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Ref. JFTC Draft Rules, Policy and Guidelines With the Amendment of the Antimonopoly Act

Dear Sir,

We have pleasure in enclosing a joint submission on behalf of the Antitrust Litigation and the Cartels Working Groups of the Antitrust Committee of the International Bar Association (IBA).

The Co-chairs and representatives of the Antitrust Committee would be delighted to discuss the enclosed submission in more detail with the representatives of JFTC.

Yours sincerely,

Daniel G. Swanson

Co-Chair Antitrust Committee

Thomas Janssens

Co-Chair Antitrust Committee

IBA ANTITRUST COMMITTEE COMMENTS ON JAPAN FAIR TRADE COMMISSION'S DRAFT RULES, POLICY AND GUIDELINES WITH THE AMENDMENT OF THE ANTIMONOPOLY ACT

I. INTRODUCTION

The International Bar Association (IBA) is the world's leading organization for international legal practitioners, bar associations and law societies. It is interested in the development of international law reform and seeks to shape the future of the legal profession throughout the world by providing assistance to the global legal community.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, the IBA is in a unique position to provide an international and comparative analysis in this area since it unites jurisdictional backgrounds and professional experience spanning all continents. Further information on the IBA is available at http://ibanet.org.

The Antitrust Litigation and the Cartels Working Group ("Working Groups") jointly commend the Japan Fair Trade Commission ("JFTC") for its efforts to improve the transparency of the JFTC's work through its draft guidelines, policy and rules with the recent amendments to Japan's Antimonopoly Act ("AMA") ("Draft Rules and Guidelines"), and welcomes JFTC's reinforced willingness to incorporate better practices such as protection of confidential communications between a company and its attorneys. We offer these Comments in the hope that they will assist JFTC in further refining the Draft Rules and Guidelines.

II. EXECUTIVE SUMMARY

This submission offers comments and suggestions regarding certain sections of the Draft Rules and Guidelines, considering approaches adopted by key jurisdictions regarding such practices. In particular, the Working Groups respectfully propose that JFTC considers the following proposed changes to enhance further transparency and legal certainty of the Draft Rules and Guidelines:

1. Reduce restrictions to legal professional privilege (LPP), concerning the nature of proceedings and documents covered and formal conditions;
2. Include a Leniency plus policy;
3. Reconsider the strict division between applications before/after the investigation start date;
4. Recommend the adoption of a variable system instead of a partially fixed system when assessing the value of cooperation;
5. Apply attorney-client privilege to all proceedings;
6. Reconsider the exclusion of documents that state facts from the list of those which may be covered by LPP;
7. Do not grant the benefit from LPP exclusively due to labels, storage or to whom it is addressed.
8. Reconsider the limitations of LPP to foreign lawyers;
9. Reconsider the timeframe for the submission of privilege claims and provide more security to the documents provided in case of any disagreement about legal privilege;
10. Reconsider the transfer to the investigator in order to provide legal certainty
11. Reassess the possibility of transferring objects to a case investigator when the applicability of the confidential treatment is unclear.

III. RESPONSE TO THE GUIDELINES

With the purpose of contributing to the improvement of the Draft Rules and Guidelines, this submission offers the following comments regarding specific sections, and other important considerations that reflect the experiences of other jurisdictions.

Draft Rules on Reporting the Facts and Submitting the Materials Regarding Immunity from or Reduction of Surcharges (Attachment 1)

The central document in the EU with regard to leniency is the Notice by the European Commission on immunity. The most recent version is dated 8 December 2006. In the Notice the Commission states that cooperation by participants to detect cartels has an intrinsic value. It warns though that leniency submissions should be protected from discovery in (civil) damages claims: *These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.* So leniency applicants can be immune from fines and their leniency submissions are protected from civil discovery in private litigation. This protection from discovery has been enshrined in EU law in the 'Damages Directive' (2014/104/EU).

The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in a cartel. In the Notice, the conditions are laid out to either grant a total immunity from fines or a reduction thereof. Total immunity requires that the leniency applicant is the first to submit sufficient information either to enable the Commission to carry out a targeted inspection in connection with the alleged cartel, or to find an infringement of Article 101 TFEU in connection with the alleged cartel. If the criteria for total immunity are not met, a reduction can be granted if the leniency applicant can provide evidence which represents significant added value to the evidence already in the possession of the Commission. Only the addressees of a so-called Statement of Objections (preliminary stage to the final decision of the Commission) can have access to corporate statements submitted in order to qualify for application of leniency. This access is limited for use in the administrative proceedings only.

