Dispelling the Perception that Legal Privilege impedes Antitrust Enforcement – The US Experience

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My contribution to this article is to share my experience of the United States Department of Justice Antitrust Division ('Antitrust Division') with legal privilege to dispel the perception that it impedes antitrust enforcement. Having moved to private practice, I cannot speak for the Antitrust Division. However, during my tenure heading the Antitrust Division's cartel enforcement programme, I saw first-hand and gained a great appreciation for how attorney-client privilege and the work product protection promote compliance and complement enforcement of the US antitrust laws. These protections would produce the same benefits in Japan and would further the interests of all stakeholders in the fair and effective enforcement of the Anti-Monopoly Act in Japan.

As discussed in Yabuki-san's contribution, the Advisory Panel debated the

9 See Japan Fair Trade Comn'n, Guidelines on Administrative Investigation Procedures under the Antimonopoly Act (Draft) (2015), available at: www.jftc.go.jp/en/pressreleases/yearly-2015/June/150630.files/Attachment.pdf.

introduction of the attorney-client privilege in the JFTC's administrative procedures. Its members did not consider the merits of introducing a protection for attorney work product. The attorney-client privilege and the work product protection (collectively, 'legal privilege') operate as distinct protections under US law and consideration should be given to introducing both protections in order to achieve the benefits discussed in this response to the Advisory Panel Report.

The attorney-client privilege protects a communication between the attorney and client from discovery, as long as the communication is intended to secure legal advice and involves a legal issue that is the subject of the representation. These communications are protected from disclosure because an attorney must 'know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.'[10] The work product protection, on the other hand, covers more than just attorney-client communications. An attorney's 'work product' – the 'interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other' reflections of an attorney's efforts prepared pursuant to or in anticipation of litigation – deserves 'a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel'.[11] Although it encompasses a broader set of documents and communications than the attorney-client privilege does, the protection afforded to attorney work product is qualified and – unlike attorney-client privilege – may be overcome if an opposing party 'shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means'.[12]

The current stalemate

The JFTC has resisted recognising attorney-client privilege in its investigations unless Japanese law is amended to give the JFTC discretion in its sanctioning power. The JFTC believes that discretionary sanctioning power is required to ensure that companies do not exaggerate privilege claims to impede the JFTC's investigations. The JFTC's concerns were echoed by Advisory Panel members who stated that '[w]ith no incentives for companies to cooperate in the JFTC's investigation… in the current situation, there is much apprehension that companies will claim an attorney-client privilege in terms of a variety of aspects including materials concerning facts necessary to prove violations and other documents, and that an attorney-client privilege will be abused.'[13]

Linking the introduction of the attorney-client privilege with the granting

10 *Upjohn Co v United States*, 449 US 383, 389 (1981).
11 *Hickman v Taylor*, 329 US 495, 510–11 (1947).
12 Federal Rules of Civil Procedure 26(b)(3).
13 *Advisory Panel Report*, n3 above, at 19.

of new discretionary sanctioning powers has drawn opposition from within the Japanese business community as well as from several members of the Advisory Panel. Rights of defence for the subjects of JFTC investigations have not kept pace with the continuous expansion of the JFTC's investigative powers in recent years, and some hold the view that enhanced protections should be introduced before the JFTC's powers are boosted again with the introduction of discretionary sanctioning powers. A companion concern exists that the JFTC will seek to raise the maximum surcharge levels if legislation providing it with discretionary sanctioning powers is introduced. Lastly, questions have been raised as to whether the JFTC would misuse discretionary sanctioning powers leading to higher, inequitable and disproportionate sanctions.

Thus, as reflected in the collective views of the Advisory Panel, a stalemate currently exists over the introduction of legal privilege linked to the granting of discretionary sanctioning powers to the JFTC. Resolving that impasse is hampered by the level of suspicion that exists on both sides of the debate as to whether the exercise of legal privilege by companies or discretionary powers by the JFTC will be abused. However, there is common ground, within the debate and a way forward.

A proposed way forward

All stakeholders share a common interest in promoting the fair and effective enforcement of Japan's Antimonopoly Act. Both the introduction of legal privilege and grant of discretionary sanctioning powers in JFTC investigations advance that objective. Legal privilege would ensure that confidential communications are protected and that the Japanese business community receives full and adequate representation which would lead to greater compliance. In addition, the protections would encourage companies to conduct more thorough and effective internal investigations which, in turn, would support the JFTC's objectives in promoting the early detection of cartel activity and the self-reporting of cartel violations. The JFTC can respect the valid exercise of legal privilege in its investigations without hindering its fact-finding ability if it is able to exercise discretionary sanctioning powers. These powers would allow the JFTC to consider whether a company provided full and timely cooperation when imposing a sanction. The exercise of discretionary sanctioning powers would benefit all stakeholders if applied in a transparent, consistent and equitable manner.

Legal privilege is not presently recognised under Japanese law in either criminal or regulatory investigations or proceedings. The Advisory Panel heard from various stakeholders and debated the merits of amending the Antimonopoly Act to introduce the attorney-client privilege to JFTC investigations.

This response to the Advisory Panel Report seeks to complement the work of the Advisory Panel by comparing a proposed procedural framework for evaluating

privilege claims considered by the Advisory Panel with the protocols established by the Antitrust Division. It also builds on the proposed framework laid out in the Advisory Panel Report by proposing an amendment to the Antimonopoly Act that would institute a process for allowing privilege holders to appeal adverse JFTC decisions regarding legal privilege claims to an independent body. The proposed appeal procedures are designed to protect the interests of the privilege holder as well as the integrity of JFTC investigations. If legal privilege is introduced, it will be necessary for the reviewing body to quickly develop expertise so as not to delay JFTC investigations. Therefore, this article also proposes introducing either a special court or a special commission to hear prompt appeals of JFTC decisions and to render binding decisions in future JFTC proceedings.

