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The Law Society of England & Wales' submission on the JFTC Draft Guidelines with the Amendment of the Antimonopoly Act

Thank you for the opportunity to provide our comments on the proposed procedure and guidelines developed by the Japan Fair Trade Commission (JFTC) for documents consisting of confidential communications between the enterprise and the attorney under the Anti-Monopoly Act. The Law Society of England & Wales is the independent professional body supporting and representing 180,000 solicitors worldwide.

We welcome the consultation and proposals. We wish to comment particularly on the incorporation in these proposals of a legal concept similar to 'attorney-client privilege', which is known as 'legal advice privilege' (LAP) in England and Wales.

Legal advice privilege is one of the two main parts of the wider concept known as 'legal professional privilege' (LPP) in England and Wales. LPP is considered a fundamental legal right in the English legal system. We have shared with you below some history as well as our experience of the benefits that we believe LPP helps secure in protecting the rule of law and promoting the effective administration of justice.

At the same time, we acknowledge with respect the different tradition and legal system in Japan that does not currently incorporate LPP as part of its law and jurisprudence. From our experience, we encourage the JFTC to proceed with implementation of these reforms and to monitor their impact for consideration of a wider application of LPP.

The rationale for legal professional privilege

LPP is a long-established common law right consistently upheld by the judicial authorities in England and Wales. The rationale in favour of LPP (and in particular LAP), which relates to the vital role we believe it plays in underpinning the rule of law and administration of justice, has been regularly emphasised by our courts. In one example, the highest court of England and Wales reviewed the position in a leading case and explained this rationale as follows:

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests." (per Lord Taylor in *R. V Derby Magistrates' Court ex parte B* [1995] UKHL 18)

A similar rationale has been recognised by the EU courts. For example, the European Court of Justice has stated in this context that the principle:

“... springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help...; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law [and] what is forbidden.....”(AM&S v. Commission 1982 ECR 1575).

LPP is regarded with a similarly high degree of importance in both common law and civil law jurisdictions across the world. It is also indirectly covered by international instruments such as the International Convention on Civil and Political Rights (ICCPR). While there may be differences in the application of the concept across jurisdictions, we consider there is a wide acceptance of its benefits in enabling access to legal advice in confidence. Such access is especially important in complex legal systems where both individuals and corporations need to understand their rights, obligations and duties in a society underpinned by the rule of law. Without confidentiality, the facts necessary for the lawyer to be able to formulate the advice may not be forthcoming and this may undermine the right to receive accurate practical legal advice. We believe that this, in turn, negatively affects the administration of justice.

The benefit of LPP should not to be viewed as a means to encourage the shielding of wrongdoing. In English law, 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, contrary to public policy or the interests of justice (*Williams v Quebrada* [1895] 2 Ch 751, 755). Rather, many of the circumstances in which the measure would be available are precisely those where corporations are trying to do the right thing - in this instance, by cooperating with the JFTC.

LPP should also be viewed in light of the wider context of the situation: if the privileged information is available elsewhere, then that is from where it should be obtained in the first instance. In a complex legal situation, we believe that LPP protections encourage businesses to obtain proper legal advice in order to understand their rights and duties, which in turn leads to greater compliance.

Scope: areas of law and practice

Where LPP applies, it protects confidential communications (and material that evidences such communications) from being disclosed without the permission of the client. This is because the privilege is the right of the client and the duty of the lawyer. It therefore can only be waived by the client.

In England & Wales, the LAP part of LPP applies to all confidential communications between a lawyer and client for the main purpose of giving or receiving legal advice. It further extends to communications that form part of a continuum (or a range) that aim to keep client and lawyer informed so that legal advice may be given as required.

LPP may be distinguished from the duty of confidentiality that lawyers and law firms in England and Wales also owe to their clients. A lawyer's duty of confidentiality is wider than LPP and

attaches to information about a client's activities in connection with their lawyers' retainer, irrespective of the source of the information.

LPP in England and Wales is therefore not limited in application to competition law or any other particular area of law or practice and applies generally with very limited exceptions. We understand that the JFTC proposals are limited to application to cartel investigations. We would encourage the JFTC to consider the possibility of a wider application of LPP in investigations.

For example, one possible wider application might extend protection to communications made for the purpose of legal advice that may be discovered during the course of a cartel investigation. These communications may relate to issues other than those specifically related to the matter at hand. Such a wider protection might provide an additional incentive to companies to cooperate with the JFTC's investigation process.