Section 6 – Reporting the Facts and Submitting the Materials Prior to the Investigation Start

Date

Section 7 – Reporting the Facts and Submitting the Materials on or after the Investigation Start Date

The Draft Rules and Guidelines regarding the reduction system for cooperation in investigation is congruent with the EU rules. Total immunity is granted to the first applicant, provided of course that the information provided is sufficient. All other applicants can apply for a reduction of fines, the amount of which is calculated by applying the following criteria: (i) the report must be detailed and concrete; (ii) it must include all relevant materials contributing to revealing the truth of the case; and (iii) it must be corroborated by materials submitted by the applicant.

All in all the system to be used in Japan is not materially different from the one used in EU. Albeit it appears that any leniency submissions would not be protected from use other than in administrative proceedings.

The Draft Rules and Guidelines propose a strict division in applying before and after the investigation date. Before the investigation date, the first applicant will receive total immunity. The second 20%, the third to fifth 10%, the sixth and later applicants 5%. All discounts can be higher (up to 40%) depending on the willingness of applicants to cooperate in the investigation.

After the investigation date, the first 3 applicants will receive 10%, and any later applicants 5%. All discounts can be higher (up to 20%) depending on the willingness of applicants to cooperate in the investigation.

In this sense, the main difference between the European and the draft Japanese rules is the amount of fine reduction. In the EU system there is no strict division in before and after the investigation. Immunity is granted if the enterprise has requested leniency before the Commission had any evidence to start any investigation. So that is slightly different than in Japan, where the cutoff point is simply whether or not any investigation has started already. Any subsequent applicants (irrespective of the dates on which the enterprise applied) will be able to enjoy a reduction of fines. The first undertaking to provide significant added value, a reduction of 30-50%; the second 20-30%; and any subsequent applicant up to 20%. Similarly in Australia, full immunity may be granted to the first applicant generally if, at the time an application is received, the Australian Competition and Consumer Commission ("ACCC") is not already in possession of evidence that is likely to establish at least one contravention arising from the cartel conduct.[1]

[1] 'ACCC immunity and cooperation policy for cartel conduct', para. 24 (https://www.accc.gov.au/system/files/1579_ACCC%20immunity%20%26%20cooperation%20policy%20for%20cartel%20conduct%20-%20October%202019_FA.pdf)

The Leniency Regime ("Regime") of India has been in force since 2009.[2] The Competition Commission of India ("CCI") during the continuance of the enforcement of the Regime encountered a few challenges. In mitigating such challenges, it brought out a few Amendments in 2017 ("Amendments").[3] Individuals within an enterprise, who may have been responsible for or contributed to the cartel conduct on behalf of the enterprise in their own capacities, were brought within the ambit and scope of the amendments. In the absence of such inclusive provision in law, the CCI was unable to grant equivalent immunities to them even though the enterprises, with which they were associated with, were granted appropriate immunities on merits.[4] Opposite parties were not part of the Original Regulations and omitting them from the definition clause raised fundamental questions in law hence amendments remedied the challenge.[5]

Brazilian leniency rules also do not set forth a strict division regarding applications before/after the investigation start date and focus on the whether or not the authority has sufficient evidence of the practice and grants immunity only to one applicant.[6]

The Working Groups respectfully understand that the JFTC should reconsider the strict division between applications before/after the investigation start date.

[2] Section 46 of the Competition Act, 2002 read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (Original Regulations)
[3] The Competition Commission of India (Lesser Penalty) Regulations (as amended) (Amended Regulations 2017)
[4] Regulation 2(b) of the Amended Regulations 2017 read with Section 48 of the Competition Act, 2002
[5] Regulation 2(ga) of the Amended Regulations 2017
[6] See CADE's Antitrust Leniency Guidelines available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf

Draft Guidelines to Reduction System for Cooperation in Investigation (Attachment 2)

Section 1 – Purposes

The Draft Rules and Guidelines have proposed a partially fixed system to account for how the JFTC would credit a company's contribution to revealing the truth of the case (i.e., reduction rates based on the "degree of contribution") under the Reduction System for Cooperation in Investigation, an element newly introduced to the JFTC's new leniency program in June 2019 by the AMA amendment. As proposed, additional to the fixed rates based on the order of a company's application, the JFTC would determine the reduction rates based on the "degree of contribution" by measuring the content of the company's report to the JFTC against three factors listed in Section 4. (1) in Attachment 2.[7]

