

## Questionnaire Q199

### Remedies to protect the right of clients against forcible disclosure of their IP professional advice

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**National Group:** Greek Group

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#### 1. Q.199 - Questionnaire

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The Groups are asked to reply to the following questions in the context of what applies or what they may consider ought to apply in their own country or by agreement between their country and others, as may be appropriate to the particular question. The responses of each Group need to be endorsed by that Group. It will be helpful and appreciated if the Groups follow the order of the questions in their reports and use the questions and numbers for their responses.

##### **Present position**

##### **Local position**

- 1.1 What protection of clients against forcible disclosure of communications relating to IP professional advice applies in your country as to such communications between clients and IP professionals within your country?

**Greek jurisdiction recognises the Attorney at Law –client privilege. It is protected by statute (article 49 of the Lawyers Code of Conduct). Such privilege has been confirmed in various cases by respective Court decisions.**

**In the Greek jurisdiction there are no provisions establishing Patent Attorney agents. Only Attorneys at Law are authorised to act as patent agents. Consequently, there is full protection of clients against forcible disclosure of communications relating to IP professional advice.**

- 1.2 What protection of clients against forcible disclosure of communications relating to IP professional advice applies in your country as to such communications between clients and third parties (such as technical experts) where their advice is required to enable legal advice related to IP to be obtained and given?

**With regard to communications between clients and third parties, there is no protection against forcible disclosure of communications, even when the advice of the third party is required to enable legal advice related to IP to be obtained or given.**

**We consider that such a protection should apply also when the advice of the third party is required to enable legal advice related to IP to be obtained and given.**

- 1.3 What protection of clients against forcible disclosure of communications relating to IP professional advice applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?

**There is no case law on this topic. In our opinion, it is of paramount importance that protection should also be extended in these instances.**

#### **Overseas communications**

- 1.4 What protection of clients applies in your country against forcible disclosure of communications applies to clients relating to IP professional advice where those communications are (a) between their local IP professionals in your country and overseas IP professionals, and (b) between clients and overseas IP professionals?

**a) We believe that, if the foreign IP adviser is bound in his country by an obligation of confidentiality, which creates privilege, the foreign IP professional will enjoy privilege to the same extent as the local IP professionals.**

**b) We believe that the same applies with respect to clients and overseas IP professionals.**

#### **Scope of protection – qualifications of IP professional advisers**

- 1.5 As to each of the following sub-paragraphs (i) to (iv) inclusive, to what category or categories (eg lawyer, lawyer/patent attorney, non lawyer patent attorney, lawyer/trade marks attorney, non lawyer trade marks attorney etc) of IP professional adviser does the client protection described in your answer to previous questions denoted below, apply or not apply, including whether your answers apply only to external advisers, or also to in-house advisers?

(i) as to 1.1. ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and IP professionals within your country?

(ii) as to 1.2 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and third parties (such as technical experts)

where their advice is required to enable legal advice related to IP to be obtained and given?

- (iii) as to 1.3 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?
- (iv) as to 1.4 ie the protection (if any) of clients which applies in your country against forcible disclosure of communications relating to IP professional advice as to those communications which are (a) between their local IP professionals in your country and overseas IP professionals, and (b) between the clients and overseas IP professionals?

**With regard to the sub-paragraphs (I) to (IV), the client protection applies only if lawyers, lawyers/patent attorneys, lawyers/trademark attorneys are involved. The client protection is not applicable if non lawyers, patent attorneys and non lawyers/trademark attorneys are involved.**

**With regard to in-house advisers (lawyers), the employer of any in-house lawyer is considered to be the lawyers' client. If the lawyer is acting as a legal adviser in participating in the communications, the client privilege protection applies.**

#### **Limitations and exceptions**

- 1.6 What limitations (eg dominant purpose test, judges' discretion to do justice etc) and/or exceptions (eg crime/fraud etc) and/or waivers apply to the protection described in your answers to previous questions denoted below?
- (i) as to 1.1 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and IP professionals within your country?
  - (ii) as to 1.2 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and third parties (such as technical experts) where their advice is required to enable legal advice related to IP to be obtained and given?
  - (iii) as to 1.3 ie the protection (if any) of clients against forcible disclosure of communications relating to IP professional advice which applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?
  - (iv) as to 1.4 ie the protection (if any) of clients which applies in your country against forcible disclosure of communications relating to IP professional advice where those communications are (a) between their local IP professionals in your country and overseas IP professionals, and (b) between the clients and overseas IP professionals?