The Law Society of England & Wales encourages the JFTC to consider such options for extending the scope of LPP beyond the current proposals. Even if such extensions are not adopted in the current proposals, we would encourage the JFTC to keep these issues under review for possible future extensions.

Scope: defining the legal representative

As outlined above, LAP protects certain communications between a lawyer and client. A lawyer for this purpose includes barristers; solicitors; in-house lawyers in England and Wales; and appropriately qualified non-UK lawyers.

It follows that a lawyer does not need to be qualified in England for privilege to be claimed under English law (*IBM Corp v Phoenix International (Computers) Ltd* ([1995] 1 All ER 413). In a situation where corporations and law firms work globally across borders and where domestic and foreign legal advice may be intermingled, we consider it is important that LPP in the law of England and Wales applies to advice from foreign lawyers. Further, lawyers of many jurisdictions have in common a strict professional obligation to safeguard confidential communication between themselves and their clients. This obligation may arise from the client's right to confide with a legal adviser in private or, as in Japan, it may arise from the lawyer's duty to safeguard confidential information that has been acquired in the course of professional duties.

Similarly, LPP under English law extends not only to relevant communications with external lawyers, but also with in-house counsel in relation to work that is performed by them as a lawyer (see e.g. *Financial Services Compensation Scheme Limited v Abbey National Treasury Services Limited* [2007] EWHC 2868 (Ch) at [9]). The reason behind including in-house lawyers in the same way as external ones for LPP is that the in-house lawyer is bound by the same professional obligations, including the duty to carry out their work 'with independence' according to Principle 3 of the *SRA Principles*, which is one of the fundamental ethical tenets for solicitors imposed by their regulatory authority.

Even though in-house lawyers may be agents of their employer, the UK courts have been clear on this point that, in their capacity as legal advisers, in-house lawyers "are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and



to the court. They must respect the same confidences. They and their clients have the same privileges...” (Lord Denning in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs* (No 2) [1972] 2 QB 102). Therefore, we consider that the inclusion of in-house lawyers under LPP is consistent with the professional duties held by in-house lawyers, as members of the legal profession and with the underlying rationale of LPP.

We note that the current JFTC proposals appear to exclude communications with foreign lawyers from the scope of protection unless such communications relate to the case under investigation. Even if the risks to such communications with foreign lawyers under the investigation procedures are limited, we would encourage protection to be extended to those communications as a matter of principle. This would, for example, give assurance to businesses that such advice could not be subject to examination by investigation officers. We would encourage the JFTC to continue to monitor and review any limitations on the scope of lawyers covered by the protections that are imposed.

Draft Guidelines with the Amendment of the Antimonopoly Act

We do not comment in detail on the draft guidelines prepared by the JFTC, except to note that the law in England and Wales recognises that LPP is treated as being “absolute” in nature. This occurs where LPP has been properly established as applying under common law principles and has not been limited by Parliament. As a result, once established, LPP cannot be overridden by competing private or public interests in disclosure. This feature of LPP is important because it recognises that any uncertainty or conditionality in the protections offered by LPP can undermine its purpose in encouraging businesses and citizens to be candid when taking legal advice.

This means that the processes and procedures around LPP need to be carefully designed to ensure there is confidence in the protections provided. In that context, we note that the JFTC draft guidelines do not currently appear to include information on whether the Determination Officer holds a duty of confidentiality for any documents that they may see during an investigation. The rules also do not appear to clearly state the position in situations where the Determination Office cannot decide whether the materials are a specific communication or not. While the procedure allows for the material to be returned to the investigation officer and for the entity to file an application, it is not clear whether the investigation officer may inspect the material pending the outcome of either the entity’s action for revocation of the rejection, under the Administrative Case Litigation Act 139/1962, or pending the outcome of the entity’s formal objection under Article 22(1) of the Inspection Regulations. It may be useful to consider express provisions that clarify the position in both these situations.

Conclusion

The measures proposed by the JFTC in respect of investigations into restraint of trade investigations under the leniency programme are a much-anticipated development. The proposals, if implemented, would provide a valuable opportunity to observe the benefits to society that flow from LPP, strengthening the right to communicate fully and frankly with a lawyer and further enhancing Japan’s high regard for the rule of law. The Law Society of England & Wales strongly believes that these benefits will continue to accrue as the scope of LPP is increased and would support further measures to do so.