

Opinion on the “draft Rules and draft Guidelines of the Japan Fair Trade Commission (“JFTC”) proposed in conjunction with the implementation of the Amendments to the Anti-Monopoly Law of Japan (“AML”)(“this Opinion”)

May 7, 2020

Japan Federation of Bar Associations

I Gist of this Opinion:

1 Scope of Application

The confidential treatment of communications between clients and attorneys (“**Treatment**”) should not be limited to investigation procedures of an alleged violation of an unreasonable restraint of trade which is subject to the leniency program, and should apply to all aspects of investigation procedures concerning AML.

2 Article 23-3, Paragraph 1, Item 2 of the draft rules (“**Rules**”) and II-1 (Objects recording contents of the Specified Communications) of the draft Guidelines on the Treatment of Confidential Communication Between Enterprises and Attorneys (“**Guidelines**”).

With regard to Article 23-3, Paragraph 1, Item 2 of the Rules, legal consultation is based on facts and, thus, legal advice contained in a legal opinion is based on certain facts. Considering this background, even if the communications include descriptions of factual perception or the like by an attorney who provides their opinion or advice, it should not be taken as recording facts which are not eligible as Specified Communications because of such descriptions. This interpretation should be clarified in the Guidelines.

3 Article 23-3, Paragraph 1, Items 4 and 5 of the Rules and II-2 (Appropriate Custody) and VII-1 (Appropriate Custody) of the Guidelines

In reference to “Indication”, “Place of Storage” stipulated in Article 23, Paragraph 1, Items 4 and 5 of the Rules and the Guidelines, the prescribed methods are recommended to both enterprises and the JFTC as best practice. However, such communications should be submitted to the Determination Officer for its determination, provided that the communications are reasonably perceived upon the request of the applicable enterprises, based on circumstances concerning the material in the case, as possibly satisfying the requirements that communications are made with attorneys related to a legal opinion on the AML and their confidentiality is maintained.

II Reasons for this Opinion

1 General

The proposal may be viewed as a positive step towards the protection, in part, of communications between clients and attorneys, although protection is limited. However, the scope of application of this Treatment and the requirements for the confidential treatment are not consistent with international standards. We are concerned that, even if Japan adopts a unique regime deviating from such international standards, it cannot be utilized in practice and desired purposes cannot be achieved.

The House of Representatives, when it approved the Amendments to the AML in 2019, mandated in its Supplemental Resolutions that "the scope and content of the Treatment should be consistent with international standards as much as possible."

The proposal deviates from practices implemented by Japanese enterprises which operate their business globally. The requirements for confidential treatment should be carefully assessed from the viewpoint of maintaining and improving the competitiveness of Japanese enterprises.

In view of these, we provide this Opinion here on the determination procedure (the procedure which enables confidential communications between enterprises and attorneys to be returned to enterprises without disclosing the contents to investigators) which are proposed by the Rules and the Guidelines.

2 First Item of this Opinion (Scope of Application)

According to the proposal, the Treatment is limited to circumstances where enterprises respond to the investigation procedures of an alleged violation of an unreasonable restraint of trade which is subject to the leniency program. However, such limitations are not known in foreign jurisdictions and are inadequate given that confidentiality should be protected for the purposes of facilitating legal consultation with confidence and thereby enhancing compliance with the laws and regulations and the due process of law. We pointed this out in the "President's Statement on Protection of Confidentiality of Communications between Clients and Attorneys," dated June 19, 2019 (the "**2019 President Statement**").

3 Second Item of this Opinion (Objects recording contents of the Specified Communications)

Article 23-3. Paragraph 1, Item 2 of the Rules requires that communications should not include any records which are not eligible as Specified Communication. However, the

confidential communications between enterprises and attorneys, such as legal consultation and advice, usually include in part statements of factual perception or the like by the attorney on which they provide legal opinion or legal advice, even though the entire purpose of the communications is to seek legal advice and give legal opinion. This is because legal consultation should be based on facts and, thus, it is common that legal opinion is advice based on certain facts. Excluding such communications from the confidentiality protection pursuant to Article 23-3. Paragraph 1, Item 2 of the Rules would contravene the objectives of the proposal; i.e. substantially protecting confidential legal advice related to consultation and ensuring the appropriateness of administrative investigation procedures (I of the Guidelines). We pointed this out in 2019, in a President Statement that "objects subject to confidentiality protection should be determined by the purposes and attributes of the object."

In this regard, Note 7 to II-1 of the Guidelines (Objects recording contents of the Specified Communications) states that "documents that mainly state the facts...are not included". However, any factual perception by an attorney which are described as a basis of his or her opinion or advice should not be considered as "facts" for the purposes of these Guidelines. We urge that Article 23-3. Paragraph 1, Item 2 of the Rules and II-1 of the Guidelines (Objects recording contents of the Specified Communications) be interpreted and implemented in a manner consistent with the second item of this Opinion.

4 Third Item of this Opinion (Appropriate Custody)

The proposal includes formality requirements such as "indication" and "visual separation." According to the proposal, communications between enterprises and attorneys, which are otherwise confidential by nature, are not protected unless such formality requirements are satisfied. It is conceivable that the Guidelines would recommend the best practices of indication or separation of the relevant objects from the other materials to facilitate efficient on-site investigations. It should be beneficial, and even necessary, to state clearly in the Guidelines that the JFTC should treat objects which are kept in accordance with the best practices to be the ones under "appropriate custody" and implement such practices.

However, rigid "requirements" beyond best practices are excessive burdens on enterprises. In particular, small and medium-sized enterprises, which cannot afford sufficient human resources and legal knowledge may find it difficult to place such indication and separation in advance. In addition, when a client conducts an initial consultation, the client may not have sufficient knowledge of the requirements at the point and in such a case it would be too onerous to expect the client affix "indication" (or "subject" in the case of e-mails) on, or create a specific e-mail account for, such initial communication.

In conclusion, “indication” and “place of storage” should not constitute requirements for confidentiality protection (such as requirements that specific or certain words should be affixed on the surface of objects, or that e-mail should be sent from an account specific to the relevant case). With this understanding, such communications should be submitted to to the Determination Officer for its determination, provided that the communications are reasonably perceived upon the request of the applicable enterprises, based on circumstances concerning the material in the case, as possibly satisfying the requirements that communications are made with attorneys related to a legal opinion on the AML and their confidentiality is maintained, even though the communications do not meet the best practices with regard to “indication” or “place of storage”.

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