

## Treatment of confidential communication between an enterprise and attorney

## 1. Purpose

If the leniency program unique to the Antimonopoly Act is revised for the purpose of enhancing the incentive for enterprises to voluntarily cooperate with investigations by the Fair Trade Commission so that the amount of reduction of surcharge corresponds to the degree of voluntary cooperation by enterprises with such investigations, the need by enterprises to consult with independent attorneys to effectively cooperate with the investigation is likely to increase. This system is being established from the perspective of making the new leniency program more effective and protecting confidential legal advice, etc. related to such consultations substantially, ensuring the appropriateness of administrative investigation procedures.

## 2. Summary

A system setting forth that the investigators will not access documents stating the contents of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act), if certain conditions are confirmed to be met pursuant to prescribed procedures

## 3. System

## (1) Format/Legality

- Main items to be prescribed in rules based on the provisions of Paragraph 1 of Article 76 of the Antimonopoly Act
- Detailed rules to be prescribed in the Guideline
  - ❖ The rules will be prescribed the approach on exercise of authority by the Fair Trade Commission or its investigators against specific objects under Article 47 of the Antimonopoly Act

## (2) Procedures subject to this system

- Administrative investigation procedures regarding cases involving unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act)
  - ❖ The procedure of compulsory investigation of criminal cases are out of scope of this system

## (3) Objects subject to this system

- An object stating the contents of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act)

## &lt;Applicable Objects&gt;

- Consultation documents from the enterprise to the attorney
- Responding documents from the attorney to the enterprise
- Reports stating the legal advice based on the internal investigation performed by the attorney

- Minutes of internal meeting stating the discussion with the attorney on the legal advice at an internal meeting attended by the attorney, etc.

<Out of Scope Objects>

- Materials indicating facts forming the base of confidential communication between an enterprise and attorney regarding legal advice on unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act): so-called primary materials/fact finding materials
- Materials stating contents such as legal advice on provisions of the Antimonopoly Act other than the unreasonable restraint of trade, or on other laws and regulations

<Requirements>

- The enterprise shall request treatment under this system at the time of order for submission.
- The documents shall be treated appropriately (title of the document, place of storage, maintenance of confidence, etc.) .
- Submission of lists stating the time and date of preparation of the object, name of the person preparing the object, names of persons with whom the object was shared, attributes (letter, memorandum, internal investigation report, minutes of internal meeting, etc.) and the summary, etc. for each object that the enterprise is seeking treatment under this system, shall be performed within a specified period of time.
- If an out of scope object is included, submit a copy of such object or report its contents to the Fair Trade Commission.
- It shall not have illegal purposes.

(4) Scope of legal professionals

- An attorney as prescribed in the Attorney Act, who engages in legal practices independently from the enterprise (does not have employment relationship with the enterprise)
- ❖ So-called in-house attorneys and foreign attorneys (including Registered Foreign Lawyers) shall be treated as follows (to be expressly stated in Guidelines):
  - In-house attorneys shall be included within the scope of Legal Professionals if it is clear that, as triggered by the discovery, etc. of violating facts the attorneys will get out of the directions, orders and supervision in accordance with the instruction from the enterprise who is the employer and that the attorneys will engage in legal practices independently.
  - With respect to international cartel related to an alleged violation case, objects stating the contents of consultation between the enterprise and foreign attorney regarding response to foreign competition laws (excluding so-called primary materials/fact finding materials in (3) above) shall not be subjected to submission order under Article 47 of the Antimonopoly Act.

(5) Determination procedure (measures for prevention of abuse)

- Determination procedure by the Fair Trade Commission

- With respect to objects that have been requested to be treated under this System, the investigator shall order the submission of the object, keep a seal, and place under the management of the Determination Officer.
- Determination Officer shall confirm whether the object satisfies the conditions for inclusion within the scope of this system.

(6) Return

- Objects confirmed to be within the scope of this system as a result of the determination procedures shall be promptly returned. However, the Determination Officer shall transfer objects that could not be confirmed to satisfy the requirements of this system under the management of the investigators.

(7) Measures to secure confidentiality in determination procedure

- Place in an envelope, etc. and seal at the time of submission order.
- Determination Officer shall be appointed at the Secretariat (a bureau different from the Investigation Bureau).
- The object shall be managed under the Determination Officer who performs the determination procedures.

(8) Measures to block influence on other administrative investigations

- For administrative investigation procedures regarding unreasonable restraint of trade (latter half of Article 3 of the Antimonopoly Act) by an act of violation jointly conducted by multiple enterprises in secret that lacks material evidence clearly indicating the presence of such act, voluntary cooperation by enterprises under the new leniency program is extremely important for detection and solution of such acts of violation. Thus, this system is being designed to ensure more effective implementation of the new leniency program.  
In light of the unique circumstances of unreasonable restraint of trades and the purpose of this system, it is clear that the System cannot be introduced to other administrative investigation as is, and will not have influence on other administrative investigations. Consequently, provisions on measures to block influence is unnecessary.

(9) Relationship between the use of the System and aggravation or mitigation of surcharge

- Under the new leniency program, whether or not this system is being used shall not be an item for evaluation of degree of cooperation with the investigation.
- New sanctions against abuse of this system itself shall not be established. In case an abuse of this system falls under the crime of obstruction of inspection (Article 94 of the Antimonopoly Act), etc., relevant provisions shall be applicable.

(10) Application of the system in the process of interview

- The subject of this System shall be objects, and is not applicable to deposition (interrogation and voluntary interview).
  - ❖ From the perspective of making the new leniency program more effective (perspective of ensuring that employees do not hesitate to provide attorneys with facts), the Guideline shall be prescribed expressly that in principle, no questions will be asked on the communication between employees and attorneys stated in the object within the scope of this system.

(11) Litigation/Objections regarding determination procedure

- Decision of the Determination Officer has no feature as a disposition, and itself shall not be the subject of litigation or filing of an objection; however, an objection pursuant to the provisions of Article 22 of the Rules on Investigations by the Fair Trade Commission as well as an action for the revocation pursuant to the provisions of the Administrative Case Litigation Act may be filed with respect to the disposition by the Fair Trade Commission.
- To clarify that the order for submission is made under this system, the Fair Trade Commission will prepare a format for submission order under this system.

○ Other

- The revision of Antimonopoly Act including the review of the administrative surcharge system, etc. does not add new investigation authority.
- The Fair Trade Commission shall add to the “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” (December 2015) that employees, etc. of the applicant for the leniency program may note down on the spot after the completion of interrogation conducted by investigators.
- The Fair Trade Commission will immediately consider the expansion of the scope of administrative investigation procedures subject to this system, such as inclusion of alleged violation cases of Antimonopoly Act related to alleged violation cases of competition laws in other countries. When considering it, the Fair Trade Commission is required to note that it needs to take into account how this system is implemented and should not lead to any regime that puts small- and medium-sized enterprises at undue disadvantages and affects other Japanese laws and regulations.