Government Investigations 2020

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Government Investigations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The following government agencies are principally responsible for the enforcement of laws and regulations applicable to businesses:

- the Public Prosecutors Office (PPO);
- the Police Department (the police);
- the Japan Fair Trade Commission (JFTC);
- the Security and Exchange Surveillance Commission (SESC);
- the Consumer Affairs Agency; and
- the National Tax Agency (NTA).

In addition to these agencies, various other government agencies, such as the Labour Standards Supervision Office, are responsible for investigations of administrative and civil violations and enforcement of civil penalties. Serious cases are referred to the PPO for criminal enforcement actions.

Scope of agency authority

2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

PPO

In general, a public prosecutor of the PPO is responsible for the prosecution and enforcement of criminal charges.

Criminal investigations are usually initiated by the police, and the public prosecutor requests the police to collect additional evidences if necessary. The public prosecutor may also initiate criminal investigations itself without the involvement of the police, particularly in high-profile cases such as bribery and serious fraud. The public prosecutor conducts investigation with other government agencies in the areas of competition law, securities regulations, tax law, etc, when such government agencies pursue criminal enforcement. Only a public prosecutor of the PPO has the authority to determine whether to bring criminal charges.

Corporate employees may be subject to criminal charges. In practice, however, criminal charges are usually filed only against the directors and officers responsible for the alleged crime, as well as the company itself.

Police

In a lot of criminal cases concerning businesses, the police primarily conduct investigations, and then refer the cases to the PPO if it forms the view that there is sufficient evidence in a given case.

JFTC

The JFTC has the sole authority to conduct administrative investigations and impose administrative sanctions (such as cease-and-desist orders and surcharge payment orders) on companies for breaches of the Antimonopoly Act (AMA) and other competition law. In addition, the JFTC has the authority to conduct criminal investigations, but it has no power to impose criminal sanctions (such as fines and imprisonment). If the JFTC believes that the case in question warrants criminal enforcement, it must file an accusation with the Prosecutor General. The PPO, alone, has the power (at its own discretion) to initiate criminal proceedings against corporate employees and companies. The JFTC has handled most cases under the administrative investigation scheme.

SESC

The SESC has the power to conduct administrative investigations and make recommendations to the Financial Services Agency to issue administrative surcharge payment orders for breaches of the Financial Instruments and Exchange Act (FIEA). Typical cases include insider trading, market manipulation, accounting fraud of listed companies and breach of regulations by securities firms and asset management firms. If the SESC discovers serious breaches of the FIEA, it refers the case to the PPO to pursue criminal enforcement.

NTA

The NTA has the power to conduct investigations and impose deficit tax in cases of tax evasion. The NTA refers serious cases to the PPO to pursue criminal enforcement.

Simultaneous investigations

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Yes. Investigations of businesses are usually initiated by the police, but in cases where the AMA, the FIEA or tax avoidance laws are breached, the JFTC, the SESC or the NTA, depending on the particular violation, will initiate the investigation. The police and other agencies normally conduct their investigations together with the public prosecutor after cases are referred to the PPO. The PPO may receive information before other agencies initiate their investigations. In normal practice, however, the PPO commences a formal investigation only after other agencies refer the case to the PPO for criminal charges.

Civil fora

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

Civil charges can be imposed as administrative sanctions without the involvement of a court. Government agencies can directly issue administrative orders relating to civil charges. If a target company is not satisfied with the application of an administrative order, the company can bring the case to court.

It is a requirement of Japanese law that criminal charges are examined in criminal court proceedings.

Corporate criminal liability

5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

In general, corporations cannot be the subject of criminal charges. However, for certain types of crimes, such as cartel conduct and bid rigging, accounting fraud and bribery of foreign officials, there are specific provisions under which a corporation will be held criminally liable if its officer, director or an employee commits the crime in the course of the corporation's business activities.

Bringing charges

6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

The public prosecutor has the sole discretion and authority to determine whether to bring criminal charges against a person, regardless of whether it is a natural person or a corporation. There are no codified guidelines or standards governing how the public prosecutor exercises this discretion; in practice, however, various factors are considered, such as the gravity and the social impact of the wrongdoing.