**In relation to all of the above instances (I-IV), there is only one exception to the application of privilege by statute in Greece, namely the legislation against terrorism and organized crime.**

**With regard to waivers, as it is the clients' right to privilege and not the lawyers', the client has the right to waive the privilege and permit disclosure.**

### **Quality of protection**

#### **Local communications**

1.7 Does your Group consider that the protection described in answer to questions denoted below is of appropriate quality, or not, and if not, why not – including what are the problems in practice?

- (i) as to 1.1 ie the protection of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and IP professionals within your country?
- (ii) as to 1.2 ie the protection of clients against forcible disclosure of communications relating to IP professional advice which applies in your country as to such communications between clients and third parties (such as technical experts) where their advice is required to enable legal advice related to IP to be obtained and given?
- (iii) as to 1.3 ie the protection of clients against forcible disclosure of communications relating to IP professional advice which applies as to such communications between IP professionals and third parties (such as technical experts) where their advice is required to enable IP legal advice to be obtained and given?
- (iv) as to 1.4 ie the protection applies in your country against forcible disclosure of communications applies to clients relating to IP professional advice where those communications are (a) between their local IP professionals in your country and overseas IP professionals, and (b) between clients and overseas IP professionals?

**Our group considers that the existing protection, as described in our answer to question 1.1., is satisfactory only when considering the Greek jurisdiction.**

**As only Attorneys at Law are authorised in Greece to deal with the matters raised in the questionnaire, thus the rules on privilege applies exclusively to them.**

**Our concerns, however, are that, under the existing regime, European Patent Attorneys in Greece who only have technical background are not allowed to file patent applications and to deal with contentious cases. As a result, they are also not covered by the above-mentioned privilege.**

**In view of the above, we do wish that the Client – Attorney Privilege to be extended to cover communications also with non legal advisers or professionals.**

**We would also welcome the extension of the protection so as to also cover the questions raised in the sub-paragraphs (II), (III), (IV) of paragraph 1.5.**

**The EPC 2000 adopted on December 13, 2007 contains an article and a related rule intending to provide European Patent Attorneys with a Client – Attorney Privilege “from**

**disclosure in proceedings before the EPO in respect of communications between a professional representative and his client or any other person". The new EPC privilege, however, is covering only communications relating to handling and giving opinion in proceedings before the European Patent Office.**

**It would be beneficial if the law relating to Client – Attorney Privilege on an international level is harmonized by way of a treaty, which should cover European Patent Attorneys, both in private practice and in industry, in relation to their clients or any other person.**

### **Communications with overseas IP advisers**

- 1.8 Does your Group consider that the protection described in answer to question 1.4 above is of appropriate quality or not, and if not, why not – what are the problems in practice?

Our Group considers that the protection described in our answer to question 1.4 above is of appropriate quality.

## **2. Remedies**

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### **The 'device' to be agreed and applied within and between countries**

The Working Guidelines indicate that such a 'device' could be on a scale between unilateral changes and treaties. However, unilateral changes will not solve the problem that no country is immune from the potential that IP legal advice which is protected from disclosure within its own borders, will be required to be disclosed in another country or countries (see para 2.4 (viii)). The Groups are requested to focus on the standard or principle required to remedy problems nationally and internationally (see para 4.6).

### **Limitations**

#### **Tests such as the 'dominant purpose' test.**

- 2.1 Does your Group agree that provision should be made in the agreed principle or standard that countries may limit the documents to which protection applies in their country to such standard or by such test as defines what relationship is required between the documents and the IP legal advice for which protection from disclosure is claimed?

