter), and the CMA applies the English privilege rules when it carries out an investigation, whether it is in relation to EU or UK competition law.

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In 2013, the CMA's predecessor the Office of Fair Trading (OFT) published guidance on applications for leniency and no-action in cartel cases, which included a policy on legal professional privilege waivers. This guidance has since been adopted by the CMA.

https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases

For ease of reference, the relevant extract from the guidance is attached to this letter as Annex A.

Under the guidance the CMA will not, as a condition of leniency, require waivers of privilege, but it may invite a leniency applicant to consider waiving LPP. However, a refusal by an applicant to waive privilege does not adversely affect the leniency application, as legal professional privilege is a fundamental right.

The OFT guidance introduced a procedure for the use of Independent Counsel (IC) as an means of deciding whether to accept claims to legal professional privilege made by leniency parties. On the one hand, the CMA does not want to be put in the position of accepting unsubstantiated claims by the leniency applicant that documents are privileged; on the other, it is unsatisfactory for the CMA to make a determination in its own interests. The IC is instructed by the CMA to provide an independent opinion to the CMA on whether or not the information in question is protected by legal professional privilege.

Failure or refusal to provide relevant information to the IC could result in the withdrawal of the leniency agreement on grounds of non-co-operation.

If the IC advises that the information (or part) is not privileged, the CMA will expect the leniency applicant to provide that information (or the relevant part, subject to redactions that may be approved by the IC).

As set out in the Annex, the CMA is able to consider whether a claim for legal professional privilege claim is unfounded or is calculated only to frustrate or prejudice the CMA investigation.

2. Would the purposes of ACP be achieved if communications are not guaranteed or recognized as a right of defense and are only to be "taken care of", which means it may be subject to the discretion of the authority? Would it be meaningful protection if, as proposed, the communications are protected in relation only to the consultation in the new leniency program and to the extent that JFTC's fact-finding ability is not impeded?)

Law enforcement agencies and regulators in the UK are not entitled to decide themselves whether a claim to LPP is properly made, nor is it for a lawyer to satisfy law enforcement agencies and regulators that claims to LPP are well-founded. It is common for statutes which give powers to obtain information to also provide special requirements which protect LPP. Some include procedural remedies to resolve claims to LPP which are disputed; see for example the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009/2009/1916) made under section 86 of the Finance Act 2011.

No adverse inferences should be drawn from a claim to privilege or a refusal to waive privilege (*Wentworth v Lloyd* [1864] 10 H.L.C. 589) whether under section 34 of the Criminal Justice and Public Order Act 1994 (which permits adverse inferences to be drawn from a defendant's silence when questioned) or otherwise.

Where a claim to LPP is properly made, it is absolute. Where LPP properly arises and has not been curtailed by parliament it cannot be overridden by competing private or public interests in disclosure. The Law Society considers that any form of pressure put on clients to waive LPP undermines the absolute nature of the protection.

The courts have on a few occasions condoned the practices of prosecutors in requesting a waiver of LPP from suspects in return for lenient treatment or as a condition of their eligibility for a particular enforcement response (see *R v George, Crawley, Burnett and Burns*, unreported, 7 December 2009; *R v Daniels* [2010] EWCA Crim 2740).

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The Law Society is not, however, aware of any support for a general position that law enforcement agencies or regulators must always request privileged material in order to fulfil their investigatory function. This would be an extension of any need they might have to satisfy themselves, as part of their disclosure obligations in criminal proceedings, that claims to LPP have been properly made (see *R v George, Crawley, Burnett and Burns* for the suggestion that an investigators' obligations to take appropriate steps to obtain relevant third party material in accordance with the *Attorney General's Guidelines on Disclosure* (2005) might involve taking steps to ensure that claims to LPP have been properly made and, potentially, to request a waiver as a condition of leniency/immunity).

Given that English law is clear that adverse inferences cannot be drawn from a client's refusal to waive LPP, no regulator or investigator is entitled to pressure a client to waive LPP and in such circumstances it is for the regulator to decide whether the client should in some way be credited if it takes that decision. Equally, no client should be criticised, let alone treated detrimentally, if they decide to assert LPP, however helpful a waiver might be to the regulator or investigator. English law has long recognised that an assertion of LPP may mean that relevant information is withheld and in such situations regulators, like courts, have to accept the consequences of the exercise of this long-established right.

Where a claim to LPP is properly made no action can be taken against a lawyer for asserting it, and no action can be taken against their client for refusing to grant any waiver sought by law enforcement agencies or regulators.