In response to the Advisory Panel Report, this article also supports conferring discretionary sanctioning powers to the JFTC in order to create both an incentive for full cooperation as well as a deterrent for obstructive conduct, including exaggerated legal privilege claims. The lack of discretionary sanctioning powers is the focal point of the opposition to introducing legal privilege, but its ramifications reach more broadly. The JFTC's inability to recognise meaningful differences between companies that fully cooperate and those that do not puts it at a significant disadvantage in its investigations compared to the world's other major competition authorities, because companies, for the most part, are reluctant to incur the substantial costs associated with cooperation unless there are tangible benefits to be gained.

The proposals contained herein are bold and would require substantial revisions to the Antimonopoly Act and widespread support from all affected stakeholders to succeed. The JFTC and the Japanese business community are urged to join together in supporting the introduction of legal privilege as well as discretionary sanctioning power in order to promote the fair and effective enforcement of the Antimonopoly Act.

Addressing concerns regarding the misapplication of legal privilege

The heart of the Advisory Panel's and the JFTC's opposition to introducing attorney-client privilege appears to be that it risks hindering the JFTC's fact-finding ability because: (1) privileged communications may constitute the only source of evidence for facts essential to proving a violation; and (2) companies will improperly assert the privilege to conceal incriminating documents that are devoid of privileged communications.[14] From the perspective of the Antitrust Division's experience, the first concern regarding impairing the JFTC's access to essential facts is overblown and the second concern relating to the risk of improper privilege assertions is manageable.

14 See *Advisory Panel Report*, n3 above, at 19-22.

Privileged communications and the search for truth

The JFTC's objections to introducing attorney-client privilege were shared with the Advisory Panel and summarised in the Advisory Panel Report as follows:

- 'If a wide range of information on *facts necessary for investigation* is protected by attorney-client privilege, there is a possibility that the admissibility of evidence may be denied in litigation by the court eventually, which in itself impairs the fact-finding ability of the JFTC.
- In judging whether information is protected by attorney-client privilege and *essential to prove violations*, such judgment need to be made very carefully, taking into account the possibility of such judgment being challenged in litigation for rescinding a JFTC decision.
- Whether some information is *essential to prove violations* cannot be determined at an early stage of investigation, and it could be even more difficult for the Inspector who is not involved in the investigation to make such highly-advanced judgment.
- Even if such judgment is made, there will be a problem that information on facts included in materials subject to attorney-client privilege cannot be used as evidence until near the end of investigation when other evidences are on the table.'[15]

In essence, the JFTC appears concerned that: (1) restricting its access to a privileged communication between a lawyer and a client may harm enforcement because the document may constitute the only source of evidence for facts essential to proving a violation; and (2) making a determination as to whether the privileged communication contains facts essential to prove a violation is difficult and will lead to litigation challenges. Both concerns rest on the assumption that the JFTC is likely to encounter situations where privileged communications are the only source of information for facts essential to the JFTC's ability to prove a violation. Yet, it appears from language in the Advisory Panel Report that the JFTC conceded that it has not encountered a situation where information contained in a communication between counsel and a client would have met this test. The Advisory Panel Report states that: 'According to the JFTC, there are no cases where a document that could be subject to an attorney-client privilege has constituted conclusive evidence to prove violations.'[16]

The conclusion that legal privilege is likely to harm enforcement by depriving authorities of information essential to prove a violation is also inconsistent with the Antitrust Division's experience. While overseeing the Antitrust Division's cartel enforcement programme, I was not aware of an instance where the content of a privileged communication was considered essential to the Antitrust Division's

15 *Ibid* at 22 (emphasis added).
16 *Ibid* at 18.

ability to prove the existence of cartel activity. Legal privilege does not protect from discovery underlying evidence, it only protects from discovery an attorney's communications or work product analysing the underlying evidence. Typically, the company and/or the Antitrust Division will have direct access to the underlying evidence through a non-privileged document, a witness or a combination of documents and witnesses that capture the same factual information contained in a privileged communication.

Indeed, privileged communications containing relevant factual information in cartel investigations are typically created after the discovery of the conduct and are prepared for the purpose of advising the client on addressing the conduct. Attorneys representing targets in ongoing Antitrust Division investigations regularly create internal investigative reports that summarise incriminating documents and witness statements. Those reports may in some cases identify witnesses, documents and/or leads presently unknown to the government. However, the attorney's work product will rarely, if ever, be the only source for the information because the work product is most often based on existing non-privileged documents and on statements from witnesses who could be deposed by the JFTC.

It may be tempting for an authority to piggyback off of a company lawyer's investigative work. However, such a shortcut comes at a steep cost. It undermines the ability and the incentives of companies to utilise their lawyers to conduct a thorough and effective internal investigation, which, in turn, has the undesirable effect of leading to a higher likelihood that misconduct will go undiscovered and that companies will receive uninformed legal advice that results in less self-reporting, and, ultimately, diminished enforcement.

The Antitrust Division's unique stance

It would take a bold stance by the JFTC to embrace legal privilege in its investigations. As previously noted, legal privilege is not recognised under Japanese law. Introducing it would set the JFTC apart from other Japanese government regulators and prosecutors in the treatment of confidential communications. It is noteworthy that the Antitrust Division similarly stood alone in the past in protecting legal privilege.

