

Dear Mr. Nakamoto,

It is a great pleasure to provide comments on your request regarding due process in anti-trust investigations. It is understood that anti-trust investigation processes both in the Republic of Korea(ROK) and Japan are quite similar; not only are the Fair Trade Commissions of both countries empowered with strong administrative authority but also Attorney-Client Privilege(ACP) has not yet been introduced in both jurisprudences.

I am glad to share our opinion that it is of our interest to adopt the principle of due process of law, including the ACP, into investigation procedures of Fair Trade Commissions.

On September 27, 2016, the Korean Bar Association held a forum on "Guaranteeing the right of audience and attorney-client privilege" and discussed the importance and necessity of introducing attorney-client privilege. Participants of the forum introduced the importance of ACP in legal systems, provided comparative studies, and came to a conclusion that we should work towards the legislation of ACP.

We believe that it is our duty as representatives of our clients to best protect their rights, and to strongly argue for the improvements on due process as promoters of rule-of-law.

I would like to inform you that we are in the process of preparing an official submission of opinion, calling upon the KFTC to fully recognize the rule-of-law, right of access to a lawyer, and ACP.

I hope the following comments will appropriately assist you in preparing

for your opinion to the Japan Fair Trade Commission.

Sincerely yours,

Dr. Hyun, KIM

President

Comments on reviewing the surcharge system

1. Comments on "Concrete facts were not found that enterprises have actually suffered from disadvantages for lack of so-called attorney-client privilege."

⇒ Attorney-Client Privilege(ACP) has been actively discussed, but not yet formally introduced in the jurisdiction of ROK.

In one particular criminal case (Seoul High Court, Case No. 2008No2778, rendered 26 June 2009), the Seoul High Court recognized ACP, holding that a guilty finding by a lower court based on materials protected by ACP was invalid. However, on appeal (Supreme Court, Case No. 2008Do6788, rendered 17 May 2012), the Supreme Court reversed the decision of the Seoul High Court.¹⁾

There are articles that provide legal basis for attorneys-at-law to refuse forced release of either knowledge or items that were obtained from clients²⁾, but it is a right granted only to attorneys, not clients, whereas

1) Hoil Yoon·Jae Yong Kim·Jason Sangoh Jeon, 「Immunity, Sanctions & Settlements」, 2016. 7. 26.

<http://globalcompetitionreview.com/jurisdiction/1000438/korea>

2) Criminal Procedure Act Article 112 (Professional Secrets and Seizure) A person who is or was a licensed advocate, patent attorney, notary public, certified public accountant, licensed tax accountant, public scrivener, doctor, herb doctor, dentist, pharmacist,

druggist, midwife, nurse, or a religious functionary may resist seizure of articles held in his/her custody or possession in consequence of mandate he/she has received in the course of his/her profession and which relates to secrets of other persons. **Provided that** this shall not apply if such other persons have consented to such seizure, or if it is necessary for important public interests.

Article 149 (Professional Secrets and Refusal of Witness) A person who is or was an attorney-at-law, patent attorney, notary public, certified public accountant, certified tax accountant, public scrivener, doctor, herb doctor, dentist, pharmacist, druggist, midwife, nurse, or religious functionary may refuse to testify in respect to facts of which he/she has obtained knowledge in consequence of a mandate he/she has received in the course of his/her profession and which relate to secrets of other **persons**. **Provided that** this shall not apply if such other persons have consented, or if the testimony is deemed necessary for the important public interest.

Civil Procedure Act Article 315 (Right to Refuse Testimony)(1) A witness may refuse to testify if it falls under any of the following subparagraphs:

1. When an attorney-at-law, patent attorney, notary public, certified public accountant, certified tax consultant, persons engaged in medical care, pharmacist, or a holder of other post liable for keeping secrets under statutes, or of a religious post, or a person who used to be in such post, is examined on matters falling under the secrets of his/her official functions;
2. When he/she is examined on matters falling under his/her

ACP is recognized as the right of clients.

However, it is easily predictable that when ACP is not granted, it will discourage clients to have genuine and free conversations with their attorneys, and this in turn will hinder attorneys from providing the best legal advice. In other words, —ACP encourages full and frank communication between attorneys and their clients. The advantage of ACP goes on to promote broader public interests in the observance of law and administration of justice.³⁾

2. Comments on "from the perspective of enabling the new leniency program to function better, it is appropriate for the JFTC to take care of the only communications between attorneys and their clients (enterprises) related to the use of the new leniency program to the extent that fact-finding ability of the JFTC should not be impeded,"

⇒ The purpose of the ACP is to ensure that clients receive accurate and competent legal advice by encouraging full disclosure to their lawyer, without fear that the information will be revealed to others. It also helps attorneys in giving sound legal advice and representation, because attorneys can come up with the most desirable outputs only when honest assessments regarding all necessary information and facts around the clients have been secured.⁴⁾

technical or professional secrets.