The Working Groups commend the JFTC for providing transparency to how it proposed to determine the "degree of contribution," a concept left undefined by the Amendment, but respectfully recommends that the JFTC reconsider the merits and limitation to having a partially fixed system versus a variable system in measuring the value of cooperation. In the United States, the U.S. Department of Justice Antitrust Division ("Division") measures the value of cooperation from second-in and subsequent cooperators through a more flexible system than that proposed by the JFTC. As explained by the Division, "[i]*f the Division were to establish an absolute, fixed discount for second-ins without consideration of these types of variables, then the need for proportionality would be sacrificed for increased transparency*."[8] It is important to recognize that a company's contribution might vary greatly from case to case, in the "*nature and extent to which the cooperation advanced the investigation*," as well as "*whether the cooperation earned Amnesty Plus credit for disclosing undetected cartel offense*"[9]—another element missing in the JFTC's new leniency program as discussed below.

A system such as the one used by United States focuses more on the value of cooperation rather than starting with a higher cooperation discount based solely on timing of acceptance of

[7] The three factors are "[w]hether or now the content of the Report (etc.) provided by Reporting (etc.) Enterprises: (i) is detailed and concrete; (ii) includes all the relevant materials 'contributing to revealing the the true of the case' as stipulated in the JFTC's rules; and (iii) is corroborated by materials submitted by the Reporting (etc.) Enterprise." Section 4. (1), Guidelines to Reduction System for Cooperation in Investigation (Amendment 2), *available at* https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/200402a2.pdf.

[8] *See* Scott Hammond, Deputy Assistant Attorney General, U.S. Dep't of Justice, *Measuring The Value Of Second-In Cooperation In Corporate Plea Negotiations*, speech at The 54th Annual American Bar Association Section of Antitrust Law Spring Meeting (Mar. 29, 2006), *available at* https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations.

[9] *Id.*

responsibility. As an example, under the proposed system in Japan, the third company to cooperate with an investigation could provide significantly more information about the cartel, which expands the products, geographic and temporal scope of the investigation, yet still is likely to receive less credit than the second-in cooperator.

Other jurisdictions base their decisions for sanction reductions for second in and subsequent applicants in both the value of the cooperation and the number in line. Although limits for those reductions are expressly stated in the Law. This is the case for example of Mexico, where second in applications have been a very important source of cooperation.

Similarly in Australia, sanction reductions for subsequent applicants are assessed according to "*the extent and value of the party's cooperation*". This is determined by reference to a number of factors, including "*whether the party approached the ACCC in a timely manner*", and "*whether the party provided significant evidence regarding the cartel conduct, which was previously unknown to the ACCC or has materially advanced the ACCC investigation*".[10]

Likewise in Brazil, the reduction granted to a given applicant cannot be higher than the one granted to any of those who have come forward before. Brazil also limits the discount of the second in line to 50%, gives up to 40% to the third and no more than 25% to additional applicants. Criminal immunity is also restricted to the first applicant.[11]

The Indian Original Regulations also prohibited filing of fourth application and beyond[12] and such prohibition delayed the investigation, which commenced at the behest of the first application and strengthened by second and third later. During the course of implementation of the regime the CCI realised that unless the restriction is lifted by introducing an enabling provision, the willing applicants beyond the third applicant may continue to challenge the regime and delay the investigation nullifying the intent.

For these reasons, the Working Groups respectfully suggest that the JFTC adopt a variable system, instead of a partially fixed system when assessing the value of cooperation.

