CONSEIL NATIONAL DES BARREAUX
LES AVOCATS

To: Japan Fair Trade Commission
Opinion of the French National Bar Council ("CNB")
on the draft of the amendment of the JFTC rules, submitted on 13 May 2020

The law which created the CNB states that it represents all the lawyers practicing in France as advocates (hereinafter referred to as "lawyers").

As mentioned in our previous contribution to JFTC in May 2017, the protection of *« professional secrecy»* under French law is a principle of public policy.

This principle naturally results in an unconditional and unlimited obligation for lawyers not to disclose any confidential information given to or by their clients, under penalty of seeing their criminal liability triggered (Article 226-13 of the French Criminal Code : *"The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of €15,000"*).

If so, disciplinary sanctions may also be pronounced against the lawyer pursuant to Article 2.1 of the French National Internal Regulation of the legal profession.

Moreover, this duty to protect professional secrecy applies to the investigators of the French Competition Authority ("FCA"), when conducting dawn raids within companies benefiting from legal advice. Indeed, any document whose author or recipient is a lawyer is covered by professional secrecy and cannot therefore be consulted nor seized by these investigators.

This substantive right deriving from the lawyer's status itself justifies the broad material scope of French lawyers' professional secrecy, which covers all confidences that the lawyer may have received due to his or her status or profession, whether in the field of counselling or litigation[1].

This includes not only the client's confidences, but also information received from third parties in the context of the client's case or litigation[2], as well as anything that the client may have observed, discovered or deduced from his or her professional activity[3].

[1] Article 66-5 of Act No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions provides indeed provides that *"In all areas, whether with regard to advice or in the matter of defence, written opinions addressed by a lawyer to his / her client or intended for the latter, correspondence between the client and a lawyer, between the lawyer and other lawyers with the exception for the latter of correspondence marked "official", meeting notes and, more generally, all documents held in a file are covered by professional secrecy".*
[2] Paris Court of Appeal, November 30, 1994.
[3] Paris Court of Appeal, November 30 1994, D. 1999. 230; Court of Cassation, Criminal Chamber, March 2, 2004 n° 03-85.295; Paris Court of Appeal, 14th chamber, November 13, 1979.

Nonetheless, it should be noted that the protection conferred by professional secrecy ceases in the event of the voluntary surrender to the authorities by the client of documents covered by professional secrecy and is, in fact, weakened if:

- the investigators become aware, during a search, even a cursory one, of elements covered by professional secrecy;
- documents covered by professional secrecy have been widely distributed within the company (and *a fortiori* beyond the circle of the company concerned)

Therefore, in practice, the approach adopted by the FCA towards documents covered by professional secrecy is in some aspects similar to the one followed by the Japan Fair Trade Commission within its Amendment of the Antimonopoly Act.

First, the Whirlpool case[4] introduced a shift in the French judge's analysis towards a more Anglo-Saxon concept of the secrecy of attorney-client correspondence.

In this case, the Paris Court of Appeal ruled, with respect to the emails exchanged between the company's lawyers, that, although they did not originate from or were not addressed to a lawyer, they nevertheless reflected a defence strategy put in place by the company's lawyers. As a result, the Paris Court of Appeal considered that their being referred to in the proceedings constituted a breach of *"legal privilege".*

Second, through an ex-post examination by the judges of the content of electronic mailboxes seized by FCA's investigators, the Versailles Court of Appeal held in the *Janssen Cilag* case that electronic messages were technically *"unbreakable"* by their nature, and therefore constituted a single document to be seized by the FCA – regardless of their author or recipient (Versailles Court of Appeal, Order February 19 2010, nº 09/0435).

Nevertheless, French case law has enshrined the possibility for companies subjected to an investigation to obtain the return of the seized messages covered by professional secrecy, and thus the need for the judges to identify individually the protected communications because of their content.

In this context, the company has to inform the judge of the messages covered by professional secrecy and to disclose their content. It cannot simply cite the name of the file to claim its exemption; the commercial division of the Court of Cassation held that the mere mention of the lawyer's name on the file does not create a presumption that it is covered by professional secrecy (Cass. com. July 7, 2015, no. 14-15.965). The judge must exercise effective control over each of the documents alleged to be covered by secrecy.

The Court of Cassation has on several occasions validated the approach consisting in cancelling the seizure of only the electronic communications covered by professional secrecy,

[4] Paris Court of Appeal, November 8, 2017, nº 14/13384. An appeal before the Court of Cassation is pending against this decision.

with a prohibition for the FCA to make use of them, and not the entire operations of visits and seizures.

For example, in its *Tech Data France* judgment[5], the Court of Cassation held that *"the First President rightly limited the cancellation of the seizure to certain documents covered by professional secrecy between lawyer and client, and held that in the absence of possible restitution, the French competition authority will not be able to report it, since the irregular seizure of certain files or documents, from which it has rightly drawn the consequences with regard to the technical constraints linked to the unbreakable nature of the messaging systems in question,* ***has no effect on the validity of all the inspection operations and other seizures****".*

The French National Bar Council wishes to highlight the necessity of providing Japanese companies with a similar mechanism to challenge the Determination officer's decision regarding the protection of seized documents.

Beyond the notion of electronic communications, companies benefit from an autonomous action provided for in Article L. 450-4 of the French Commercial Code, in order to challenge the conduct of dawn raids and in particular the seizure of protected documents:

> *"The conduct of dawn raids may be appealed against before the first president of the court of appeal in whose jurisdiction the judge authorized them, in accordance with the rules laid down in the Code of Criminal Procedure. The Public Prosecutor's Office, the person against whom the order of the of the liberty and custody judge was issued and the persons implicated by means of documents seized during these operations may lodge this appeal. The appeal shall be formalized by declaration to the Registry of the Judicial Court within ten days of the delivery or receipt of the report and inventory or, in the case of persons who have not been visited and seized and who are defendants, from the date on which they received notification of the report and inventory and, at the latest, from the date of notification of the complaint".*

Although the Court of Cassation requires a distinctive identification of protected documents as being from or originating from a lawyer, the French National Bar Council also wishes to point out that the formalistic rules provided in the draft Amendment of the Antimonopoly Act seem to be contrary to the imperative of protecting professional secrecy.

In particular, the mandatory mention of a *"legal advice on cartel matters"* appears to be burdensome, both for lawyers and for companies. It could also discourage companies from seeking legal advice, as such indication could appear as self-incriminating in the eyes of JFTC's investigators. An alternative would be to only require the express and visible mention on the document[6] that it "**concerns the preparation of the company's defence in a litigation**".

[5] Cass. crim., December 20, 2017, nº 16-83469.
[6] See in this respect the AKZO-Nobel ruling of the General Court of the European Union of September 17, 2007 (Joint cases T-125/03 and T-253/03).