(2) The provisions of paragraph (1) shall not apply where the witness has been exempted from a liability for keeping secret.

3) *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

4) Thierry Calame, 「The nature of the problem – is this a matter of public interests as well as private interests, and where does the

Considering the nature of ACP, it should not be arbitrarily adopted for the sake of trust and protection of a target under investigation. Only with full guarantee of ACP, the purposes of ACP will be attainable.

In the case of KFTC, it formulates and administers competition policies, and deliberates, decides, and handles antitrust cases. When possible violation of the law is reported or alleged, the competent bureau or regional office launches an examination into the concerned issue. The examination process includes investigation of relevant documents, taking statements from related parties, consultation with experts, conducting legal reviews, etc.⁵⁾

It is clear from the overview that the investigation thoroughly covers almost all areas of the investigation target. Protection of attorney-client communications itself is meaningful in that candid conversations helps both attorney and clients to prepare for what is expected. However, the right of access to a lawyer at any stage of investigation will be necessary to reach the true meaning of rule-of-law.

3. Comments on "The right of defense in deposition procedures is sufficiently protected under the current system, since the guidelines clearly allow for employees to contact their attorneys and take notes based on their memory in breaks during the deposition procedure."

⇒ The KFTC, which sets out regulations on investigation procedures, recently introduced the right of investigation targets to expressly request

balance lie between those interests?」, 2008. 5. 23.

5) Korea Fair Trade Commission,
<http://www.ftc.go.kr/eng/about/overview3.jsp?pageId=0102>.

that their lawyers be present during on-site investigations.⁶⁾

6) Public Notification of Korea Fair Trade Commission Investigation Procedure Rules (Korea Fair Trade Commission Public Notification No. 2016-1, Feb 4, 2016.)

Article 13 (Right to Counsel throughout Investigation) ① Upon investigated company's request, investigating official shall allow the presence of lawyer, such as the lawyer appointed by investigated company (including in-house lawyers), throughout the investigation (including the interview and the preparation of a statement of acknowledgement) as a matter of principle except in cases where the situation falls any of the followings.

1. It is deemed that the request for the presence of lawyer by investigated company has a purpose of delaying or obstructing the initiation or the process of investigation.

2. If the lawyer intervenes the interview without approval from investigating official or if the lawyer uses insulting words or conducts.

3. If the lawyer answers on behalf of investigated company or induces investigated company to make a particular answer or to recant.

4. If the lawyer films, records, or takes note of the interview, except in cases where the lawyer took note very briefly just to remember what kinds of legal counseling he or she plans to give to the client.

5. In addition to the cases stipulated in item 1 through item 4, if the lawyer makes it significantly difficult to achieve the investigation objective.

Amendments to the KFTC's regulations on investigation procedures took effect from February 4, 2016, and largely aim to strengthen investigation targets' defense rights - e.g. at on-site investigations (dawn-raids), investigating KFTC officers are now required to present investigation targets with the charges made against them in writing, and investigation targets now have the express right to request that their lawyers be present during the on-site investigation. Previously, although investigation targets were often permitted to have lawyers present if they requested it, this was not a right but a privilege bestowed by discretion of the investigating officers; it is now an express right stated in investigation procedure regulations, to strengthen investigation targets' defense rights and prevent arbitrary exercises of discretion by investigators.⁷⁾

Even an ordinary person who is without any fault would feel uncomfortable during the deposition procedures. Similarly, an investigation target who is intimidated would easily make inappropriate choices of presentation, which could lead to penalty resolutions of the committee.

The deposition procedures are made up of not only statements, but also other details, including gestures, tone of voices, eye contact, atmosphere,

② Notwithstanding paragraph ①, if a cartel investigation demands a timely investigation due to concerns over evidence tampering, etc., investigating official may initiate or proceed with the investigation, irrespective of investigated company's request for the participation of lawyer.

7) Korea Business Leaders Alliance, "The KFTC in 2016 and 2017", 2017. 2. 26.
<http://www.kbla.info/index.php/the-kbla-blog/1050-kftc-2016-2017>.

and etc. Break times to take notes and consult with attorneys would not be enough for the examinee to secure a full defense right.

In the case of Korea, considering how the KFTC functions as a quasi-judiciary body, the anti-trust investigation process is equivalent to execution of state power in terms of its effect on people. Therefore, we believe that the defense right of the examinee would be fully secured only when it is equally guaranteed as in criminal procedures or at the very least, full right of access to a lawyer at any stage of the investigation is guaranteed.