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[10] 'ACCC immunity and cooperation policy for cartel conduct', para. 93 and 95 (https://www.accc.gov.au/system/files/1579_ACCC%20immunity%20%26%20cooperation%20policy%20for%20cartel%20conduct%20-%20October%202019_FA.pdf)

[11] *See* CADE's Settlement Program for Cartel Cases available at http://en.cade.gov.br/topics/publications/guidelines/guidelines_tcc-ingles-final.pdf

[12] Regulation 4(c) (ii) of the Amended Regulations 2017

Considerations on Leniency Plus

The JFTC could also consider including in the Draft Rules and Guidelines a "leniency plus" policy in the JFTC's evaluation of additional reduction rates. In the United States, the DOJ's Leniency Program has a "Leniency Plus" policy, which gives a company under investigation additional credit for self-reporting an additional antitrust offense.[13] In that case, the company under investigation gets leniency for the additional antitrust conspiracy and a further sentencing reduction for reporting the additional conspiracy. Since the 1990s,[14] the DOJ has effectively utilized this policy to incentivize more self-reporting and assistance in government investigations by companies. The DOJ has estimated that the leniency plus program is likely to have accounted for approximately half of all reported cartels.[15]

As illustrated in the DOJ's guiding documents, a company may in its internal investigation in relation to conspiracy A uncovers information of its executives' participation in Conspiracy B, which the government has not yet detected, and it may seek leniency with respect to Conspiracy B, plus the DOJ's recommendation for a "substantial assistance departure" in the court's calculation of the company's fine for its participation in Conspiracy A to account for the company's truthful, full, continuing, and complete cooperation with the government.[16] This usually happens when a company is too late to obtain leniency for the conspiracy for which it is under investigation. The DOJ expects a high level of cooperation for the company to earn its "leniency plus" and to create incentives for companies to self-report yet-undetected conspiracies.

Following the U.S. success in incentivizing more self-report through this mechanism, more jurisdictions have adopted similar "leniency plus," "amnesty plus," or "immunity plus" programs.

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[13] *See* U.S. Dep't of Justice, *Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters* at 9 (updated Jan. 26, 2017), *available at* https://www.justice.gov/atr/page/file/926521/download.

[14] The DOJ has articulated how its "leniency plus" policy works as early as in 1999. *See* Gary Spratling, Deputy Assistant Attorney General, U.S. Dep't of Justice, *The Antitrust Division's Corporate Leniency Policy -- An Update*, speech at The Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), *available at* https://www.justice.gov/atr/speech/making-companies-offer-they-shouldnt-refuse-antitrust-divisions-corporate-leniency-policy.

[15] Leah Nylen, *'Leniency Plus' accounts for more than half of the DOJ cartel leniency applications, official says*, MLex (Jan. 25, 2018), *available at* http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=957586&siteid=191&rdir=1.

[16] The DOJ measures the "substantial assistance" and how much credit a company receives for reporting an additional conspiracy depend on a number of factors: (1) the strength of the evidence that the cooperating company provides with respect to the leniency investigation; (2) the potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of coconspirator companies and individuals; and (3) the likelihood that the Division would have uncovered the additional violation without the self-reporting, e.g., if there were little or no overlap in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Leniency Plus matter, then the credit for the disclosure will be greater. Of these three factors, the first two are given the most weight. *See Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters* at 10.

For instance, in South Korea, [17] the KFTC reduces surcharges if a company that is under investigation and will be punished for A cartel discloses B cartel, it will get leniency for not only B cartel (100%) but also A cartel (20-100%). In Switzerland,[18] the COMCO reduces up to 80% of the sanction if a company voluntarily provides information or submits evidence on another hard-core violation. In Hong Kong,[19] the HKCC reduces up to 10% off the recommended pecuniary penalty for the first cartel if a company cooperates with the HKCC in a cartel investigation and come first to disclose the existence of another cartel. Such programs allow the agencies to further incentive reporting and detection of cartels and enhance enforcement in a broader sense. Australia has a similar Amnesty Plus program which enables the ACCC to recommend to a court further reductions of the civil penalty if a party cooperates and is the first to disclose the existence of a second unrelated cartel.[20] In Brazil, the leniency plus provision was key for the antitrust authority to identify multiple additional cases in the context of the Car Wash and auto parts investigations. After the first agreement was reached, defendants were incentivised to report additional cases in exchange of substantial fine reductions in the first investigation and immunity in the additional cases reported.[21]

Accordingly, the Working Groups recommend JFTC to consider including, to the extent possible, a discussion on leniency plus in the Rules and Guidelines to further incentivize self-reporting.

Draft Guidelines on Treatment of Objects Recording Confidential Communications Between an Enterprise and an Attorney (Attachment 4)

Section I – Introduction

The Draft Rules and Guidelines provide that legal professional privilege ("LPP") should apply only in relation to alleged acts to which the leniency procedure may apply (i.e., cartel cases).