The Antitrust Division has a long track record of committing itself to assiduously respecting legal privilege in its investigations. Antitrust Division leadership over the years has made public policy announcements and instituted uncompromising internal practices that recognise the vital role that legal privilege plays in promoting compliance and facilitating effective internal investigations. For example, an applicant to the Antitrust Division's corporate leniency programme is not required to provide communications or documents protected by the attorney-

client privilege or the work product doctrine in order to meet its cooperation obligations.[17] Moreover, as stated in the introductory paragraph of the Antitrust Division's Model Corporate Conditional Leniency Letter, the Antitrust Division will agree 'that disclosures made by counsel for Applicant in furtherance of the leniency application will not constitute a waiver of the attorney-client privilege or the work-product Privilege'.[18] Similarly, the Antitrust Division's Model Annotated Corporate Plea Agreement makes clear that a company will not be required to produce communications protected by legal privilege in order to meet its cooperation obligations.[19]

For many years, the Antitrust Division was the only litigating component in the Department of Justice ('Department' or 'DOJ') with a uniform and unwavering practice of respecting legal privilege. Outside of the Antitrust Division, DOJ prosecutors routinely pressured cooperating parties to waive these protections and provide privileged documents and information in order to receive full credit for cooperation. It was not until 2008 when, under intense pressure from the US Congress, the Department of Justice adopted internal regulations requiring all of its prosecutors to respect legal privilege in a manner consistent with then-existing Antitrust Division practice.[20] The Antitrust Division held steadfast to its practice despite its solitary stance for many years within the Department of Justice because its leadership recognised that legal privilege waivers undermine compliance as well as the ability of companies to conduct effective internal investigations that may lead to the early detection and self-reporting of cartel activity.

The Antitrust Division also recognised that forfeiting these protections would reduce incentives for companies to self-report antitrust violations because it would put cooperating companies at risk of losing the ability to assert legal privilege over

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17 See Dep't of Justice Antitrust Division, Model Corporate Conditional Leniency Letter (2014), available at: www.justice.gov/sites/default/files/atr/legacy/2014/05/13/239524.pdf; Scott D Hammond and Belinda A Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (2008) Dep't of Justice Antitrust Division 16–17, available at: www.justice.gov/sites/default/files/atr/legacy/2014/09/18/239583.pdf.

18 See Model Corporate Conditional Leniency Letter.

19 See Dep't of Justice Antitrust Division, Model Annotated Corporate Plea Agreement 15 No 26 (2013), available at: www.justice.gov/atr/public/criminal/302601.pdf; see also Scott D Hammond, Deputy Assistant Att'y General for Criminal Enforcement, Dep't of Justice Antitrust Division, The US Model Of Negotiated Plea Agreements: A Good Deal With Benefits For All (17 October 2006), available at: www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all.

20 See Dep't of Justice, United States Attorneys' Manual s 9.28.710 (2009) (hereinafter *US Attorneys' Manual*), available at: www.justice.gov/usam/title-9-criminal ('[W]hile a corporation remains free to convey non-factual or 'core' attorney-client communications or work product – if and only if the corporation voluntarily chooses to do so – prosecutors should not ask for such waivers and are directed not to do so.'); Evan Perez and Amir Efrati, 'US Pares Its Arsenal in White-Collar Crime Fight' (29 August 2008) Wall St J: www.wsj.com/articles/SB121993073286679655 (The new guide was 'intended to assuage criticism that prosecutors have unfairly wielded the threat of criminal charges against companies to pressure them… to share information normally protected by attorney-client privilege'); Eric Lichtblau, 'US to Ease Pressure Tactic Over Legal Help for Employees' (27 August 2008) NY Times, see: www.nytimes.com/2008/08/28/business/28justice.html.

the same communications in follow-on private actions in the US, where claimants can recover treble damages and where civil exposure can eclipse the amount of any criminal fine. Once a privileged document is disclosed to a third party, such as an investigating enforcement agency, a high risk exists that the protection will be deemed waived and the privilege holder will have to produce the document, and potentially all other privileged documents involving the same subject matter, to private claimants.[21]

A company that discovers its involvement in cartel activity affecting markets in the US and Japan has an incentive to simultaneously report the conduct and seek full immunity in both jurisdictions. However, while the Antitrust Division and JFTC leniency programmes both offer full immunity from sanctions for the first company to self-report,[22] the diverging treatment with respect to privileged communications potentially creates a substantial disincentive to self-reporting in Japan for companies facing, or likely to face, private treble damage exposure in the US.

Evaluating privilege claims

A majority of the Advisory Panel members supported the JFTC's view that it was premature to introduce the attorney-client privilege to JFTC investigations because the agency currently lacks the ability to curtail exaggerated privilege claims. Before addressing the issue of whether the JFTC should have discretionary sanctioning powers in order to curb exaggerated privilege claims, it is worth exploring how the introduction of legal privilege could be paired with companion regulations governing how legal privilege will be evaluated and challenged.

Procedures considered by the advisory panel

Yabuki-san and another member of the Advisory Panel who supported the attorney-client privilege's prompt introduction in Japan proposed a mechanism for companies to assert privilege claims and for the JFTC to evaluate them (the 'Proposed Procedures').[23] As contemplated under the Proposed Procedures, when a company asserts privilege over a seized document, the JFTC staff assigned to the investigation ('Investigative Staff') passes the document to a separate JFTC staff member referred to as the 'Inspector.' The Inspector reviews the documents and determines whether there is 'good reason' for returning the document to the company.

21 See *United States v AT&T*, 642 F.2d 1285, 1299 (DC Cir 1980) ('the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege').

