

Protection of Confidential Attorney Communications in Hard-Core Cartel Investigations in Japan

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On December 25, 2020, the Japan Fair Trade Commission (JFTC) implemented new procedures to protect confidential communications between an enterprise and its attorney from disclosure in administrative investigations of hard-core cartels. While this may appear to be the adoption of an attorney-client privilege in Japan, the newly announced protection is notably different from the privilege in the United States in several respects.

First, the scope of the protection is narrowly applied and only protects:

- communications with an attorney admitted in Japan, either as outside counsel or an in-house attorney, but certain limitations apply to an in-house attorney;
- in the context of an administrative investigation of a hard-core cartel; and
- where the attorney is providing legal advice about the cartel under investigation

Second, the protection does not extend to attorney work product, such as fact-finding memoranda.

Moreover, the new regime requires strict compliance with rules regulating the storage and management of the relevant files. Eligible documents and files must be clearly separated from those that are not eligible for the protection. And eligible files must be clearly marked to qualify for the protection.

Background and Context

This new protection in Japan is not codified as law, which must be passed by the Diet, but rather is included in the investigation procedures set forth by the Rules on Investigations (Rules), which are established solely by the JFTC.¹

The procedures were first implemented on the same day as the new leniency program, which created greater flexibility in the ways in which administrative cartel fines are determined, allow for fine reductions for cooperating companies that vary according to the degree of their contribution to the JFTC's investigation. Japan's protection of confidential communications with attorneys was introduced specifically to help enterprises seeking leniency to consult with an outside counsel so that their contributions to the JFTC's investigations would be more effective. As such, its scope and the degree of protection it offers are quite limited.

This post describes the procedures and practical tips for companies and legal advisors to capitalize on the available protection.

Scope of Protection

The new policy applies in administrative investigations of hard-core cartels, including for price-fixing and market allocation.² It does not apply in criminal investigations.³ The aim of the policy is to prevent investigators from accessing documents and files that contain confidential communications between an enterprise and an attorney about the cartel under investigation. Where relevant documents reflecting any such communications are seized, the policy requires that they be returned to the enterprise after a JFTC officer who is not involved in the underlying cartel investigation confirms that the seized files qualify for protection from disclosure. In order for materials to receive this “Treatment,” as the new policy calls it, several conditions must be met.

1. Specified Communications

The Rules define as “Specified Communications” those confidential communications that are eligible for the Treatment. They must reflect a confidential consultation between an officer or employee responsible for seeking legal advice on behalf of the company and a *bengoshi*, an attorney admitted in Japan working independently from the company, seeking legal advice about an alleged violation that constitutes a hard-core cartel or the confidential reply provided by the attorney.

Accordingly, the following communications are not protected by the Treatment:

- a. legal advice by in-house counsel under the direction of the company,⁴ legal department staff members, or foreign attorneys;
- b. legal advice about matters other than the hard-core cartel under the investigation; and
- c. fact-finding materials, such as reports of an internal questionnaire or records of an interview, including interviewed memoranda prepared by counsel.

With respect to communications with foreign attorneys seeking legal advice about the application of foreign competition laws to the alleged conduct under investigation by the JFTC, the policy is that such communications need not be submitted to the JFTC unless they include primary materials, such as memoranda discussing details of cartel meetings or fact-finding materials such as records of interviews, or they are otherwise considered necessary for the investigation.

2. Appropriate Custody

To qualify for the Treatment, files must be properly labeled and stored and kept confidential.

First, the documents or files must be clearly and visibly labeled as containing Specified Communications. For example, they must:

- Include “公取委審査規則特定通信” (“Specified Communications under JFTC Investigation Rules”) on the spine of the document folder or in the file name of electronic data.
- Include “公取審査規則第23条の2第1項該当” (“Document under Article 23-2, Paragraph 1 of JFTC Investigation Rules”) on the first page of the document or in the subject line of email.

Second, Specified Communications must be segregated from other files and stored in a specially designated location managed by the division or officer responsible for consultations with attorneys. Hard copy documents must be visually separate from other files, and electronic data must be stored in a separate folder with restricted access. Emails containing Specified Communications may only be sent to and from a dedicated email account and stored separately from emails not containing Specified Communications.

Third, access to the Specified Communications must be restricted on a need-to-know basis. Sharing the contents of the files with foreign attorneys for the leniency applications in foreign jurisdictions will not adversely affect treatment under the policy so long as necessary measures are taken to maintain confidentiality.

Seizure and Return of Documents

Dawn Raid

During a dawn raid, the enterprise must submit a written request for the Treatment. If a JFTC investigator visually confirms that the documents or recording media containing confidential communications with an attorney are appropriately labeled and stored as described above, the investigator will seal the objects in an envelope and order the enterprise to submit the sealed objects to the same investigator (pursuant to a submission order issued at the time of the raid). Generally, the sealed objects are taken during the dawn raid. Within two weeks from the submission order, the enterprise must submit a log of each confidential communication that describes the title and creation or acquisition date of the objects, the name of an officer or employee and an attorney involved in or with knowledge of each communication, the storage place, and a general description of the objects or communications. The log is similar to a privilege log that is created in an investigation or litigation in the United States. Because the log must be submitted within a short period of time after the relevant documents have been seized, companies seeking this protective Treatment should prepare and maintain a log of all relevant documents before any dawn raid is conducted.

