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pour le droit & la justice

La Présidente
The President

James Brokenshire MP
Immigration and Security Minister
Home Office
2 Marsham Street
London SW1P 4DF
UNITED KINGDOM

Brussels, 19 March 2015

Dear Minister,

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.[1]

The concern which I express in this letter arises from recent reports in the media that refer to the existence of policies in the United Kingdom which permit access by staff of the Security Services of the UK (including GCHQ) to confidential lawyer-client communications. These reports suggest that, while the sensitivity of privileged material is recognised by the security services, they nevertheless regard it as legitimate, in principle, to obtain access to such communications.

These reports cause much concern to the Council of which I am President, especially as the justification for such policies is frequently presented as a "balancing" of a supposed right to confidentiality against what are presented as wider security concerns. This then admits of discussions as to how the balance should be struck. Such policies, and such justifications for them proceed upon a false premise, namely that the confidentiality of lawyer/client communications is capable of being abrogated, leaving only a question as to the circumstances in which such abrogation should be permitted.

The foundation of our liberty is the rule of law. Where the rule of law is not respected, 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 the rule of law.

The importance of the right to a fair trial is enshrined in Article 6 of the European Convention on Human Rights, as well as the common law of the UK jurisdictions. The inviolability of lawyer client communications forms an indispensable precondition for a fair trial.

[1] We are also writing in similar terms to Mr. David Lidington MP, Minister of State at the Foreign and Commonwealth Office

The Edward Report, *The Professional Secret: Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community*, prepared for the CCBE in 1975 by Sir David Edward, explained it thus:

"The purpose of the law is not to protect the lawyer or his individual client. The purpose is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his rights and, second, to ensure the fair and proper administration of justice. This cannot be achieved unless the relationship between the lawyer and his client is a relationship of confidence. The rights, duties and privileges given to lawyers are therefore an essential element in the protection of individual liberty in a free society. They exist for the public interest; they have not been created by lawyers for their private benefit."

So fundamental is the lawyer client privilege to the rule of law that it is, indeed, non-negotiable. To suggest 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.

Over the course of the last year or so, there has been the growth of a profound disquiet amongst the legal professions across Europe about the risk which the work of the security services may pose to this core value of the profession - and hence to the rule of law itself. In July and October last year, the CCBE issued statements on the subject. Its statement in October about mass data mining expressed "deep concern that a core value of the profession ... is at serious risk, and erosion of this aspect of confidentiality will erode trust in the rule of law as recognised in modern democracies".

It is appreciated that the security services have a difficult task to perform, and that, in the generality, there may be a balance to be struck between security and liberty, but the particular anxiety of the profession is that the non-negotiablity of lawyer/client privilege may not properly be recognised, leading to an attack on the very rule of law which it is the task of the state to uphold and protect.

In this regard, I view as entirely unacceptable the unlawful interception of legally privileged communications admitted by the UK government in the Belhaj case.

In these circumstances, I seek assurance from you that none of the activities of the security services of the United Kingdom will in future trespass upon this fundamental principle of the rule of law.

To that end, I seek clarification of the following matters:

1. In the conduct of its authorised and legitimate activities, which of the United Kingdom security agencies in fact intercepted confidential and privileged communications between lawyers and clients?
2. Will they continue to carry out such interception in future?

3. What, if any, is the legal basis or bases upon which the security services consider that they may access such confidential communications?

4. What are the circumstances in which the UK Government considers that it would be appropriate for them to do so?

5. Are there any policy or policies which govern such activities, and, if so, what are those policies?

6. In the event that privileged communications come so to be intercepted (or may be intercepted inadvertently) what safeguards, if any, are in place to protect the key principle of lawyer-client confidentiality?

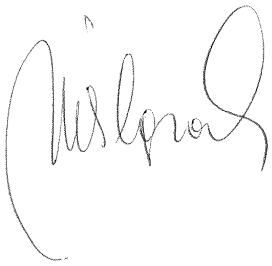
My predecessor in office, Mr. Aldo Bulgarelli, wrote several months ago expressing similar concerns to the Director of the United States National Security Agency and seeking similar clarifications as to the extent to which the NSA intercepted and made use of confidential lawyer/client communications where the lawyer or client was not a "U.S. Person." I still await a response to that letter. However, given the recent decision of the Investigatory Powers Tribunal regarding the unlawfulness up until December 2014 of the sharing of mass surveillance data between GCHQ and the NSA together with the light shed on the extent of co-operation between UK and US security agencies in the allegations in the recent case of Abdel Hakim Belhaj, I seek also clarification of the following additional matters:

7. Do the security agencies of the United Kingdom obtain or make use of confidential lawyer/client communications intercepted by foreign agencies and shared by them with UK agencies?

8. If this be the case, then I should seek similar clarification in respect of the use of such shared information as is sought in questions 2 to 6 above in respect of such confidential lawyer/client information as may be intercepted directly by the agencies themselves.

I seek these clarifications and assurances as an earnest of the values which the free and democratic societies of Europe all share and our common commitment to the upholding of the rule of law.

Yours sincerely,



Maria ŚLĄZAK
President