22 See Dep't of Justice Antitrust Division, Corporate Leniency Policy (2007), available at: www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf; Japan Fair Trade Comm'n, About the Leniency Program, available at: www.jftc.go.jp/files/about_leniency.pdf.

23 See *Advisory Panel Report*, n3 above, at 20-21.

If the Inspector determines that a document is subject to privilege, then it will be returned to the privilege holder unless it contains facts essential to prove a violation (the 'Essential Facts Exemption'). In that case, the JFTC's enforcement interests will trump the privilege and the Inspector will deliver the document to the Investigative Staff as evidence. Thus, the Proposed Procedures attempt to address the JFTC's and the Advisory Panel's concerns regarding the preservation of the JFTC's fact-finding ability by placing the JFTC's investigative interests above the interests in protecting the sanctity of the privilege.

Comparing the proposed procedures with antitrust division practice

Set forth below is a comparison of the Proposed Procedures considered by the Advisory Panel for asserting and evaluating privilege claims in JFTC investigations and the corresponding Antitrust Division practice. Language in the Proposed Procedures granting powers to the JFTC that differs from or exceed Antitrust Division practice and/or US law are noted in italics. Non-italicised language denotes a protocol that is similar to Antitrust Division practice. As shown below, the Proposed Procedures would provide the JFTC with broader powers to seize privileged communications, to circumvent valid privilege claims, and to adjudge whether documents are subject to legal privilege than are recognised in the US.

PROTECTED MATERIALS

The Proposed Procedures define what materials may be covered by attorney-client privilege in JFTC investigations as follows:

- '*Materials to be protected (submission of which is refused for good reason) are limited to legal questions from a company to an attorney and legal advice from an attorney to a company.* However, any descriptions of facts integrated into the above questions or advice are also protected.'[24]

Under US law, the material protected by the attorney-client privilege is broader than that protected by the Proposed Procedures. In the US, attorney-client privilege protects more than legal questions from a client and legal advice from the attorney. To wit, it applies to any confidential communication 'for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding,' as long as it was not 'for the purpose of committing a crime or tort.'[25] Thus, attorney-client privilege can apply even when an attorney-client relationship has not been established and the communication is pursuant to establishing such a relationship.

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24 *Ibid*, at 20 (emphasis added).

25 *United States v United Shoe Mach Corp*, 89 F Supp 357, 358 (D Mass 1950).

Attorney work product is not discoverable in the US even if the information is not the subject of an attorney-client communication. Any tangible product of an attorney's efforts prepared in anticipation of litigation is protected, unless a party 'shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.'[26]

Privilege logs and separate storage requirements

The Proposed Procedures envision that companies in Japan will store privileged materials separately from other documents and maintain up-to-date privilege logs as a prerequisite to asserting privilege over a document in a JFTC investigation as follows:

- '*A company beforehand makes a list of materials subject to attorney-client privilege* and stores them separately from other documents.'[27]

This Rule would appear to serve form over function. While it is a best practice for companies to maintain the confidentiality of legally privileged materials by storing them in separate files and clearly and prominently labelling the files as containing privileged communications, compliance with this highly recommended practice is not a prerequisite for asserting legal privilege in the US. Further, in practice, legal advice is shared via email among employees in the legal and compliance departments, as well as with senior executives. Maintaining one copy of the document in one location given the realities of today's working environment would appear unnecessarily restrictive, unrealistic and burdensome. Moreover, no requirement exists in the US that a company maintain an up-to-date log or list of every privileged communication located on the premises in order to assert legal privilege. Such a prerequisite could add a significant burden and, if an innocent oversight resulted in the omission from the list of a key privileged document, losing protection due to a technicality would render the rule arbitrary and unfair if the document otherwise met the substantive criteria of a privileged document.

Cursory review by investigating staff

The Proposed Procedures allow the JFTC Investigating Staff to perform a cursory review to test privilege assertions as follows:

- 'At the time of on-the-spot inspection, the *investigation staff* can take a cursory look at documents that may be subject to protection in order to determine whether there is a good reason for refusing to submit.'[28]

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26 Federal Rules of Civil Procedure 26(b)(3).
27 *Advisory Panel Report*, see n3, at 20 (emphasis added).
28 *Ibid* (emphasis added).

In Antitrust Division investigations, search warrants are performed by Federal Bureau of Investigation (FBI) agents. Antitrust Division personnel assigned to the matter are not present for, and do not take part in, the search. If the FBI agents come across documents that may be subject to legal privilege, they must stop reviewing the materials, separate them from the other seized materials, and deliver them to Antitrust Division prosecutors who are not assigned to the investigation, the so-called taint or filter team (the 'Taint Team'). As discussed below, the Taint Team will review and assess the legal privilege claim. The Antitrust Division prosecutors and the FBI agents assigned to the matter (the 'Prosecution Team') will not have access to seized documents until any related legal privilege claims are resolved. Any member of the Prosecution Team that is exposed to information that is determined to be privileged is subject to being removed from the matter.

Seizing documents when privilege is asserted

The Proposed Procedures set forth the following procedure when a company claims privilege over a document seized by the JFTC Investigative Staff:

- '*If the investigation staff reasonably judges that a company may destroy or hide documents it refuses to submit, the investigation staff issues a submission order to the company,* seals off the submitted documents and passes them to another investigation staff (hereinafter referred to as the 'Inspector') who is not involved in the investigation of the case.'[29]

The Proposed Procedures differ from the US experience to the extent that it appears to give the investigative staff the right to seize documents that are determined to be subject to legal privilege '[i]f the investigation staff reasonably judges that a company may destroy or hide' the documents. In the US, if a determination is made at the time of the search that a document is subject to legal privilege, then it falls outside the lawful scope of the search warrant and may not be seized. However, in reality, the FBI agents are unlikely to make that determination on the premises and are likely to seize documents that are responsive to the search warrant in the face of a legal privilege claim. In that situation, the company should alert the agents that the documents are subject to legal privilege and should be segregated from the other seized materials pending the review of its privilege claim.