As explained in the response to 'Scope of agency authority', the JFTC can initiate a criminal investigation with respect to certain AMA violations (such as cartel conduct and bid rigging). It can then file an accusation, if it is deemed to be warranted, with the Prosecutor General for criminal enforcement. The JFTC's policy, which has been published, states that it actively files accusations with the Prosecutor General for (i) malicious and serious cases that are considered to have a pervasive impact on people's lives or (ii) cases of repeat offenders or industries in which violations are repeated and where the JFTC believes that it is unable to achieve the purposes of the AMA through the pursuit of administrative sanctions alone.

INITIATION OF AN INVESTIGATION

Investigation requirements

7 What requirements must be met before a government entity can commence a civil or criminal investigation?

A government entity can commence a civil investigation without satisfying any requirements. The JFTC, the SESC and the NTA also have the authority to conduct quasi-criminal investigations in certain cases – such as those involving cartels, insider trading or aggravated tax evasion – that lead to a criminal investigation by the PPO. The PPO can commence a criminal investigation after it receives an official criminal accusation from the government entity that regulates the violation.

Triggering events

8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

Information from the tax authorities, which may indicate bid rigging, insider trading, bribery or other violations, and reports from the media are common triggers of a government investigation. There are also a few economic magazines that occasionally publish high-profile stories. In addition, leniency applications from competitors (see 'Notification before investigation') often lead to cartel investigations. The SESC also watches for unreasonable market trends and transactions.

Whistle-blowers

9 What protections are whistle-blowers entitled to?

Businesses are prohibited from terminating employment contracts because of whistle-blowing. Terminations on that basis are considered to be null and void. In addition, businesses are prohibited from imposing disadvantageous treatment on whistle-blowing employees, including demotions, salary reductions or discrimination in promotions. Nonetheless, there is no criminal or administrative penalty for a violation of this prohibition.

Investigation publicity

10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

An investigation is usually disclosed when a government entity conducts a search and seizure. Sometimes, the agency leaks information about the search and seizure to the media beforehand, and the event is widely broadcast. In such a case, there is very little opportunity for anonymity because the freedom of the press will prevail over the economic interests of the business.

EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

Covert phase

11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

In many cases, the government conducts a covert investigation before it approaches the target business. The length of the covert phase depends on the complexity and scale of the case. The government usually spends several months conducting the covert investigation, but this may take more than a year if the case is complex and serious.

12 What investigative techniques are used during the covert phase?

During the covert phase of the investigation, the government often interviews cooperative employees of the target business (including whistle-blowers) and collects relevant objective evidence, such as bank statements, call histories and corporate registrations.

Investigation notification

13 After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

After a target business becomes aware of the government investigation, it should conduct an internal investigation and develop an understanding of the misconduct that occurred in the company as soon as possible. In many cases, target businesses retain outside investigation experts, such as lawyers, certified public accountants or digital forensic companies. For the target business to avoid the risk of appearing to conceal or destroy evidence, it is better for the business to notify the investigative authorities through its lawyers that it is or will be conducting its own internal investigation properly and appropriately.

The way in which a target business responds to the government investigation should be decided on a case-by-case basis. In many cases, however, it is preferable for the target business to act cooperatively with the government; otherwise, it will face an increased risk that the government will take tougher measures, such as searches and seizures, and arrests. If the target business is cooperative and its lawyers communicate well with the government, it has more opportunities to obtain information about the investigation from the government.

Evidence and materials

14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

There is no express legal obligation for the target business to preserve documents, recorded communications or any other materials in connection with a government investigation. However, if employees of the target business intentionally conceal or destroy evidence to avoid liability, such actions may constitute the destruction of evidence (article 104 of the Penal Code), which is a crime, or the obstruction of an inspection (eg, articles 63 and 64 of the Bank Act). Thus, it is recommended that the target business preserve documents, recorded communications and any other materials if the government starts to conduct an investigation.

Leniency applicants under the AMA (see 'Notification before investigation') may be required by the JFTC to make additional submissions, and if they do not satisfy this requirement, their leniency position may be disqualified. Therefore, a company that intends to apply for leniency under the AMA must bear in mind that destruction or disposal of documents may lead to the disqualification of its leniency application.

Providing evidence

15 During the course of an investigation, what materials - for example, documents, records, recorded communications - can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

During the course of an investigation, the government (administrative agencies, the police and public prosecutors) can require that the target business provide any kind of evidence if necessary.

