

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Treatment of legally privileged information in competition proceedings – Note by
Japan****26 November 2018**

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More documents related to this discussion can be found at

www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

Please contact Ms. Despina Pachnou if you have any questions about this document.
Email: Despina.pachnou@oecd.org.

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Japan

1. Introduction

1. Forms of protection on communication between lawyers and clients vary one jurisdiction to another depending on its historical and social background; in Japan, specific laws prescribe lawyers' right and obligation to keep their clients' secrets.
2. So-called "legal professional privilege", which allows a client to refuse disclosure of communication with its attorney to public bodies or third parties, is neither defined nor recognised in the Antimonopoly Act ("AMA") and also in the whole legal system in Japan. However, information which is legally privileged in other jurisdictions can partly be protected by the specific Japanese laws mentioned above.
3. At the same time, JFTC held the "Study Group on the AMA" (hereinafter referred to as "Study Group")¹ in order to review the surcharge system on the AMA. The Study Group suggested the revision of the surcharge system including the expansion of leniency programme. Issues on legal professional privilege were also discussed in the Study Group. On the basis of the Report by the Study Group, JFTC is currently discussing internally how communication between lawyers and clients should be treated.
4. This contribution paper firstly explains the current situation of the treatment of legal professional privilege in a whole Japanese legal system and in real enforcement front of JFTC in section 2. Then it introduces the discussion on legal professional privilege in the Study Group in section 3. Finally, section 4 touches upon future discussion about JFTC's treatment of communication between lawyers and clients.

2. Current situation in Japan

2.1. Legal professional privilege

5. Legal professional privilege does not exist in both criminal proceedings and administrative proceedings (including the AMA proceedings) in Japan; any law, judicial precedent and practice do not recognise legal professional privilege as a substantive legal right or interest.
6. Courts² ruled that no reason could be found to guarantee legal professional privilege as a legal right or interest under the current Japanese legal system and to give special protection to communication between lawyers and clients, beyond the scope of secrecy of communication guaranteed by Article 21 (2) of the Constitution or lawyers' obligation of secrecy prescribed in the existing laws.

¹ The Study Group was convened by JFTC and consisted of experts from various sectors. It held 15 meetings from February 2016 to March 2017.

² Tokyo District Court Judgment on January 31, 2013 and Tokyo High Court Judgment on September 12, 2013.

2.2. Lawyers' obligation of secrecy

7. On another front, communication between lawyers and clients which is possessed by lawyers is protected by express provisions in laws such as the Attorney Act, Code of Civil Procedure and Code of Criminal Procedure.

8. To be more precise, Article 23 of the Attorney Act provides that lawyers have the right and bear the duty to maintain the confidentiality of any facts which they may have learnt in the course of performing their duties.

9. Also, Code of Civil Procedure provides that lawyers may refuse to testify any fact learnt in the course of their duties which shall remain confidential (Article 197 (1) (ii)), and that they may also refuse to submit to the court any document stating matters which are under the duty of secrecy (Article 220 (4) (iv)).

10. Moreover, Code of Criminal Procedure provides that lawyers may refuse to give testimony on matters pertaining to the confidential information of others which they came to know through entrusted professional conduct (Article 149), and that they may also refuse the seizure of articles containing the confidential information above (Article 105).

2.3. Treatment of communication between lawyers and clients during dawn raids by JFTC

11. During an administrative investigation on the suspected violation of the AMA, JFTC can conduct dawn raids to any business premises if JFTC reasonably finds it necessary for the investigation. Accordingly, it is theoretically possible for JFTC to conduct dawn raids to companies' legal departments, which normally hold documents which can be subject to legal professional privilege in other jurisdictions; however, JFTC does that only in an exceptional situation³.

2.4. Problems caused by the absence of legal professional privilege in Japan

12. In Japan, some shows concerns regarding the absence of legal professional privilege. For example, if a Japanese company faces a civil damages lawsuit for an international cartel along with foreign companies in other jurisdiction where legal professional privilege is guaranteed, those foreign companies in that jurisdiction can refuse to disclose communication with their domestic lawyers. However, the Japanese company cannot refuse disclosure of communication with Japanese lawyers, resulting in the Japanese company being placed in a disadvantageous position in the lawsuit. However, JFTC has not observed concrete facts that such situations have actually been taken place.

13. In addition, there is another concern that if a company submits to JFTC a document which is subject to the protection of legal professional privilege in other jurisdiction, [1] the information contained in the document can be revealed to other competition authorities, and [2] the submission can be treated as a waiver of legal professional privilege in other

³ Among the dawn raids conducted during the period of 2016 and 2017 (432 premises in total), only three targeted to legal departments. In these cases, JFTC found reasonable grounds for the dawn raids; for instance, there was a high possibility that documents related to the violation could be found on one employee's desk in legal department, who had just got transferred from sales department.

jurisdictions and the document can no longer be protected from disclosure to other competition authorities.

14. In this regard, JFTC exchanges information with other competition authorities in accordance with Article 43-2 of the AMA, which prescribes that JFTC does not provide information “if the provision of the relevant information is found likely to interfere with the proper execution of this Act or to infringe on the interests of Japan in any other way”. JFTC recognises that the provision of that type of documents to other competition authorities is likely to result in companies’ non-cooperation with its investigation in future and a huge negative impact on its enforcement activities. Therefore, JFTC has not provided other competition authorities with that kind of documents and will continue the same practice.

15. Also, JFTC recognises that, at least in the US, there are several judgements by courts which stated that submission of communication with lawyers in response to compulsory requests by authorities would not be regarded as a waiver of legal professional privilege.

3. Discussion about legal professional privilege in the Study Group

16. The AMA has so-called surcharge system as an administrative measure to deter AMA infringements by imposing pecuniary disadvantages on companies involved in those infringements. The Study Group discussed how the surcharge system should be, and the discussion also included issues regarding legal professional privilege.

17. In the Report by the Study Group released in April 2017, the Study Group concluded as follows: concrete facts that companies have actually suffered from disadvantages due to the absence of legal professional privilege in Japan, which allows them to refuse to disclose certain communications with lawyers, was not found. However, if the leniency programme is expanded by the AMA revision suggested in the Report (described in more detail in section 4), companies’ needs to consult with lawyers is expected to grow in order to apply for the new leniency programme. Therefore, from the perspective of enabling the new leniency programme to work properly, it is appropriate for JFTC to give consideration to communication between lawyers and their clients (i.e. companies) only when it is related to the use of the new leniency programme, to the extent that the fact-finding ability of JFTC would not be impeded, on the premise of establishing new measures to prevent adverse effects such as concealing evidence.

4. Further discussion about the treatment of communication between lawyers and clients

18. Based on the Report mentioned in section 3 above, JFTC is currently considering to amend the leniency programme in order to increase incentives on companies to cooperate with investigation. If implemented, companies will need more to seek advice from lawyers who have a thorough knowledge of the new leniency programme on how to deal with the leniency procedure.

19. JFTC is therefore considering to take care of legal professional privilege by means of limiting access in practice to communication between lawyers and clients (i.e. companies) from case investigators during its investigative procedure on the AMA

violations which are subject to the leniency programme⁴, aiming at ensuring an environment where companies can seek advice from lawyers without hesitation and thus promoting the use of the new leniency programme.

⁴ Unfair restraint of trade (Article 3 and of the AMA)