Using non-investigating staff to review privilege claims

The Proposed Procedures create a protocol whereby a JFTC 'Inspector', who is

29 *Ibid* (emphasis added).

not affiliated with the investigating staff, reviews and is the final arbiter of privilege claims as follows:

- 'The Inspector investigates documents (including the submitted documents mentioned above) for which there is a conflict as to whether they are subject to protection, and determines whether there is a good reason for refusing to submit them. The Inspector returns to the company the documents for which he/she judges there is such a good reason (documents subject to attorney-client privilege) and *delivers the other documents to the investigation staff as evidence*.'[30]

In comparison, after the Antitrust Division obtains a search warrant and seizes documents from a company's premises, it invites the company to raise legal privilege claims with respect to any seized documents before the Prosecution Team reviews the documents. Any documents identified as subject to legal privilege by the company are separated from the other seized documents and reviewed by a separate Taint Team to test the privilege assertions. The Taint Team will consist of Antitrust Division prosecutors who are not assigned to the investigation and whose only role in the pending matter is to review and, if necessary, contest privilege claims. Members of the Taint Team are walled off from the Prosecution Team to ensure that its members remain free of the 'taint' arising from exposure to legally privileged materials.

If the Taint term determines that the privilege claim is valid, it returns the document to the company ensuring that no one on the Prosecution Team is exposed directly or indirectly to the privileged communication. If the Taint Team concludes that the privilege claim is unfounded, it will advise company counsel of its position. However, in contrast with the role of the Inspector in the Proposed Procedures, the Taint Team is not the final arbiter of whether a document is privileged. If the privilege holder is unwilling to withdraw the privilege claim, then a determination is made by a supervising court as to whether the document is privileged and must be returned.

The Taint Team will release any documents to the Prosecution Team over which the seized party (or anyone else with a privilege claim over the documents) fails to invoke legal privilege. Therefore, privilege holders need to be diligent in promptly asserting privilege and in seeking the return of privileged materials in court or run the risk that the privilege will be deemed to have been waived. The Taint Team procedures are designed to test and resolve privilege claims without running the risk that the Prosecution Team will make direct or derivative use of confidential communications that are subsequently determined to be privileged. Of course, whether the procedure is effective depends on its good faith application.

30 *Ibid* (emphasis added).

If members of the Taint Team leak information or assist the Prosecution Team in making derivative use of the information in any way, their unethical conduct will undermine the procedural safeguards in place.

The Antitrust Division has traditionally taken a more conservative approach than the rest of the Department by invoking the Taint Team procedures for every search warrant performed in its investigations and by assigning only Antitrust Division prosecutors to serve on Taint Teams, rather than staffing Taint Teams with a mixture of FBI agents and prosecutors. These practices are not dictated by law or Department Policy.[31] However, they have achieved the desired result. I am not aware of any instance where a court determined that a member of the Prosecution Team obtained direct or indirect access to legally privileged information improperly seized by the government in an Antitrust Division investigation, nor am I aware of any instance where such a claim was levied against the government by a privilege holder.

PRIVILEGE LOGS

The JFTC initiates its cartel investigations by seizing documents pursuant to an order of submission. Therefore, the Proposed Procedures assume that the JFTC will take possession of a document when evaluating a privilege claim. However, that will not necessarily be the case in the US. The Antitrust Division will often launch the overt stage of an investigation by issuing federal grand jury *subpoena duces tecum* to the corporate subjects rather than by executing search warrants. A *subpoena duces tecum* is a court order requiring the subpoena recipient to produce evidence, such as documents, tape recordings, photographs, and other tangible evidence.[32]

If a legal privilege is claimed with respect to a document otherwise responsive to a subpoena duces tecum, then the Antitrust Division will be required to follow a different procedure to test the privilege claim. In this scenario, the company is in possession of the document, so the government has no visibility as to its contents and cannot verify the basis for the assertion of privilege or whether to challenge it. A subpoena recipient who claims privilege over otherwise responsive material is required to create a privilege log identifying which documents are excluded from the subpoena production on the basis of a legal privilege. The purpose of the privilege log is to provide sufficient information to the requesting party and the court to evaluate the claim of privilege. Without disclosing its content, for each withheld document, a privilege log typically identifies the legal privilege asserted,

31 The Department of Justice's US Attorneys' Manual, an internal guidebook for Department prosecutors, contains recommended procedures for the utilisation of Taint Teams for searches conducted at an attorney's office, but it does not provide guidance for the handling of privileged materials for searches conducted at other locations. See *US Attorneys' Manual*, n20 above, at s 9-13.420(E).

32 See Federal Rules of Criminal Procedure 17(c).

the document type, the subject matter involved, date, author and recipients, and any other information necessary to identify the document and basis for the privilege.