Procedure to Determine Whether Documents Qualify for the Treatment

The JFTC designates as a determination officer a JFTC officer who is not involved in the underlying cartel investigation to decide whether the seized objects meet the requirements for the Treatment. The determination officer may not become involved with the investigation itself. The determination officer verifies the following: (1) the documents or files contain confidential communications eligible for the Treatment and do not contain other contents;⁵ (2) the documents or files do not contain communications to commit or facilitate a hard-core cartel or to obstruct the investigation; (3) the documents or files have been labeled and stored properly; and (4) the log does not misrepresent the contents of the documents or files.⁶

Return to the Enterprise or Transfer to the Investigator

Once the determination officer confirms that all requirements are satisfied, he or she informs the enterprise that the seized objects are no longer needed and returns them immediately to the enterprise. If any of the requirements are not met, the determination officer instead transfers the relevant objects to the investigators and notifies the enterprise of the transfer and the reason that the particular files do not meet the requirements for the Treatment.

Appeals

An enterprise may not appeal a decision by the determination officer to transfer the particular files to the investigator. However, if the investigator rejects a request from the enterprise to return seized objects, the enterprise may raise an objection pursuant to Article 22, Paragraph 1 of the Rules or initiate an action for revocation under the Administrative Case Litigation Act.

Practical Considerations

Unlike the attorney-client privilege protection in the United States, the protective Treatment requires significant advanced preparation on the part of an enterprise to discern, segregate, label, and properly store relevant communications. In the context of international cartels, it is crucial that foreign lawyers understand the JFTC's investigation process so that they cooperate closely and effectively with the enterprise to take full advantage of this Treatment to protect the confidentiality of communications with counsel. Below are some practical tips for Japanese companies and their foreign counsel.

1. Tips for Japanese Companies

- To satisfy the appropriate custody requirement, review the information management system of the company and its subsidiaries to ensure the ability to comply with the requirements.
- Manage access rights to documents and files, including creating new email addresses used solely for the Specified Communications, and prohibit unnecessary copying and forwarding.
- Where a business department seeks legal advice on its own, ensure that the company's legal department or other department responsible for communications with counsel is made aware of the communications with counsel so Specified Communications can be managed in a proper way to qualify for the protective Treatment.
- Strictly separate documents and files containing Specified Communications from other documents. Blurry boundaries could lead to a denial of the protection for all communications.
- Prepare and maintain a log of the Specified Communications as they are sent and received because there is not sufficient time or access to the files to create the log from scratch after the files are seized in a dawn raid.

2. Tips for Foreign Lawyers

- Fact-finding materials like interview memoranda made by the foreign lawyers could be seized by the JFTC. Consider sharing such memoranda only with overseas subsidiaries or outside lawyers in Japan and providing only a high-level oral summary with the client in Japan. Balance risks that those documents could be seized against the inconvenience the client would suffer by not having access to the underlying memoranda.
- Handle with care documents or communications drafted by Japanese lawyers. Do not share with the client via regular email addresses. Emails containing Specified Communications must be sent only to the specifically designated email address.

Consider the impact that submitting files to the JFTC might have on the client's discovery obligations, particularly in connection with civil litigation in the United States.

¹¹ Rules are available in English as a translation at https://www.jftc.go.jp/en/legislation_gls/20122502.pdf. Guidelines on the Rules are available in English as a translation at https://www.jftc.go.jp/en/legislation_gls/20122503.pdf.

¹² In this article, we refer to unreasonable restraint of trade set forth in Article 7-2, Paragraph 1 of the Antimonopoly Act as hard-core cartels.

¹³ The JFTC actively seeks criminal penalties in limited circumstances, including (i) serious cases with a widespread impact, such as price-fixing or supply-restraint cartels, or market allocation or bid-rigging arrangements; or (ii) against recidivist firms or industries where the JFTC's administrative measures are insufficient. See "The Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations" revised on Oct. 23, 2009. Accordingly, particularly flagrant cartel conduct may be subject to criminal as well as administrative penalties, and it would be criminally investigated before the administrative investigation begins. Documents seized and reviewed in connection with a criminal investigation would not qualify for this new protection in a subsequent administrative investigation.

¹⁴ The Guidelines state that in response to discovery of an alleged violation, when an enterprise issues written instruction to an in-house attorney and the attorney is no longer under the directions, orders, and supervision of the retaining enterprise but engaging in legal practice independently in accordance with the instructions, the attorney is considered as engaging in legal practice independently. To satisfy this requirement, an in-house counsel must leave other tasks that entail directions or supervision and work exclusively on an alleged cartel case. Because of the high hurdle, it is generally not practicable for in-house lawyers to qualify for the protection.

¹⁵ If any ineligible contents are included in the seized objects, submission of their redacted copies without any eligible contents is required.

¹⁶ The timeline of the determination procedure is divided into the two parts: the primary determination procedures occur within two weeks of the submission order, and the secondary determination procedures within six weeks after the end of the primary determination procedures. During the primary determination procedures, the determination officer determines whether the written request for the Treatment was made without misrepresentation, the log is complete and was submitted by the due date, and the seized objects were labeled appropriately. During the secondary determination procedures, the determination officer checks whether the rest of the requirements have been met.

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Author

[Jeffrey J. Amato](#)

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