**Our Group agrees that it is reasonable to focus on the device of "The Dominant Purpose Test" to define the relationship of the documents protected with the IP advice, which is to be protected from disclosure and to limit the documents accordingly.**

- 2.2 As to your answer to 2.1 (bearing in mind that it would not be mandatory for any country to have such a limitation), why?

**We deem that the suggestions proposed in 2.1 above would provide the most applicable solutions.**

### **Judicial discretion to deny protection**

- 2.3 Does your Group agree (as para 2.7 of the Working Guidelines suggests) that provision should be made in the agreed principle or standard, that countries may allow judicial discretion to deny protection from disclosure where that is found on reasonable grounds to be required in order to enable the court to do justice between the parties?

**We are concerned that allowing such discretions based on findings “of reasonable grounds” might lead to misuse of the system.**

**In any case, the basis “reasonable grounds” is very vague**

- 2.4 As to your answer to 2.3 (bearing in mind that it would not be mandatory for any country to have such a limitation), why?

**Although we understand the necessity of allowing a certain degree of judicial discretion, our concern is that basing this on the existence of “reasonable grounds” it would be too difficult to define the same.**

- 2.5 If your Group considers that the limitation in relation to judicial discretion would be acceptable if expressed differently from 2.3, how would you express it?

**We do not believe that different expression would lead to a different opinion, because we believe that such a limitation, which establishes judicial discretion on the basis of grounds which are not clearly defined, might open the “Aeolus’ Bag”.**

### **Qualifications required of IP advisers**

- 2.6 Does your Group agree (as para 4.14 of the Working Guidelines suggests) that the standard required by the principle agreed should be no more than requiring the IP adviser 'to be qualified to give the IP advice in relation to which the question arises, in the country in which the advice is given'?

**YES.**

- 2.7 If your answer to 2.6 is no, if your Group considers that the limitation would be acceptable if differently expressed, how would you express it?

**N/A**

- 2.8 If for some category of IP adviser in your country, no qualification is required –

- (i) What category is that?

**Legal qualifications are required for all kinds of IP advisers in Greece.**

- (ii) Do you think that protection from forcible disclosure of IP professional advice should apply to communications relating to the advice between clients and persons in that category?

**N/A**

(iii) As to your answer to sub-para (ii), why?

**N/A**

**Scope of protection against forcible disclosure – the differences between lawyer-client privilege and litigation privilege**

2.9 Does your Group agree in principle (para 4.25 of the Working Guidelines raises this question) that the standard or principle agreed should allow countries to limit the protection they provide according to categories of privilege which are currently part of their law?

**We do deem it necessary to require, as a part of any remedy, that the two forms of privilege be distinguished accordingly to categories of privilege, which are currently part of our law.**

2.10 If no to 2.9 (bearing in mind that such a limitation would not import any effect on a country that does not already have such a limitation unless it voluntarily adopted such a limitation), why?

**N/A**

2.11 As to any country which applies a limitation referred to in para 2.9, do you agree that the agreed standard or principle should not deny such a country the right to vary or abolish such a limitation should it wish to do so in the future – in other words, there should be liberty to vary or abolish a presently applied limitation?

**YES.**

2.12 If yes to 2.11, what limitation (if any) should apply to the liberty to vary or abolish a previously applied limitation and how would you express it?

**We cannot think of any further limitations that could be applied to the liberty to vary or abolish a previously applied limitation.**

**Exceptions and waivers**

2.13 Does your Group agree in principle (para 4.30 of the Working Guidelines suggests this) that the standard or principle agreed should in any particular country be subject to any exception (such as the crime-fraud exception) and waivers which are already part of the law of that country.

**YES.**

2.14 Assuming that the maintenance of exceptions and waivers already part of the law of any country is accepted in AIPPI, does your Group agree that the allowance of existing exceptions and waivers should not deny any country the right to vary or to abolish any such an exception or waiver should it wish to do so in the future, in other words, that there should be liberty to vary or abolish a presently applied exception or waiver?

**We agree that the allowance of existing exceptions and waivers should not deny any country the right to vary or to abolish any such exception or waiver should it wish to do so in the future.**

- 2.15 If yes to 2.14, what limitation (if any) should apply to the liberty to vary or abolish a previously applied exception or waiver and how would you express it?

