

PRIVILEGE IN ANTITRUST INVESTIGATIONS IN JAPAN: NEW RULES ON TREATMENT OF ATTORNEY-CLIENT CONFIDENTIAL COMMUNICATIONS

Attorney-client communications have not historically been privileged under Japanese antitrust law. However, under the new rules and guidelines published by the Japan Fair Trade Commission (JFTC), companies may request that the JFTC does not share with their investigation team certain confidential communications between a company and its lawyers in relation to alleged cartel activities. The scope of confidential communication and the procedure are different from those of privilege in the US, UK and EU. Companies should treat confidential communications in the manner required under the new rules, which differ from other jurisdictions.

BACKGROUND

There is currently no attorney-client privilege under Japanese antitrust law, meaning that companies may not refuse to disclose communication with their legal counsel to the JFTC during a JFTC investigation.

Consequently, if a company is forced to submit evidence of correspondence with its legal counsel as to cartel conduct in which the business operator is suspected to have participated, due to the absence of protection through attorney-client privilege to the JFTC, the company may be deemed to have waived attorney-client privilege in other jurisdictions by such submission.

On 19 June 2019, a bill for an amended Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the Japanese Anti-Monopoly Act or JAMA) passed the Diet. Under the current leniency program in Japan, the amount of exemption from administrative fines is determined based simply on the order of application to the JFTC. The amendment introduces a new leniency mechanism whereby any leniency applicant who cooperates with the JFTC to bring anticompetitive conduct to light can be additionally granted a certain degree (40% at most) of immunity, and in order to encourage applications for leniency, it was decided to introduce a procedure to protect certain confidential communication between companies and lawyers so that companies can consult with lawyers more freely on leniency.

Key issues

- There was no attorney-client privilege under the Japanese antitrust law. This is a new rule to protect confidential communications between lawyers and clients.
- The protection is only applicable to investigations relating to cartels and bid-rigging.
- Only legal advice from lawyers qualified in Japan is protected. Advice from in-house lawyers and foreign lawyers (even if they are registered in Japan) is not protected in principle.
- Legal advice must be stored separately, and files must have the title specified under the JFTC's rules and guidelines.
- Access to the legal advice should be restricted to a limited number of people who need to see such legal advice.

SCOPE OF PROTECTED COMMUNICATION

According to the amended rules on investigations published by the JFTC (Investigation Rules) and new guidelines on the treatment of objects recording confidential communications between enterprises and attorneys (Specified Communications Guidelines), the scope of protected confidential attorney-client communications (defined as Specified Communications) is as follows:

- Only legal advice on JAMA regarding alleged cartels and bid-rigging would be protected. Legal advice relating to other conduct is not protected.
- Primary documents underlying cartel conduct are out of the scope of protection. Reports on interviews by lawyers are also not protected.
- If legal advice contains any illegal advice such as obstruction of the JFTC's investigations, such legal advice is not protected.
- In principle, only an external lawyer's advice is protected. An in-house lawyer's advice might only be protected if such in-house lawyer is working independently.
- Only legal advice by lawyers qualified in Japan is protected. Legal advice from foreign lawyers (even if they are registered in Japan as a Registered Foreign Lawyer (*gaikokuho jimusho bengoshi*)) is not protected. However, the Specified Communications Guidelines state that the JFTC would not order the submission of advice by foreign lawyers on foreign competition laws unless the communication contained materials which were required for the JFTC's investigations.
- The legal advice must be stored separately, and it must be indicated clearly that it is a Specified Communication under the JFTC's Investigation Rules on the first page of the document. Also access to such legal advice must be restricted to limited persons who need to receive it.
- Electronic data will be treated in the same way in principle. Electronic files should be stored separately, being accessible by limited persons, and the clear indications of the Specified Communications must be in the subject line of emails or in the names of electronic files.

PRACTICAL PROCEDURE

If a company is ordered by the JFTC's investigator to submit documents which the company believes are Specified Communications, the company may request that the investigator treat the documents as Specified Communications.

The JFTC's investigator would then place the documents in an envelope and seal it.

The company then submits a summary of the documents within two weeks of the submission order, and the JFTC must appoint a determination officer, who must be a person who was not involved in the investigation of that case.

The determination officer determines whether the relevant documents meet the requirements for being regarded as Specified Communications within six weeks of the initial check of the above summary.

If the requirements are met, the determination officer must promptly return the documents to the company. If the requirements are not met, the documents will be transferred to the JFTC's investigator.

TIMELINE

Amended Investigation Rules and new Specified Communications Guidelines will be effective on the effective date of the amended JAMA, which is expected to be this autumn or winter but no later than 26 December 2020.

DIFFERENCES FROM PRIVILEGE IN OTHER JURISDICTIONS

In most other jurisdictions, attorney-client privilege is considered a company's right to defence against forced disclosure of internal documents or communications to external parties. Interestingly, this new scheme regarding attorney-client communications is not considered the company's right to defence against the JFTC, but as one of the tools to give companies an incentive to cooperate with JFTC investigations through the new leniency system. Therefore, the scope of protection under this scheme is narrower than that in other jurisdictions.

For example, legal advice privilege under English law applies to confidential communications between lawyers and their clients for the purpose of giving or obtaining legal advice. Generally, English law does not distinguish between in-house lawyers and lawyers in private practice, although such communications must be for the purpose of giving or receiving legal advice, not purely commercial, management, business, or administrative advice. The concept of privilege in Australia and Singapore is similar to English law.

In the context of EU competition investigations, communications between a company and its in-house lawyers are not protected by legal advice privilege. Advice from external lawyers that are entitled to practice before a court of an EEA country is privileged, but not advice of non-EEA qualified lawyers, even if they are registered as a foreign lawyer in an EEA country. However, EU privilege covers a broader spectrum, as privilege is applicable not only to advice on cartel and bid-rigging but also other competition law infringements. Also, in most cases Commission officials may be able to confirm during an inspection whether or not the document should be excluded and if there is any dispute as to whether a document is privileged the parties under investigation can ask the EU's General Court to determine the dispute, without affording Commission officials even a cursory glance at the contents of the document. However, under the new scheme in Japan all requests must be checked by the JFTC's determination officer.

Under US law, legal advice from foreign lawyers can be protected by attorney-client privilege, if there is a reasonable expectation of confidentiality under the foreign law where the foreign lawyer is qualified. The US antitrust agencies (Federal Trade Commission and the Department of Justice, Antitrust Division) operate under a policy whereby they will not seek information that is privileged under US law from foreign authorities through waivers or other cooperative activities. It is still not clear whether advice from Japanese lawyers would be privileged under US law because of this new scheme.

Singapore law also specifically provides that professional legal advisers are not obliged to disclose privileged communications to the Competition and Consumer Commission of Singapore. What is considered to be privileged is likely to be determined according to the general law of privilege, and no special exemptions will apply simply because the documents are to be disclosed in the competition law context.

PRACTICAL SUGGESTIONS

Although the scope of protection is narrower than privilege in other jurisdictions and not all legal advice from lawyers will be protected, this is still a positive move for companies.

It is advisable that companies pay attention as to how they treat communications with lawyers when companies start discussing cartels or bid-rigging with them. In particular, it is important to receive advice from lawyers qualified in Japan, store such advice separately and indicate that such communications are Specified Communications. Also, companies must limit access to such advice from lawyers. It would be helpful to introduce an internal protocol specifically focusing on Japanese antitrust law, so that companies may seek advice from lawyers in an effective and timely manner.

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