[17] *See* Korea Fair Trade Comm'n, *Cartel Leniency Program in Korea* at 7, *available at* http://www.ftc.go.kr/DATA/download/eng/Quick_Link/Leniency%20Program%20of%20Korea.pdf.
[18] *See* ICN Anti-Cartel enforcement template: Switzerland (last updated Jul. 3, 2013), *available at* https://www.weko.admin.ch/dam/weko/en/dokumente/2013/07/icn_anti-cartel_enforcementtemplate.pdf.download.pdf/icn_anti-cartel_enforcementtemplate.pdf.
[19] *See* Press Release, Hong Kong Competition Commission, *Competition Commission Publishes Cooperation and Settlement Policy* (Apr. 29, 2019), *available at* https://www.compcomm.hk/en/media/press/files/20190429_Competition_Commission_Publishes_Cooperation_and_Settlement_Policy_Eng.pdf.
[20] 'ACCC immunity and cooperation policy for cartel conduct', para. 103 to 108 (https://www.accc.gov.au/system/files/1579_ACCC%20immunity%20%26%20cooperation%20policy%20for%20cartel%20conduct%20-%20October%202019_FA.pdf)
[21] *See* CADE Statistics on Leniency Cases available at http://en.cade.gov.br/topics/leniency-program/statistics

A comparison with the EU regime suggests that the JFTC's proposed rules on LPP, while constituting a step in the right direction, may still be too restrictive in some aspects, for example as regards the nature of proceedings covered, the types of documents benefiting from the protection, the formal conditions for a document to benefit from protection, and some of the procedural aspects of claiming LPP.

In jurisdictions including the United States, attorney-client privilege is one of the oldest evidentiary principles "*founded upon the necessity, in the interest and administration of justice, and the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure*."[22]

Similarly, in the EU LPP is considered to be a fundamental principle and an essential corollary to the exercise of the right of defense.

While no law or regulation provided for LPP in the EU, in the *AM & S* case in 1982, the Court of Justice ("CJEU") found that EU law "*must take into account the principles and concepts common to the laws of those states concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client*". The Court found that LPP was rooted in the idea 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*."[23] It also went on to affirm that "*care is taken to ensure that the rights of the defense may be exercised to the full, and the protection of the confidentiality of written communications between lawyer and client is an essential corollary to those rights*."[24] These sentiments have more recently been supported in the CJEU's *Akzo Nobel* judgment of 2010.[25]

In *Michaud*, the European Court of Human Rights ("ECtHR") held that "*legal professional privilege is of great importance for both the lawyer and his client and for the proper administration of justice. It is without a doubt one of the fundamental principles on which the administration of justice in a democratic society is based*".[26]

In the context of the ACCC's enforcement powers, the High Court of Australia has similarly recognised that "*legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity.*"[27] Respect for the

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22 Hunt v. Blackburn, 128 U.S. 464, 470 (1888).
23 Case C-155/79 – *AM & S v Commission*, ECLI:EU:C:1982:157, para. 18.
24 Id., para. 23.
25 Case C-550/07 P – *Akzo Nobel & Akcros Chemicals Ltd v Commission*, ECLI:EU:C:2010:512.
26 ECtHR, *Case of Michaud v. France*, Application no. 12323/11, para. 123.
27 Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission (2002) 213 CLR 543, 553 [11].

principles of legal professional privilege is now enshrined in Australia's competition and consumer legislation.[28]

In Brazil, the broad invalidity of evidence resulting from attorney-client communication has been reaffirmed by Courts[29] and is key to building trust among potential applicants that the preliminary discussions with their attorneys regarding the application and also the reports on internal investigations will not be used by authorities if an agreement is ultimately not reached. Reducing this privilege would create an incentive not to carry out internal investigations and discuss the results with attorneys.

The Working Groups respectfully recommend that the JFTC consider expanding LPP benefits to all proceedings, instead of acts to which the leniency procedure may apply only, in order to protect the full exercise of defense rights.

Section II.1 – Objects recording contents of the Specified Communications

The Draft Rules and Guidelines state that the following categories of documents may be covered by LPP:

1. Consultation document from the company to its attorney;
2. Response by the attorney to the consultation document;
3. Reporting document restating the legal advice of the attorney; and
4. Notes from an internal meeting that reports on the discussion with an attorney.