**A certain limitation should apply to the liberty to vary or abolish a previously applied exception or waiver.**

**It is difficult to indicate what limitations could be added.**

**In any case, any variations should be within the scope of the standard or principle agreed.**

**In case of abolishment, it would be advisable that the country involved would give some kind of explanations as to the reasons of abolishment of the exceptions.**

#### **The AIPPI proposal compared with the alternative described in Section 5 above**

- 2.16 Leaving aside the potential need to provide for limitations and exceptions in relation to the AIPPI proposal, and assuming there are no other proposals, from the Groups as an alternative to the AIPPI proposal, which of these two proposals (the AIPPI and the alternative in Section 5 above), does your Group prefer and if so why?

**Our Group prefers the AIPPI proposal. The AIPPI proposal aims to the establishment of a particular standard, which is drafted in such a way as to apply to all countries.**

**Under the WIPO proposal regime, the current uncertainty among countries as to the application of privilege to clients would continue to persist.**

#### **Proposals from your Group**

- 2.17 Assuming that your Group would prefer a proposal different from those proposed by AIPPI or in Section 5, please describe the preferred proposal of your Group.

**Our Group does not have any further suggestions that those put forward by AIPPI.**

- 2.18 The Groups are invited to submit any further comments they might have with regard to the principles of remedies in the context of this Questionnaire, which have not been dealt with or mentioned specifically in the Questionnaire.

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#### **Note:**

**It will be helpful and appreciated if Groups follow the order of the questions in their Reports and use the questions and numbers for each answer.**



## Zusammenfassung

Frage 204

- Das griechische Rechtssystem, welches ein „civil law“ – System darstellt, kennt das Verfahren des „discovery“ nicht. Im griechischen Recht gilt das Anwaltsprivileg im Verhältnis zum Mandanten. Da nur Rechtsanwälte berechtigt sind, als Patentagenten tätig zu werden, gilt ein vollständiger Schutz gegen die Herausgabe von Kommunikation betreffend der Beratung in IP- Angelegenheiten. Trotzdem sind wir der Meinung, dass dieses System nicht ausreichend ist, da es nur auf Rechtsanwälte Anwendung findet, nicht aber auf andere Berater. Auch werden andere Problembereiche, wie z.B. das Herkunftsprinzip, nicht geregelt.
- Die griechische Gruppe ist der Ansicht, dass es vorteilhaft wäre, wenn ein internationaler Vertrag das Instrument des Beratungsprivilegs regeln würde, so dass dieses Privileg zwischen dem Berater und dem Mandanten eine internationale Harmonisierung erfährt.

## RÉSUMÉ

QUESTION Q199

La juridiction grecque, qui a un système de droit civil, ne reconnaît pas la divulgation. La loi grecque reconnaît le privilège professionnel des communications entre avocats et clients. Comme seuls les avocats en droit sont autorisés à agir comme agents de brevets, il existe une protection complète des clients contre la divulgation forcée de communications concernant les conseils professionnels par rapport à la propriété intellectuelle. Nous croyons, quant même, que le système est insuffisant, car il ne concerne que les avocats en droit et pas les conseillers en général, et il ignore d' autres questions, comme la question de la territorialité etc.

Le groupe grec croit qu'il serait nécessaire qu' un instrument international soit adopté par voie de traité, de sorte que le privilège professionnel entre conseillers et clients soit harmonisé au niveau international.

## ABSTRACT

QUESTION Q199

- ➡ In the Greek jurisdiction, which has a civil law system, we do not have discovery. Greek jurisdiction recognizes the Attorney at Law client privilege. As only Attorneys at Law are authorized to act as patent agents, there is full protection of clients against forcible disclosure of communications relating to IP professional advice. We, nevertheless, believe that the system is insufficient, because it deals only with Attorneys at Law and not generally with “advisers” and ignores other questions, such as territoriality, etc.
- ➡ The Greek Group believes that it would be beneficial if an international instrument on privilege is adopted by way of a treaty, so that client’s-adviser privilege is harmonized on an international level.