

## White Collar Crime - Japan

### Bribery - who is really a public official?

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### Introduction

On March 2 2012 an employee of Nippon Telegraph and Telephone East Corporation (NTT East) was arrested on charges that he had received Y1.35 million from a telecommunications company that was hoping to secure a contract with NTT East in relation to a marketing project. Five days later, the chairman of an automobile maintenance services company was arrested on charges that he had accepted a bribe from an industrial waste disposal company that wished to obtain safety certification for its illegally altered trucks. According to press sources, both suspects were arrested on charges of bribery, notwithstanding the difference in their roles and their seniority in their respective companies.

### Definition of 'public official' in Penal Code

Articles 197 and 198 of the Penal Code prohibit the solicitation and acceptance of bribes by, and the offer and provision of bribes to, public officials. Article 7(1) defines a 'public official' as:

- a national or local government official; or
- a member of an assembly or committee or an employee engaged in the performance of public duties in accordance with laws and regulations.

Accordingly, employees of private companies are not included in the definition. However, individuals who do not fall within the definition may still be subject to bribery laws. Such persons, including the company chairman and the NTT East employee, are referred to as 'deemed public officials'.

### Deemed public officials

A primary category of deemed public official includes employees and board members of former public corporations that have been privatised. The NTT East employee falls into this category. Nippon Telegraph and Telephone Corporation (NTT), the holding company of NTT East, was a public corporation until it was privatised in 1985. Notwithstanding their privatisation, NTT and NTT East are regulated by the Act on Nippon Telegraph and Telephone Corporation. Article 19 of the act prohibits a director, audit counsellor (where the counsellor is a legal person or an employee thereof who performs audit duties), auditor or employee of NTT and its affiliated companies (including those who were or will be in such a position) from receiving, soliciting or agreeing to a bribe in connection with the person's job.

Similarly, officers and employees of the Japan Railway Company and Japan Tobacco Inc - both former public corporations - are deemed public officials for the purposes of bribery offences.<sup>(1)</sup>

Another category of deemed public official relates to the Bank of Japan. Although it is a stock corporation, its officers and employees are deemed public officials because of the public importance of banking services.<sup>(2)</sup>

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In each of these cases, a special law containing a deemed public official provision prohibits the giving, solicitation or promise of bribes in respect of deemed public officials.<sup>(3)</sup>

### **Special bribery by officers of private companies**

In principle, employees of private companies who do not fall within the deemed public official provision are not liable for receiving 'bribes' within the meaning of the law. However, individuals in senior positions within stock companies may nonetheless be liable under the law for receiving bribes in certain circumstances. Article 967(1) of the Companies Act provides that where certain persons - such as directors, company auditors, executive officers and even employees to whom specific authority has been delegated - solicit, accept or agree to accept proprietary benefits in connection with their duties in response to a wrongful request, they are criminally liable. A person who has given, offered or promised to give the benefits set forth above is criminally liable under Article 967(2).

The purpose of Article 967 of the act is to ensure that key persons in a company conduct their duties fairly. It can be invoked only where there is a "wrongful" request, but Article 197 of the code has no such requirement. Article 967 of the act also limits the object of bribery to "proprietary benefits", whereas the relevant provision of the code is broader and covers any benefit which provides an advantage.

### **Bribery in relation to exercise of shareholder's rights**

A shareholder may also be liable for bribery. Under Article 968(1) of the act, criminal liability attaches to a person who, in response to a wrongful request, solicits, accepts or agrees to accept proprietary benefits in relation to matters including:

- the issuance of statements of opinion;
- the exercise of voting rights at a shareholders' meeting; and
- the exercise of rights to require directors to call a shareholders' meeting.

A person who has given, offered or promised to provide benefits to such shareholders is criminally liable under Article 968(2). Article 968 is intended to ensure fair discussion and resolutions at shareholders' meetings in order to protect the rights of stock companies and to prevent such rights from being infringed.

### **Prohibition under Financial Instruments and Exchange Act**

Like the Companies Act, the Financial Instruments and Exchange Act prohibits bribery. Article 203(1) states that an officer or official of a certain category of registered financial institution (among other things) is criminally liable if he or she accepts, requests or promises bribes in relation to his or her duties. A person who provides, requests or promises bribes is criminally liable under Article 203(3).

### **Liability for crimes outside Japan**

Although the prohibition of bribery under Article 197 of the code extends to public officials who have committed bribery outside Japan,<sup>(4)</sup> Article 198 regulates only domestic acts. Pursuant to the interpretation of the code, a person is punishable if he or she has promised a bribe or conspired with someone to provide bribes in Japan, even if the act of offering the bribe is performed outside Japan.

Moreover, the crimes of acceptance and provision of bribes under Articles 967 and 968 of the Companies Act are punishable irrespective of whether such acts are performed in Japan or elsewhere, pursuant to Article 971. Article 203(2) of the Financial Instruments and Exchange Act sets out a similar provision, as do the special laws on the Japan Railway Company, Japan Tobacco Inc and the Bank of Japan.

### **Comment**

An analysis of anti-bribery laws in Japan and an assessment of potential liability requires consideration of the Penal Code and the stipulations on deemed public officials under specific laws (including the special laws mentioned above), as well as the relevant provisions of the Companies Act.

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### **Endnotes**

(1) Article 16 of the Act on the Japan Railway Company and Japan Freight Railway Company and Article 14 of the Act on Japan Tobacco Inc.

(2) Article 30 of the Bank of Japan Act.

(3) Article 21 of the Nippon Telegraph and Telephone Corporation Act, Article 17 of the Act on the Japan Railway Company and Japan Freight Railway Company, Article 15 of the Act on Japan Tobacco Inc and Article 30 of the Bank of Japan Act.

(4) Article 4(3) of the code.

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