By contrast, the Draft Rules and Guidelines exclude documents that state facts, such as internal reports prepared by company officers for the purpose of seeking legal advice, or even records of interviews conducted by outside attorneys.

Under EU law, the following three categories of documents/information are protected by LPP:

1. Written communications with an independent, EU-qualified lawyer made for the purposes and in the interests of the exercise of the client's rights of defense in antitrust proceedings.[30] This includes memoranda drafted by attorneys, as well as records of interviews of company officers conducted by attorneys, unlike what the Draft Rules and Guidelines propose;

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28 Competition and Consumer Act 2010 (Cth) s 155(7B).

29 STF: HC 91867/PA, Justice-rapporteur Gilmar Mendes, p. 24; STJ: HC 59.967/SP, Justice-rapporteur Nilson Naves, p. 9.; TRF-4: CCR 5002108-66.2018.4.04.7200 SC, Judge-rapporteur Leandro Paulsen.

30 Case C-155/79 – *AM & S v Commission*, ECLI:EU:C:1982:157, para. 34.

2. Internal notes circulated within a company reporting on the content of communications with an independent, EU-qualified lawyer containing legal advice;[31]
3. Working documents and summaries prepared by the client, provided that they were drawn up exclusively for the purpose of seeking legal advice from an independent, EU-qualified lawyer.[32]

The scope of protection as provided by the Draft Rules and Guidelines is consequently limited in comparison to the EU regime. The exclusion of documents prepared by the company for the purpose of receiving legal advice from outside counsel and of interview reports prepared by outside counsel weakens the protection and will significantly hamper the company's ability to freely seek legal advice in most circumstances, especially in cartel cases where interviewing employees is fundamental to preparing a defense.

The Working Groups respectfully suggest that JFTC reconsider the exclusion of such documents from the scope of protection.

Section II.2. – Appropriate custody
Section II.3. – Submission of the "application" and the "log"

Under the Draft Rules and Guidelines, LPP is only available for documents and communication that have been labeled and stored following specific procedures. In addition, the Draft Guidelines appear to limit protection to documents addressed to a certain person in the company only.

In the EU, it is normal practice for legally privileged documents to be labeled "Privileged & Confidential" or "Privileged & Confidential - Communication to/from EU External Counsel". The purpose of this labeling is to facilitate the identification of documents covered by LPP in the context of large e-discoveries, dawn raids, etc.

However, crucially, whether or not a document can benefit from LPP in the EU does not depend on its labeling, storage or to whom it is addressed. Such formalism would affect the essence of legal protection, cause an undue burden on companies and hinder their rights of defense if any document on which labeling was missing, or which was not stored appropriately, could be viewed freely by the authorities.

Legal privileges between external counsels and the parties are protected in India under the Indian

31 Order in Case T-30/89 – *Hilti v Commission*, ECLI:EU:T:1991:70.
32 Case T-253/03 – *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:T:2007:287.

Evidence Act.[33] Besides foregoing, the confidentiality protection granted by the CCI while directing the office of the Director General ("DG") to commence the investigation, however, posed a serious impediment to the DG as no "confidential" document of applicants could be shown/exhibited to the opposite parties confronting them with such documents during oral testimonies on oath. It led to permitting the DG to have limited power to waive confidentiality with prior permission of the CCI and suitable amendments were introduced in the amendments.[34] Pursuant to this relaxation, the opposite parties – both leniency applicants and non-leniency applicants – were granted right to inspect the non-confidential documents, forming part of the DG's Investigation Report, submitted to the CCI by the DG by adhering to the due process provided in this behalf by law.[35] Applicants in the Original Regulations were mandated to disclose the estimated volume of business affected due to cartel which has been amended to limit such information to volume of business affecting Indian markets only.[36] Applicants on successful filing of the application shall cease to participate in the cartel unless expressly directed by the CCI not to do so. This exceptional provision may help avoiding tampering with the evidence lying with the co-cartel members thereby enhancing additional benefits to the DG during dawn raids, if any. [37]

The Draft Rules and Guidelines have also proposed strict requirements on separate custody and timely identification of files for which a company seeks protection of their confidentiality. The Working Groups urge the JFTC to consider the practical difficulties for a company to comply when a large number of electronic files could have been seized such as in dawn raids. Especially because the JFTC proposes to exclude protection of certain objects and leaves such determination to case investigator whenever in doubt, the Working Groups respectfully suggest that JFTC should allow companies enough time to comply and do not apply LPP based strictly on labels or formal aspects.