The Essential Facts Exemption

The Proposed Procedures provides for an Essential Facts Exemption whereby attorney-client privileged communications can be shared with the investigation staff and used as evidence if the information cannot be obtained by other means and is deemed essential to prove the violation as follows:

- 'As for facts that are included in questions from the company to an attorney and that support violations by the company, *if information on such facts cannot be obtained by other means (such as deposition) but is essential to prove the violations,* the Inspector deems that there is no good reason for refusing the order to submit, and delivers such information to the investigation staff as evidence.'[33]

The Essential Facts Exemption does not exist in the US and whether an attorney-client communication contains essential facts is irrelevant when evaluating whether a document is protected by the attorney-client privilege. A third party cannot obtain access to a privileged communication by asserting a need for the information in a particular case.[34] Therefore, the attorney-client privilege cannot be circumvented by the Antitrust Division on the basis that the communication is necessary to prove a violation because it is the only source of the information. In fact, American courts protect attorney-client privilege so assiduously that it even extends posthumously, and the courts are reluctant to find exceptions beyond the crime-fraud exception and waiver.[35]

Implementing an Essential Facts Exemption would raise serious challenges. The Proposed Procedures contemplate that the Inspector will resolve privilege claims after the JFTC conducts its inspections. Companies seeking to assert the privilege in JFTC investigations will be motivated to identify other sources for the same information to rebut the claim that the information is essential. However, it may be difficult or impossible for the privilege holder or the Inspector to determine whether the information is available from other sources at the early stages of an

33 *Advisory Panel Report*, n3 above, at 20 (emphasis added).

34 As discussed earlier, the work product protection can be overcome. The work product protection holds that the tangible products of an attorney's efforts produced in anticipation of litigation are not discoverable. See 8 Wright and Miller et al, *Federal Practice & Procedure § 2024* (3rd edn, updated April 2015). This protection, however, can be overcome if a party 'shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.' Fed R Civ Proc 26(b)(3). See also *Hickman v Taylor*, 329 US 495, 511 (1947) ('Where relevant and non-Privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had').

35 See *Swidler & Berlin v United States*, 524 US 399, 410 (1998) ('A 'no harm in one more exception' rationale could contribute to the general erosion of the privilege').

investigation. The JFTC recognised this challenge in its comments to the Advisory Panel. The Advisory Panel Report states that the JFTC expressed the concern that '[w]hether some information is essential to prove violations cannot be determined at an early stage of investigation, and it could be even more difficult for the Inspector who is not involved in the investigation to make such highly advanced judgment'.[36]

The Proposed Procedures are bound to result in outcomes where the Inspector in good faith (but with imperfect information) releases the information to the investigation staff after determining that a privileged communication contains essential facts and the JFTC subsequently obtains access to the same facts from another source. At that point, the information contained in the confidential communication would no longer be essential but the protections would be lost. Returning the document to the privilege holder would not remedy the taint nor cure the potential loss of protection in other jurisdictions where the JFTC's access to the document could result in a waiver of the privilege due to breach of confidentiality. Moreover, if the confidential information in the communication leads to newly discovered information (as well as to other incriminating information), then it will raise further issues about the JFTC's derivative use of the privileged communication and the integrity of the JFTC's investigation will be called into question. Given the problems associated with making an Essential Facts determination and with remedying miscalculations, as well as the low likelihood that the JFTC will encounter situations where no alternative sources exists for the information contained in the attorney-client communication, in this instance, it would be best to follow the US example and forego the Essential Facts Exemption.

Judicial review

A right to an expedited appeal

The Proposed Procedures do not provide for a prompt right of appeal from an adverse Inspector decision. That is not surprising given that no expedited appeal process currently exists for subjects of a JFTC investigation to vindicate other rights of defence during the course of a JFTC investigation.[37] Instead, appeals are heard only after the JFTC issues its final decision in the form of a cease-and-desist order or a surcharge order. Therefore, substantial legal and institutional hurdles exist to instituting a right to appeal an adverse Inspector decision before the JFTC issues its final decision which is beyond the scope of this article. Consideration, however, should be given to amending the Antimonopoly Act to institute an immediate right

36 *Advisory Panel Report*, n3 above, at 22.

37 Art 70-11 of the Antimonopoly Act provides that investigative orders cannot be appealed to a court and Art 70-12 states that investigative orders cannot be appealed to a higher panel or Commission within the JFTC.

of appeal to protect the interests of the JFTC as well as the privilege holder for privilege determinations. If on appeal of the final decision, an Inspector's decision is overturned – after the JFTC has made use of legally privileged information – then the entirety of the JFTC's case against the company may be tainted at a stage when it cannot be remedied.

The JFTC expressed concerns to the Advisory Panel about having its decision-making regarding attorney-client privilege determinations subject to judicial review. It shared with the Advisory Panel that introducing the privilege will lead to the 'possibility that the admissibility of evidence may be denied in litigation by the court eventually.'[38] It also expressed concern that the process of evaluating whether privileged information is essential could lead to 'the possibility of such judgement being challenged in litigation for rescinding a JFTC decision'.[39]

To avoid this scenario, it would be in the best interests of all stakeholders – the JFTC as well as the privilege holder – that an appeal of the Inspector's decision be resolved before direct or derivative use of the information is made by the JFTC. Furthermore, it is important that the reviewing body's decision be binding on future JFTC proceedings involving the privilege holder.

Creation of a special court or commission to hear appeals

The JFTC staff deserves recognition for the pace of its cartel investigations. The JFTC coordinates with competition authorities around the world in conducting parallel investigations of international cartel activity. It is often the first authority to complete its investigation and render a decision, at times issuing decisions years before other authorities. Therefore, it is understandable that the JFTC would have concerns about adopting changes that would interfere with the pace and momentum of its investigations, particularly at the sensitive early stages, or that would require substantial resources to litigate and resolve. Therefore, if Japan adopts a prompt right to appeal an Inspector decision, it will be necessary to ensure that the appeal process is handled on an expedited basis and does not result in lengthy and protracted litigation.