There is no data protection and privacy law in Japan that imposes limitations on the government's investigation. The Act on the Protection of Personal Information prohibits business operators from providing personal data to a third party without obtaining the data subject's consent, but there is an exception to this restriction. No consent is needed if the business operator must cooperate with a government organisation performing duties prescribed by the law and regulations and there is a possibility that obtaining the person's consent would interfere with the performance of those duties (article 23 of the Act on the Protection of Personal Information).

16 On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

Investigations are often initiated by a request for the voluntary production of materials, and the target business can negotiate the scope of the materials that it provides. However, if the government makes compliance with its production demands mandatory, there is no legal ground on which to oppose the government's demand for materials. If the target business opposes the administrative agency's order to provide evidence, it may be criminally liable for violation of the order demanding materials.

Corporate documents cannot be privileged because there is no legal professional privilege in Japan. Therefore, the investigative authorities can search and seize, or order the production of, any evidence related to communications between the target business and its attorneys.

Employee testimony

17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

The government (administrative agencies, police and public prosecutors) may request that employees of the target business cooperate in interviews and give their statements voluntarily. The government may not compel statements of employees during a voluntary interview.

However, if police and public prosecutors arrest and detain the employees of the target business, they can compel those employees to submit to interrogation (article 198 of the Code of Criminal Procedure). In such a case, however, the employees may refuse to give incriminating statements because they have the right as suspects to remain silent.

If the employees do not cooperate during the interrogation, public prosecutors can request that a judge examine them as witnesses in court (article 226 of the Code of Criminal Procedure). In practice, however, it is quite rare for public prosecutors to use this procedure. The employees may refuse to give incriminating testimony if this may result in criminal prosecution or conviction (article 147 of the Code of Criminal Procedure).

Police and public prosecutors may also request the target business to submit relevant information and evidence on a voluntary basis (article 197 of the Code of Criminal Procedure). They may conduct a search and seizure operation upon a warrant issued by a judge to compel the target business to submit the relevant information and evidence (article 218 of the Code of Criminal Procedure).

As noted in 'Notification before investigation', the Code of Criminal Procedure has been amended to introduce a new 'prosecutorial bargaining' system. This system may encourage corporate employees to disclose information about crimes committed in the target business.

In 2016, the amended Code of Criminal Procedure also introduced a new 'immunity' system, which allows a public prosecutor to request that a judge conduct a witness examination on the condition that the statements of the witness and evidence derived therefrom cannot be used as evidence incriminating the witness being examined (article 157-2 of the Code of Criminal Procedure). This new immunity system may also encourage corporate employees to give testimony regarding crimes committed in the target business at trial.

18 Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

If employees become the target of an investigation, there is usually a conflict of interest between the target business and the targeted employees. Under such circumstances, the targeted employees should obtain their own legal counsel.

Sharing information

19 Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

Multiple target businesses may share information to assist in their defence. No privilege is conferred on the shared materials. If the targets share information, there is a risk that the government may think that they are trying to conspire to make the same false statements and conceal and destroy evidence.

Investor notification

20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

A company listed on the stock exchanges in Japan is required to immediately disclose the details of certain matters that occur with respect to it or its subsidiaries. Those matters are stipulated in the Securities Listing Regulations established by each of the stock exchanges. Although investigations conducted by government authorities are not clearly described in the Securities Listing Regulations, there is a catch-all item (ie, material matters that are related to the operation, business or assets of the listed company or to listed securities and that have a notable effect on the investment decisions of investors) that is considered to include such investigations (see article 402(2)(x) of the Securities Listing Regulations of the Tokyo Stock Exchange). Therefore, a listed company must disclose the details of an investigation immediately after the investigation is initiated against the listed company or its subsidiary if the investigation is material to the operation, business or assets of the listed company or to listed securities issued by the listed company (in cases where the investigation is against the listed company's subsidiary, materiality is assessed in connection with the subsidiary) and the investigation has a notable impact on the investment decisions of investors.

In addition, unless a de minimis exemption is applied, the Securities Listing Regulations require the disclosure of the cancellation of a licence, the suspension of a business, or the imposition of any other disciplinary action by an administrative authority or an accusation of a violation of the law or regulations by an administrative authority (see article 402(2)(f)of the Securities Listing Regulations of the Tokyo Stock Exchange). Therefore, disclosure is required of a listed company not only when an investigation is initiated, but also immediately following the issuance of a final decision by an administrative authority relating to the investigation.