[33] Section 126 of the Indian Evidence Act, 1872
[34] Proviso to Regulation 6 of the Amended Regulations 2017
[35] Regulation 6A of the Amended Regulations 2017
[36] Schedule (g) of the Amended Regulations 2017
[37] Regulation 3(a) of the Original Regulations

Section II.4 – Other

The Draft Rules and Guidelines have proposed a mechanism to protect confidential communications between a company under the JFTC's investigation and its "independent attorneys," which as explained in Note 5, excludes "foreign lawyers and registered foreign lawyers (including the corporations of the registered foreign lawyers)." Nevertheless, the Draft Guidelines provide that legal advice from foreign lawyers about foreign competition laws can benefit from the protection, unless they contain primarily fact-finding material or are otherwise considered necessary for the investigation.

The Working Groups urge the JFTC to reconsider this exclusion and its harm to the true meaning of privilege and impact on proceedings in other jurisdictions.

As companies obtain a full-picture legal advice that might necessarily include communications with foreign attorneys, it is hard to justify the denial of protection which would be accorded fully elsewhere, as is the case in the United States. This exclusion rule does not only add administrative burden for companies to strictly separate its communications with counsel by jurisdiction, but also it creates uncertainty on the privilege of such communications in other jurisdictions. In the United States, for example, there is a lacking binding judicial precedent on whether the privilege is waived when a company is ordered to disclose attorney-client communications by non-U.S. government authorities.

Also, the Working Groups suggest that the most effective way of eliciting true and unvarnished communication is to eliminate any inhibition or apprehension in discussing a legal issue with a lawyer. Consistent with that belief, these rules should clearly state that communications with lawyers about misconduct, regardless of where they are based, should be subject to the privilege. In our experience the attorney-client privilege helps detect—rather than conceal—antitrust violations.

In the EU, legal advice from non-EU qualified lawyers does not benefit from the LPP protection.

However, in practice, the Commission has sought to resist the discovery of EU-privileged documents in US litigation on comity grounds.[38]

[38] F. Enrique González-Diaz and P. Stuart, "Legal Professional Privilege under EU law: Current Issues" (2007) 3 Competition Law & Policy Debate, 56, 57; See also: Letter of Georg De Bronett, Head of the Commission's Cartel Unit, In re Vitamins Antitrust Litig., 2002 U.S. Dist. LEXIS 26490, No. 99- 197, 8 (D.D.C. Jan. 23, 2002) and 25815 (Dec. 18, 2005), referred to in Samuel R. Miller, Kristina Nordlander, and James C. Owens, "U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials", CPI Antitrust

Furthermore, in multi-jurisdictional merger control proceedings, the European Commission often treats communications involving US-qualified external legal counsel in the same manner as communications with EU-qualified external legal counsel for LPP purposes, insofar as these relate to proceedings under the Merger Regulation.[39]

To do otherwise would compromise the exercise of the company's rights of defense in the context of multi-jurisdictional proceedings that often involve substantive legal advice from non-EU external legal counsel. Denying LPP protection solely on the ground that the external legal counsel concerned is US- or foreign-qualified, as opposed to EU-qualified, appears to be a formalistic argument that is no longer valid in the current context of global merger control proceedings or cartel investigations.

In this regard, the fact that the Draft Rules and Guidelines afford some protection to foreign lawyers advising on foreign competition laws is helpful. However, the limitation imposed on that protection, namely the exclusion of fact-finding material and documents necessary for the JFTC investigation, may render this protection moot in practice, and at the very least make the protection very unsafe. Therefore, the Working Groups respectfully recommend JFTC to reconsider the limitation imposed to the personal scope of LPP protection.

The International Bar Association (IBA) supports the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney and encouraging clients to discuss their legal matters fully and candidly with their lawyers to ensure compliance, access to justice and open discussions with the authority and the complete competition system. According to the IBA's view attorney-client privilege helps the enforcers and will not impede investigations and promotes observance of the law and the justice system.

