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Rajesh "Raj" De  
Director General Counsel  
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Brussels, 28 July 2014

Dear General Alexander and Mr. De,

I write to you as the President of the Council of Bars and Law Societies of Europe (CCBE) which represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

The focus of the concern which I express in this letter is the content of the recent correspondence between Mr. James Silkenat, President of the American Bar Association (ABA), and yourself, which has been published on the ABA website. In particular, I would like to address some of the details in your letter dated 10th March, 2014, to Mr. Silkenat in response to his letter dated 20th February, 2014 in which the ABA expressed its concern regarding press reports of surveillance by foreign governments of American lawyers' confidential communications with their overseas clients and the subsequent sharing of that information with your agency.

I note that the terms of your response referred throughout to "U.S. Persons". In particular, the assurances which were given, were given in respect of such U.S. Persons and U.S. Law Firms. Mr. Silkenat's concerns had been in relation to surveillance of the communications of American lawyers with their clients, and, to that extent, it is understandable that your response should be couched by reference to U.S. persons, but, nonetheless, it does mean that the letter contained no equivalent reassurance concerning surveillance not only by foreign agencies, shared with your agency, but by your agency itself, of lawyers and clients who are not U.S. Persons. This is of great concern to the Council of which I am President.

The foundation of our liberty is the rule of law. Where the rule of law is not respected, there is tyranny, corruption and the arbitrary exercise of power: the strong prosper, the weak suffer and there is no justice. For the rule of law to operate properly, certain conditions are necessary, amongst them a strong and independent legal profession. For lawyers to be effective in defending their clients' rights, there must be confidence that communications between lawyers and their clients are kept confidential. This is a universal value, shared by all free and democratic societies. The trust between lawyer and client, whether expressed as attorney client privilege, legal professional privilege or an obligation of professional secrecy, is, at root, an assurance of due process and the rule of law.

So fundamental is the lawyer client privilege to the rule of law that it is non-negotiable. To suggest, as some have done, that there is some sort of balance to be struck between preserving lawyer-client privilege on the one hand, and a supposed need in some wider

national interest to undertake surveillance of lawyer-client communications in general, or of particular lawyer client communications, is founded upon the false premise that the privilege may to any extent be permitted to suffer derogation. In reality it is a foundation of that very society, governed by law, which it is the function of government, on behalf of the people, to defend.

The importance of due process is affirmed in article 5 of the U.S. Bill of Rights and of the right to a fair trial in Article 6 of the European Convention on Human Rights. These are values which are shared between the United States of America and the members of the Council of Europe, as is the inviolability of lawyer client communications, which form an indispensable precondition for due process and a fair trial. However, there is an important conceptual difference in how those shared values are expressed. In the United States, they are Constitutional Rights which are accorded to persons who are citizens of the United States, whereas, in Council of Europe member states, they are universal Human Rights which are inherent in persons not by reason of their citizenship, but by reason their common humanity.

The practical outworking of these conceptual differences is that the careful references in your letter to Mr. Silkenat to "U.S. Persons" and not persons in general, reflect the reality that non-US Persons do not share the constitutional rights and protections accorded to U.S. citizens and so are not encompassed within the rules and procedures to which you refer, and the reassurances which you give.

In these circumstances, I should seek your reassurance that, holding as you do the commitment which you express in the second paragraph of your letter of 10th March, 2014 to "the bedrock principle of attorney-client privilege" you accord the same protection as you do in respect of U.S. persons to such privileged communications between lawyers and their clients where those lawyers or their clients are not U.S. persons.

In particular, I should welcome clarification of the following:

1. In the conduct of its authorised and legitimate activities, does your agency intercept privileged communications between lawyers and clients where those lawyers or clients are not U.S. Persons?
2. Does it make use of such communications intercepted by other, non-U.S. agencies?
3. Does it share with such other agencies such communications which it has itself intercepted?
4. Upon what legal basis is such interception or sharing, if any, carried out?
5. In the event that privileged communications come so to be intercepted, or are intercepted inadvertently, what measures are taken to ensure that they are not read?

I further note on page 60 of the paper "Big data: Seizing opportunities, preserving values" published by the Executive Office of the President in May 2014, the Policy recommendation that privacy protections should be extended to non-U.S. Persons, as well also as the announcement on 25th June, 2014 of legislative intervention to address the gap between the protections afforded to U.S. Persons and EU persons. In light of that recommendation and the legislative proposal, I should be grateful to have clarification of how such proposed changes in U.S. law will impact upon how your agency will handle lawyer-client privileged communications where the lawyers or clients are EU persons, and whether you would

support the extension of any additional protection afforded EU persons to lawyer client privileged communications where the lawyer or client is a person who, though not an EU person, is a person subject to the jurisdiction of a non-EU Council of Europe Member State.

I seek these assurances as confirmation of the values which the free and democratic societies of Europe share with the United States of America, and our common commitment to the upholding of the rule of law.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Aldo Bulgarelli', with a long vertical line extending downwards from the end of the signature.

Aldo Bulgarelli  
CCBE President