

# Recent developments regarding attorney-client privilege

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## Introduction

### Competition laws and privilege

### New rules under Anti-monopoly Law

### Comment

## Introduction

Are conversations with Japanese lawyers protected by attorney-client privilege in Japanese courts? The short answer is no. According to the Organisation for Economic Cooperation and Development (OECD),<sup>(1)</sup> Japan is one of only three OECD jurisdictions to not recognise attorney-client privilege.<sup>(2)</sup> The absence of attorney-client privilege requires foreign companies to be acutely aware of the differing treatment of sensitive communications in Japan compared with their home jurisdiction. It may also pose a greater challenge to Japanese companies in the context of international disputes and investigations. This article addresses the recent developments regarding attorney-client privilege in a competition context and its impact on foreign and domestic companies.

## Competition laws and privilege

The absence of attorney-client privilege in Japan is often discussed in relation to the enforcement of competition laws because:

- it is one of the areas where administrative penalties are most actively enforced against businesses utilising Japan's leniency programme;
- there are precedents where the governmental authorities have:
  - seized the personal computer of an attorney retained by a company that is the target of an investigation;<sup>(3)</sup> and
  - used legal advice given by a defendant's lawyer to prove the intention of a company's violation;<sup>(4)</sup> and
- international cartel investigations have highlighted the lack of protection of communication in Japan compared with other jurisdictions.

In response to discussions among committees established by the Japanese Fair Trade Commission (JFTC) and lobbying by the Japan Federation of Bar Associations and other groups, the Diet has announced amendments to the Anti-monopoly Law which will partially introduce attorney-client privilege in administrative investigations pursuant to ordinances under the law or certain prescribed guidelines.

## New rules under Anti-monopoly Law

In relation to attorney-client privilege, the Diet's amendments state that:

- the scope and requirements for attorney-client privilege should be as consistent as possible with the global standard and will need to be revised once the incoming regime has been implemented;
- the processes for the substantive protection of attorney-client privilege – including a review process under the JFTC – will be established; and
- the cases in which attorney-client privilege is claimed should be publicly disclosed to ensure transparency and credibility.

While the final draft of the relevant ordinance and guidelines have yet to be disclosed, the JFTC has published an outline of the privilege rules, the key takeaways of which are as follows:

- Privilege will apply only to administrative investigations into unreasonable restraint of trade (eg, cartels) and not to criminal investigations.

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- Written communications between businesses and their lawyers which constitute legal advice on the unreasonable restraint of trade are privileged.
- Legal advice on non-cartel misconduct is not privileged.
- Communications between foreign lawyers regarding foreign competition laws are privileged.
- Testimonies cannot be protected by privilege (however, the JFTC will not ask about privileged communication in interviews).
- Documents must be kept confidential in order to be protected.
- An express request is needed in order to exercise privilege and a record of the privileged documentation must be submitted.
- Communication with in-house counsel is not in principle privileged.
- A screening officer of the JFTC Secretariat who is not in charge of the relevant investigation will determine the applicability of the privilege.
- The exercise of privilege will not be considered when determining the amount of any discretionary surcharge.

## Comment

The new attorney-client privilege system is influenced by US-style privilege laws and practices, but will be narrowly tailored to cover only the protection of tangible evidence in administrative investigations of a certain category of misconduct. Despite the narrow approach, this is a significant step towards creating attorney-client privilege rules in Japan and will help in international cartel investigations. As cases in which attorney-client privilege applies mount under the new regime, further clarity will be given to the scope of privileged communications. These cases will become the foundation for further developments that will likely extend attorney-client privilege to civil and criminal procedures in general.

On the other hand, the introduction of the new rules in only limited circumstances may highlight the absence of attorney-client privilege in other situations. Among others, when the choice-of-law analysis in foreign lawsuits concludes that Japanese privilege law governs, the courts would likely find that a certain communication is not privileged in civil or criminal trials – although a US court has ruled that a communication is not discoverable simply through the application of Japanese law. Many discussions of Japanese privilege law seem to assume that, in the case of lawsuits or investigations in a foreign jurisdiction, the privilege laws of that jurisdiction also apply to communications occurring in Japan. However, such complicated choice-of-law analysis from the perspective of maintaining privilege can become more important and warrant a more strategic approach.

Foreign companies that undertake businesses in Japan and Japanese domestic companies should carefully review the upcoming rules and guidelines on Japanese attorney-client privilege and consider how they will be applied by the JFTC in practice.

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## Endnotes

(1) According to the Secretariat's research, the three OECD members that do not recognise legal privilege are Japan, Korea and Poland (although Poland follows EU case law when assisting the European Commission with inspections) (Treatment of Legally Privileged Information in Competition Proceedings, background paper by the Secretariat, 26 November 2018).

(2) There are some systems similar to attorney-client privilege in Japan – for example, attorneys' right to refuse testimony in a civil lawsuit (Article 197 of the Code of Civil Procedure) and attorneys' exemption from compulsory seizure (Article 105 of the Code of Criminal Procedure), which arguably constitute privilege.

(3) For example, it has been reported that the Tokyo Public Prosecutor's Office seized a personal computer of an attorney retained by a construction company subject to the investigation of the maglev train construction cartel in 2018.

(4) Tokyo High Court judgment, 12 September 2013.