Section IV.2 – Determination procedures

The Draft Rules and Guidelines provide for specific procedures to determine whether a document is covered by LPP. First, the company being investigated must lodge an application claiming legal privilege within two weeks of the request from the JFTC. The review of the claim is conducted by a "Determination Officer" who belongs to the Secretariat of the JFTC but does not belong to the team conducting the investigation. The Determination Officer conducts a preliminary assessment

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[39] This would also be in line with the cross-border cooperation of the antitrust agencies in the context of merger control and, in particular, the close and welcome cooperation between the US antitrust agencies and the Commission, per the US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations.

within 2 weeks and then a final assessment within 6 additional weeks. Documents eligible for protection are returned to the company while the ineligible documents are returned to the investigative team, which then notifies the company. The latter can appeal the decision.

EU law does not provide for any specific timeframe for the submission of privilege claims. The assessment is carried out on a case-by-case basis and case teams may set deadlines depending on the requirements of the case. This is similar in other jurisdictions such as Australia. The EU approach reduces the burden on the companies under investigation, which may not be able to prepare a privileged log in a short timeframe when facing requests for large amounts of documents.

In this respect, the two-week timing requirement in the Draft Rules and Guidelines to apply for LPP appears unnecessarily formalistic and may not provide for the flexibility required in global investigations.

As regards the procedure for determining whether a document is covered by LPP, there is no clear separation, in the EU, between the investigative team and the team that will handle a dispute on legal privilege. However, the EU regime provides for a number of safeguards.

First, according to the Akzo procedure,[40] when there is an unresolved dispute about legal privilege during a dawn raid, the European Commission must place the litigious documents into a sealed envelope and take them back to the Commission for further consideration.

The company claiming legal privilege can then ask the EU's Hearing Officer, who is independent from DG Competition, to examine the claim that the document being withheld by the European Commission is covered by LPP. The Hearing Officer then communicates to the Commission and the company his or her preliminary view and takes appropriate steps to promote a mutually acceptable resolution. Where no resolution is reached, the Hearing Officer may formulate a reasoned recommendation to the Commissioner for competition, without revealing the potentially privileged content of the document. A review protocol can be set up between the Commission's case team and the investigated company on an ad hoc basis in order to resolve the dispute.

Second, if the European Commission disagrees with the claim that the document is legally privileged, it is not entitled to review the content of the document until it has adopted a decision rejecting this claim. Such decision can be appealed before the General Court of the EU. If the

40 Procedure established after the Akzo ruling of the General Court (Case T-253/03 – *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECLI:EU:T:2007:287).

company brings an action for annulment and applies for interim relief within the specified time limit, the Commission will not have access to the sealed envelope until the General Court of the EU decides on the application for interim measures, and ultimately on the merits of the dispute if the interim relief is granted.

In view of the above, the Working Groups respectfully suggest that JFTC reconsider the formal timeframe for the submission of privilege claims and provide safeguards to the documents in case of any disagreement about legal privilege.

Section V.2. – Transfer to the investigator, etc.
Section V.3. – Responses to request for return by the Specified Party

The Draft Rules and Guidelines have proposed a mechanism for the Determination Officer to transfer objects, for which a company is seeking protection of confidentiality, to a case investigator when the applicability of the confidential treatment is unclear (Section V. 2), and the investigator would then "examine the necessity to retain" said objects (Section V. 3.). The Working Groups urge the JFTC to reconsider how this rule would work in practice, as it would essentially permit case investigators to intrude upon the confidentiality protection whenever the Determination Officer is in doubt.

This rule creates uncertainty for companies and their counsel on what communications would be protected. As the Supreme Court of the United States has stated, "[i]*f the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege (…) is little better than no privilege at all*."[41] Moreover, the more important communications might as well present harder cases for the Determination Officer to assess the applicability of the rule and make easier cases for the investigators to conclude that the communications are necessary for their investigation. Therefore, in effect, this rule deprives the protection that parties most sought after.

For these reasons, the Working Groups respectfully recommend that the JFTC reassess the possibility of transferring objects to a case investigator when the applicability of the confidential treatment is unclear, in order to provide legal certainty to the proceeding.

Finally, it seems important that LPP rules become more flexible as regards the nature of the proceedings, the types of documents and procedural conditions.

[41] Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

IV. CONCLUDING CONSIDERATIONS

The IBA Antitrust and Litigation Working Groups appreciate the opportunity provided by JFTC to comment on the draft guidelines, policy and rules with the recent amendments to Japan's AMA. We would be pleased to respond to any questions the JFTC may have regarding these comments, or to provide additional comments or information that may be of assistance to the JFTC.