

## Japan Proposes New “Privilege-Like” Rules for Attorney-Client Communications in Competition Matters

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Following the [recent overhaul of Japan’s leniency program](#), the Japan Fair Trade Commission (JFTC) has now released a set of [proposed rules and guidelines](#) changing the way confidential communications between attorneys and clients are treated – now providing some “privilege-like” protections, similar to the attorney-client privilege in the U.S., to companies under investigation for conduct that falls within the purview of Japan’s leniency system. (Presumably, the company does not have to be an actual leniency applicant for the protections to apply, although this is not spelled out in the guidelines themselves.)

In any event, the guidelines are subject to several key limitations described below.

**First**, the new rules apply only in an administrative investigation of unreasonable-restraint-of-trade cases under Japan’s antitrust law – not a compulsory investigation procedure of criminal cases. Under the Japanese antitrust law and the JFTC’s [enforcement policy](#), cartel cases can be either administrative or criminal.

**Second**, the protection mostly extends to confidential communications between companies and their outside Japanese counsel that convey legal advice about an alleged unreasonable restraint of trade under Japanese law.

- Communications with in-house counsel in Japan could qualify if it is clear that the counsel works beyond the company’s supervision, which might be rare.
- Communications with foreign (non-Japanese) attorneys retained in an alleged international cartel regarding foreign competition laws could qualify as well – unless the communications are “considered necessary for the investigation” (a potentially broad caveat).

The table below sets out some examples of applicable/inapplicable communications under the new rules.

EXAMPLES OF APPLICABLE DOCUMENTS

EXAMPLES OF INAPPLICABLE DOCUMENTS

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<ul style="list-style-type: none"> <li>• Inquiry from a company to its outside counsel</li> <li>• Response from outside counsel to the company</li> <li>• Report by outside counsel stating the legal advice based on the internal investigation performed by the outside counsel</li> <li>• Meeting minutes stating the legal advice by the outside counsel in the meeting between outside counsel and the company</li> </ul>	<ul style="list-style-type: none"> <li>• Officer or employee's notes</li> <li>• Company's internal investigation report</li> <li>• Report on facts of interview of officer or employee conducted by either in-house or outside counsel</li> <li>• Documents stating contents such as legal advice on provisions of Japan's Antimonopoly Act other than the unreasonable restraint of trade, or on other laws and regulations</li> </ul>

Although it is not clear, the JFTC does seem willing to expand the scope of protection—to include documents that the company submitted to another agency in a separate administrative investigation of the same conduct—if the privilege is otherwise applicable. It is unclear if only domestic Japanese administrative bodies qualify for these purposes, or if foreign agencies might qualify as well.

**Third**, communications will not qualify for the “privilege-like” protection unless:

- i. They have been clearly and visibly labeled as confidential communications with outside counsel;
- ii. They have been stored at a specific and segregated location that is managed by the company (like the shelves at the legal department); and
- iii. The persons with access to the contents have been restricted to those who “need to know.”

**Fourth**, during the JFTC's actual collection of the materials (as in a dawn raid), the company must explicitly request protection for identified materials. Such materials still may be collected, but would be placed under seal under the supervision of a Determination Officer (independent from the JFTC's investigation team) to determine whether the materials are within the scope of protection. If the Determination Officer grants the protection, the JFTC must promptly return the materials to the company. Otherwise, the Determination Officer shall transfer them back to the investigators.

## Conclusion

All outside and in-house counsel advising a company subject to (or potentially subject to) a JFTC investigation must proceed with a full understanding of these proposed rules to avoid—to the maximum extent possible—an inadvertent disclosure of material that otherwise may qualify for the privilege-like protection down the road. Companies considering applying for leniency, in particular, should consult with experienced antitrust attorneys paying close attention to how narrowly the protection of privilege under the proposed rules and guidelines might extend.

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