

Client Alert

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The enforcement of amendments to the Antimonopoly Act: Introduction of the Reduction System through cooperation and the Japanese attorney-client privilege

Introduction

The Act for Amendment of the Antimonopoly Act ("Amendment") was enacted on 19 June 2019, and was promulgated on the 26th of the same month.

The Amendment introduced a new system for calculating the reduction rate of administrative fines (surcharges) based on the degree of the applicant's cooperation with the Japan Fair Trade Commission (JFTC) in its investigation ("Reduction System") as part of the Japanese leniency program. The new "Japanese attorney-client privilege" will also be introduced under its Rules on Investigation.

In April 2020, the JFTC published draft rules, operational policies and guidelines regarding the Reduction System and the Japanese attorney-client privilege. The rules, operational policies and guidelines were later finalized after public consultation.

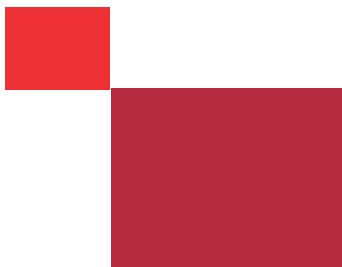
With the exception of some sections, the Amendment will come into force on 25 December 2020.

For details of the draft rules regarding the new leniency program ("Draft New Leniency Program Rules"), the draft operational policy for the Reduction System ("Draft Cooperation Guidelines") and the draft guidelines for handling materials containing confidential communications between companies and their attorneys ("Draft Privilege Guidelines") published in April, please refer to the 28 April edition of our [Client Alert](#)

Reduction System

Although slight revisions were made to the Draft New Leniency Program Rules and the Draft Cooperation Guidelines after public consultation, the drafts were finalized for enactment without any substantial changes.

A concern was raised during the public consultation that if applicants submit detailed reports/materials at time of the leniency application, there may be less information to later report under the Reduction System, which may then lead to an evaluation that the applicant's level of cooperation is not high. In response to such concern, the JFTC expressed that it will review the contents of the reports, "including the reports made under the leniency program" as a whole, to determine if they satisfy the criteria of the Reduction System. Accordingly, companies are advised to report information already recognized and submit evidence already obtained when applying for leniency.





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Determination Procedure (Japanese attorney-client privilege)

The Draft Privilege Guidelines were finalized after revising the following main points based on the public comments received:

a) Eligible documents and electronic data

With regard to "fact-finding materials," documents just recording statements made by officers/employees during interviews conducted by an attorney are not eligible for the privilege. The revisions to the Draft Public Guidelines made clear that documents are eligible if they are assessed as consultation documents or response documents between the attorney and the client on a "legal opinion regarding suspected acts eligible for the leniency program as a whole" (for example, when they contain both facts obtained from interviews and legal opinions evaluating such facts).

b) Sharing communications with a foreign-admitted attorney

Even if a company applies for the Determination Procedure for communications (documents/electronic data) that have been shared with a foreign-admitted attorney in the past, the revised Draft Public Guidelines clarified that such documents are not removed from the scope of privilege "if sharing the documents was necessary from the viewpoint of the functioning of the new Reduction System, and measures to preserve the confidentiality of the specified communications have been taken."

The addition made in **b)** above to the Privilege Guidelines benefits companies, since companies are likely to share communications that may be eligible for the Japanese privilege with a foreign-admitted attorney in cases of international cartels.

In order to request the application of the Determination Procedure at an actual on-site inspection (dawn raid) by the JFTC, preparations to meet the "Conditions of Appropriate Storage," etc., must be undertaken in advance.

The guideline on "Best Practices for Handling Confidential Communications" prepared by Baker McKenzie is available [here](#) for download. We also welcome any consultations regarding Japanese attorney-client privilege at our dedicated hotline at jacp@bakermckenzie.com.