It seems likely that an appeal process would result in initial delays as the courts grapple with a legal privilege that has never been recognised in Japan in either criminal or administrative proceedings. Therefore, given the urgent need to develop expertise quickly, consideration should be given to amending the Antimonopoly Act to introduce either a special court or a special commission consisting of appointed judges or officials (collectively, 'special court/commission') to hear expedited appeals of Inspector decisions.

38 *Ibid*, at 22.
39 *Ibid*.

Appointing a special court to consider appeals of Inspector decisions would bring greater legitimacy to the review process as well as increased certainty that the legal privilege determination could not be overturned in future JFTC proceedings. However, consideration should also be given to establishing a special commission to perform the review procedure. If a companion regulation was passed when the privilege went into effect setting up a special commission to hear appeals and its decisions were binding in future JFTC proceedings, the special commission could theoretically consist of appointed officials who did not sit on the court that hears Antimonopoly Act appeals. Further, the creation of the special court/commission could be time-limited, providing an opportunity to evaluate its continued merit after a fixed number of years. After the special court/commission develops experience and a body of precedent in Japan, the continued need for a special court/commission will diminish and its duties could be assumed by a traditional court.

This article hardly scratches the surface of the body of law that exists in the US with respect to the exercise of legal privilege. Understanding how these nuanced issues are addressed in the US, Europe and elsewhere around the world and developing similar expertise in Japan would take time, but it would take far longer if the issues were repeatedly raised before judges unacquainted with them. Appointing a special court/commission capable of conducting an expedited review and with the authority to make binding decisions will help mitigate the risk that a right to appeal an Inspector decision will cost the JFTC valuable time, momentum and resources in the early stages of its investigations.

Empowering the JFTC with discretionary sanctioning powers

The Advisory Panel concluded that it was not appropriate to introduce the attorney-client privilege at the present time because of the concern that it would impair the JFTC's fact-finding ability. This conclusion was grounded in the fact that the JFTC lacks discretionary sanctioning powers. Without such powers, the JFTC cannot incentivise companies to either fully cooperate with its investigations or deter them from making exaggerated privilege claims designed to impede its investigations. The concern is valid, and consideration should be given to granting the JFTC discretionary sanctioning powers to facilitate the introduction of legal privilege.

The current system puts the JFTC at a unique disadvantage

Like the US and other jurisdictions with an effective leniency programme, the JFTC grants a 100 per cent reduction in sanctions to the first company to self-report

cartel activity and meet the programme's other requirements. However, the JFTC is in the distinct minority among the world's leading competition authorities in utilising fixed, non-discretionary sentencing discounts for companies that come forward and admit their involvement after the immunity applicant. In Japan, surcharge discounts are based on the order in which a company comes forward and admits its involvement with the first company after the immunity applicant (the 'second-in applicant') receiving a 50 per cent discount and the third, fourth and fifth companies receiving a 30 per cent reduction in surcharges. In nearly every other jurisdiction, the cooperation discount for a company that comes forward after the first company to report is not fixed but rather is discretionary based on the timeliness and value of the assistance provided.

The fixed, non-discretionary fine reduction regime in Japan offers the advantage of providing greater transparency and predictability to a company as to the outcome it can expect, but it provides less incentive to cooperate fully with a JFTC investigation. It also fails to reward companies that provide significant cooperation or to distinguish them from those that do not. For example, in theory, the first company to cooperate after the immunity applicant in a JFTC investigation could come forward quickly; advance an investigation against multiple non-cooperating companies; expand the scope of the cartel activity disclosed by providing new information on products, bids or the time period affected by the cartel activity that was previously unreported by the immunity applicant; and/or be the first to also report wholly separate, previously undetected cartel activity. The company in this example would receive no more credit for its cooperation than a company in another investigation that is slow to come forward and is the last company to admit involvement in a two-firm cartel, whose cooperation is merely cumulative to the immunity applicant. Both second-in companies would be eligible for a 50 per cent surcharge reduction.

In the current framework, it is understandable that companies are reluctant to cooperate fully with JFTC investigations. Cooperation with government authorities in cartel investigations is a massive drain on a company's business and resources. Interviewing, preparing and making witnesses available to investigators is incredibly costly and time-consuming as is retrieving, reviewing, identifying, translating and producing documents to the government. On top of these costs, there are potential reputational and business costs associated with being perceived as the source of a government investigation. The current law in Japan does not incentivise companies to incur such costs, as the potential benefits are insignificant.

Not surprisingly, the JFTC's inability to incentivise companies to fully cooperate with its investigations puts the JFTC at a significant disadvantage in its investigations when compared to other authorities. For example, during my tenure at the Antitrust

Division, there were instances where companies were ostensibly cooperating with the JFTC and the Antitrust Division in an international cartel investigation, but resisted providing the same level of cooperation to the JFTC in the form of admissions, documents and testimony that the company was willingly providing to the Antitrust Division.