When disclosure is required, a listed company must disclose the background of the occurrence, a summary, the future prospects and any other matters that the stock exchanges consider to be material to investment decisions in relation to the investigation. However, as a general practice, listed companies refrain from disclosing details (in particular, future prospects) when an investigation is initiated in order to avoid making misstatements.

Non-listed companies are not subject to such disclosure requirements. Accordingly, they can determine whether and to what extent they disclose. As a general practice, there is voluntary disclosure when the facts of the investigation are broadly announced by the media.

COOPERATION

Notification before investigation

21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

Some laws provide a legal framework by which a company can benefit from cooperating with the investigation or voluntarily reporting its misconduct to a government authority. For instance, the AMA provides a leniency programme by which an applicant can obtain full immunity or a reduction of the administrative fines imposed by the JFTC. Under this leniency programme, an application can be made not only prior to the initiation of the investigation, but also following the initiation of the investigation under certain circumstances. Leniency applicants are obliged to submit reports on the facts of their misconduct along with evidentiary materials (eg, emails, notebooks and meeting minutes).

Other than the AMA, benefits can be obtained from voluntarily reporting to the relevant authorities under the Act against Unjustifiable Premiums and Misleading Representations (UPMR) and the FIEA. Typically, such voluntary reports must be made prior to the initiation of the investigation.

More generally, the Code of Criminal Procedure was amended on 1 June 2018 to introduce a legal system by which a prosecutor on the one hand, and a suspect or defendant and his or her attorney on the other, can negotiate an agreement pursuant to which the prosecutor will drop the criminal case or make a request to the court for lenient criminal sanctions in exchange for the suspect or defendant disclosing criminal offences committed by others.

Voluntary disclosure programmes

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

As explained in 'Notification before investigation', some laws provide for a formal voluntary disclosure programme that can qualify a business for full immunity or reduced sanctions.

A leniency application for a cartel or bid-rigging charge is allowed under the AMA. If a leniency application is made prior to the JFTC's initiation of the investigation (normally dawn raids), full immunity is granted to the first applicant, a 50 per cent reduction of the administrative fines imposed by the JFTC is granted to the second applicant and a 30 per cent reduction of the imposed administrative fines is granted to the third, fourth and fifth applicants. The fourth and fifth applicants must report new facts that are unknown to the JFTC at the time of their respective applications to qualify for the 30 per cent reduction. For the first applicant, in addition to full immunity from administrative fines, the JFTC does not, in practice, file an accusation with the Prosecutor General, which precludes a prosecutor from bringing a case based on charges of cartel conduct or bid rigging. The first applicant, therefore, can avoid criminal sanctions. If a leniency application is made following the initiation of the investigation, a 30 per cent reduction of the imposed administrative fines is granted to the first three applicants if they submit reports with new facts that are unknown to the JFTC at the time of the application. The maximum number of applicants that can qualify for

leniency, including those who made their applications prior to the initiation of the investigation, is five.

The government adopted a bill to revise the AMA. Upon its enactment, the JFTC will have the flexibility to decide the amount of fines to be imposed on violators of the prohibition of unreasonable restraint of trade. The government aims to pass the bill at the National Diet during the current Diet session ending in June 2019 and, if this happens, the new leniency programme will come into force by the end of 2020. The primary revision that has been included in the bill concerns the change to the leniency programme. After the new programme enters into effect, the percentage of reduction that will be offered, in consideration of the leniency application, will be decided by combining the fixed percentage and the variable percentage, which the JFTC determines by assessing the value of the evidence voluntarily submitted by the leniency applicants. According to the bill, if the leniency application is made prior to the initiation of the JFTC's investigation, the fixed percentage is (i) 20 per cent for the second applicant, (ii) 10 per cent for the third to fifth applicants and (iii) 5 per cent for the sixth or other applicant, and if the application is made following the JFTC's investigation, it is (i) 10 per cent for the first three applicants as the case may be and (ii) 5 per cent for the fourth or other applicants. The JFTC can vary the leniency percentage by up to 40 per cent if the leniency application is made prior to the initiation of the JFTC's investigation and up to 20 per cent where the application is made following the JFTC's investigation. The JFTC will issue guidelines on how it will assess the value of evidence to determine the variable percentage.