3. Does your jurisdiction permit the attendance of attorneys, recording and/or videotaping, or taking notes during the deposition (i.e., the investigatory interview) procedure and, if so, what is the rationale and how it is carried out in practice? The study group found that the defense right is sufficiently protected if a client is allowed to use break times to take notes and consult with his or her attorney. What is your comment on such finding?)

The importance of access to justice, of a suspect's right to silence and to have legal advice and representation are well recognised in this jurisdiction and lawyers are able to take notes during investigatory interviews. They are also allowed to be present at various parts of the investigatory process, although this is not an absolute right.

To give an example, in interviews under caution conducted under the Police and Criminal Evidence Act 1984 are subject to specific provisions governing the circumstances in which suspects may be questioned, searched or have their property removed. There is also special provision for access to legal advice and representation. Much of this is set out in Codes of Practice made under section 66 of the Police and Criminal Evidence Act 1884. Section 6.1 of Code C provides:

> *'Unless Annex B applies, all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available'.*

(The Annex B referred to sets out the circumstances in which a delay in allowing access to legal advice is permissible, initially for a maximum of up to 36 hours. Broadly, the delay is only permitted if an officer of senior rank has a reasonable belief that access to legal advice at this stage would endanger other people, or disturb or destroy evidence, or lead to the confiscation of the proceeds of crime.)

Access to a lawyer may also be delayed where there is reasonable belief by a senior officer that the lawyer might - inadvertently or otherwise, pass on information that would prejudice the investigation or evidence; or result in injury to another. Nevertheless, Annex B makes it clear elsewhere that a detained person 'must be permitted to consult a solicitor for a reasonable time before any court hearing.'

The position is modified for cases investigated by the Serious Fraud Office (the 'SFO') which deals with the most complex and serious cases of fraud. Under s 2 of the Criminal Justice 1987, a suspect must respond to SFO questioning and must comply with requests for information. Failure to comply is a criminal offence unless

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there are reasonable grounds for the non-compliance. Again, the importance of access to a lawyer and LPP are, nevertheless, acknowledged and protected.

Under section 2(9) of the Criminal Justice Act 1987, no one may be required to disclose or produce any information which he or she could refuse to disclose or produce on grounds of LPP in the High Court.

Lawyers may be present during searches of premises and the questioning of suspects by the SFO but this is no longer an automatic entitlement since the ruling in *R v on the application of Lord and others) v Director of the SFO [2015] 865.* In that case, the High Court upheld the decision of the SFO to refuse to allow the lawyer of the company under investigation to be present during interviews which formed part of an investigation into various allegations of fraud and bribery, on the ground that the attendance of the lawyer might be prejudicial to the investigation.

The Court held that although the powers contained in section 2 are designed to facilitate the legitimate purpose of furthering investigations, the risk of self incrimination would not ordinarily arise since the information obtained cannot thereafter be used in evidence against the individual that has been interviewed. This is important because it means that the suspect is still protected even though he or she may have had to provide information and may not have had access to a lawyer during an interview.

As a result of the ruling, the SFO has issued new guidelines in its operational handbook, setting out its approach to the presence of lawyers at investigations. Lawyers will be allowed into an investigation but only where the officer leading the investigation (the 'case controller') is satisfied that this will either assist in the purpose of the interview (i.e. to acquire information) or to provide essential assistance or pastoral support to the person being interviewed. The guidance gives the case controller discretion to allow a note taker.

The SFO operational guidance states that a lawyer's attendance will be conditional upon agreement by the lawyer that breach of certain parameters is likely to lead to the exclusion of the lawyer, without notice.

The parameters include that a written note may be made of the interview, but no audio or video recording may be made on behalf of the interviewee.

Protection for the rights of the suspected are adequately protected by allowing break during interviewed in criminal investigations in this jurisdiction. The PACE Codes make provision for 'comfort breaks' (if the suspect is suffering from fatigue for example) and breaks are allowed to consult a lawyer in private. The request for breaks in often made by the lawyer if he or she sees that it would be beneficial to the client. One difficulty with this is that during such breaks, if an interpreter or anyone else is present to assist the suspect, there is a danger that LPP will be lost since the communications must be confidential between the lawyer and the client in order to be subject to LPP. Pre-set break times do not take into account the requirement of the individual for breaks for reasons specific to him or her and therefore are of limited assistance.

We would comment that although these arrangements are not perfect, they do achieve at least a basic level of protection for clients, while balancing the need for adequate powers of investigation which largely do not undermine the availability of LPP or access to a lawyer. Access to justice is not therefore unacceptably weakened.

Yours faithfully,

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