Comparisons to Antitrust Division and European Commission practice

The Antitrust Division offers fine reductions and other benefits for companies that provide timely cooperation and valuable assistance in its investigations. However, the Antitrust Division does not use fixed cooperation discounts (like the JFTC) or fixed discount bands or ranges (like the European Commission).[40] So, whereas the first company to come forward after an immunity applicant would qualify for a 50 per cent surcharge reduction from the JFTC and a fine discount of between 30 to 50 per cent from the European Commission, the percentage fine discount from the Antitrust Division could be greater than 50 per cent or less than 30 per cent or it could fall somewhere in between.[41] The precise amount will depend on the timeliness and value of the cooperation provided. The Antitrust Division promotes predictability in the available outcomes through the consistent application of the US Sentencing Guidelines and the publication of sentencing policies, sentencing memos, and plea agreements that provide guidance as to how aggravating and mitigating factors are weighed by the Antitrust Division in calculating fines.[42]

Before a company decides to offer its cooperation in an Antitrust Division or a European Commission investigation, it must be prepared for the heavy costs and collateral consequences as well as the high government expectations associated with cooperation. It must also be prepared for the fact that the government will be in a stronger bargaining position when the time comes for the parties to negotiate a disposition that quantifies that cooperation. A cooperating company will typically have to lay itself bare by providing the Antitrust Division and the European Commission with the evidence of its wrongdoing before it receives any

40 See European Comm'n, Leniency, http://ec.europa.eu/competition/cartels/leniency/leniency.html ('Companies which do not qualify for immunity may benefit from a reduction of fines… The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.') last visited 25 August 2015.

41 It is also noteworthy that unlike the JFTC, the European Commission and many other competition authorities, the Antitrust Division does not have the power to actually impose sanctions, only to make sentencing recommendations to a court which makes the ultimate determination as to the appropriate sentence to impose.

42 See, for example, Scott D Hammond, Deputy Assistant Att'y General for Criminal Enforcement, Dep't of Justice Antitrust Division, Measuring The Value Of Second-In Cooperation In Corporate Plea Negotiations (29 March 2006), available at: www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations; Gary R Spratling, Deputy Assistant Att'y General, Dep't of Justice Antitrust Division, Transparency In Enforcement Maximizes Cooperation From Antitrust Offenders (15 October 1999), available at: www.justice.gov/atr/speech/transparency-enforcement-maximizes-cooperation-antitrust-offenders.

assurances with regard to how its cooperation will be credited and what fine will ultimately be imposed. Of course, any party would prefer to be in the situation where the authority commits to a specific cooperation discount and a fine amount before the company turns over its cards and divulges the details of its conduct, but the Antitrust Division's and European Commission's practice is not to commit to a specific fine reduction until after the party has cooperated.

The unequal bargaining position usually leads companies that have made the decision to cooperate to instruct their counsel to cooperate fully with the investigation in hopes of currying favour with the staff and securing the highest possible cooperation discount. A company that attempts to cooperate only halfway with the Antitrust Division, such as by attempting to withhold documents based on exaggerated legal privilege claims, will find that the authority will accept whatever level of cooperation the company is willing to provide, but will also recommend a fine reduction commensurate with that level of cooperation. The European Commission operates in a similar manner in that leniency applicants are required to provide up-front cooperation, which the EU subsequently considers when determining an appropriate sanction within the fine discount band ranges at the time it issues its decision.

However, their superior bargaining position does not mean that there are no checks on how the Antitrust Division and the European Commission exercise their discretion. A company has options. It may choose to accept responsibility and cooperate or elect to exercise its defences and put the government to the test of meeting its burden of proof. Determining whether to cooperate or to fight is often a difficult choice with myriad considerations, and the success of a government investigation is heavily dependent on inducing companies and their executives to cooperate. An authority's reputation for dealing fairly with cooperating companies will play a paramount role in a company's decision-making process. If a perception exists in the private bar and business community that the benefits for cooperating fully are unpredictable and inequitably rewarded, then the incentives to cooperate will evaporate and enforcement will suffer.

The Antitrust Division, just like any government authority, is well aware that its credibility and reputation for fair treatment are very fragile. It must appreciate that it cannot take advantage of its superior bargaining power and leave cooperating companies second-guessing decisions to cooperate and hope to induce future cooperation. With that in mind, every cooperation discount attributed to every defendant across every Antitrust Division cartel case is centrally reviewed and pre-approved by the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement (the top career official) before it is communicated by staff to a party. The centralised review of all cooperation discounts does not exist in any

other litigating component of the Department of Justice. This unique procedure was implemented for the singular purpose of ensuring proportional, consistent and equitable treatment in fine reductions, not only in the immediate investigation but also for cooperating defendants across all Antitrust Division matters.

If the JFTC obtains discretionary sanctioning power, it must use its authority consistently and proportionately in rewarding companies that accept responsibility and provide substantial assistance in its investigations. The JFTC's cartel enforcement programme would greatly suffer if the private bar and business community perceived that the JFTC was abusing its discretion and using its authority only to punish and not to reward companies. The JFTC has historically utilised the best practices of other jurisdictions to advance its cartel enforcement programme. With the continued success of the JFTC's cartel enforcement programme hanging in the balance, the JFTC has the incentives it needs to get it right.

Closing remarks

Introducing legal privilege in Japan would require the JFTC to take a bold step. But, it would be a step toward more effective cartel enforcement. A right that is viewed as a bedrock foundation of the US legal system does not presently exist in Japan for individuals or companies in either criminal or regulatory investigations or proceedings. It would not be without precedent, however, for the JFTC to take the lead in introducing a best practice in support of enhanced enforcement. Following the experience of the US and other jurisdictions, the JFTC and former JFTC Chairman Takeshima-san paved new ground in Japan by introducing a corporate leniency programme in the face of substantial legal, institutional and cultural obstacles in 2006. The JFTC recognised that an effective leniency programme would result in the early detection of cartel activity and greater deterrence, which would ultimately lead to stronger compliance. The introduction of the attorney-client privilege in Japan would achieve the very same objectives. It would advance the JFTC's core interests of effective compliance and early detection, which would ultimately lead to increased self-reporting and greater deterrence. It would also benefit Japanese businesses and consumers who share the JFTC's interest in compliance and the fair and effective enforcement of the Antimonopoly Act.

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