Under the UPMR, a 50 per cent reduction of administrative fines is granted if a voluntary report is made to the relevant authority prior to the initiation of an investigation of certain advertisements that would mislead or confuse consumers.

Similarly, under the FIEA, a company can voluntarily notify the relevant authority of its violations prior to the initiation of the investigation and be granted a 50 per cent reduction of administrative fines. This is limited to certain conduct such as insider trading of a company's own shares, failing to make mandatory reports or making false statements in mandatory reports.

Timing of cooperation

23 Can a target business commence cooperation at any stage of the investigation?

Yes, a company can commence cooperation at any stage of the investigation at its sole discretion. However, as explained in 'Voluntary disclosure programmes', the benefits of such cooperation vary depending on whether it is offered prior to the initiation of the investigation or after.

Cooperation requirements

24 What is a target business generally required to do to fulfil its obligation to cooperate?

In general, a company that applies for leniency or voluntarily reports its misconduct is required to submit the facts about its misconduct along with certain evidentiary materials (if necessary). Unlike the EU system, once a leniency applicant under the AMA secures its application position, continuous cooperation is not legally required. However, companies normally continue to cooperate voluntarily with the JFTC because they may have opportunities to engage in informal negotiations with the JFTC, through which they may narrow, as much as possible, the scope of misconduct that is ultimately found. As explained in 'Voluntary disclosure programmes', when the new leniency programme enters into effect, companies will have a greater incentive to cooperate with the JFTC to obtain a higher percentage reduction (in leniency) of the fines that they are subject to.

Employee requirements

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

As part of an employee's duties, a company can require that he or she be interviewed by the company or its legal counsel, search for and submit documents to the company and cooperate with government authorities (eg, submit to interviews by the authorities). In an administrative case, it is rare for an employee who was involved in the misconduct in question to retain his or her own attorney in Japan.

In contrast, if the misconduct in question is expected to be handled as a criminal case, there will be a conflict between the company and its employees. The company will consider such conflict when requesting cooperation. However, most companies pay the attorneys' fees of their employees, and this payment is normally evaluated neutrally by government authorities.

Why cooperate?

26 What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

In a criminal case (or a case expected to be so treated by government authorities), an individual employee generally determines whether and to what extent he or she will cooperate with the government authority based on his or her culpability and the risk of being charged. The employee's decision to cooperate with government authorities may also be based on the possibility that cooperation will allow him or her to remain employed by the company. If the employee decides not to cooperate with government authorities, the company will face difficulty in obtaining his or her cooperation. It is also difficult for the company to discipline the employee for non-cooperation because, under Japanese labour law, enforcing cooperation conflicts with the employee's right not to incriminate himself or herself (disciplinary action may be taken for misconduct after the authorities' decision is made or becomes final and binding). In a cartel or bid-rigging case, as explained in 'Voluntary disclosure programmes', the first leniency applicant receives the benefit of no criminal sanctions. This also applies to employees of the first applicant. Consequently, the company's leniency position may also be considered by an individual employee in deciding whether to cooperate.

In an administrative case, because an individual employee will not be punished by the government authority, the greatest concern of the employee is whether the company will grant immunity or leniency for his or her cooperation with the company (and ultimately with the government authorities). If the company implements an internal leniency programme, the employee can cooperate with the company and the government authorities without undue concern. As explained in 'Employee requirements', a company can require that its employees be interviewed by the company or its legal counsel, search for and submit documents to the company, and cooperate with government authorities. However, it is difficult for the company to terminate the contract of an employee who refuses to cooperate with the company (and government authorities), as termination of employment is strictly limited under Japanese labour law. In practice, non-cooperation is not evaluated negatively in making disciplinary decisions, but cooperation is evaluated positively as a mitigating factor.

Privileged communications

27 | How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

There is no concept of legal privilege under Japanese law. Documents provided to government authorities may be subject to disclosure in related civil litigation upon a request to the court from a counterparty. The JFTC has a rule concerning the disclosure of documents that it possesses in relation to its investigation. Business secrets are kept confidential, but the JFTC does not consider legal privilege or attorney work product in determining whether to disclose such documents to the court.

As explained in 'Voluntary disclosure programmes', the government hopes to pass a bill to revise the AMA at the National Diet during the current Diet session ending in June 2019. The bill also includes the introduction of attorney–client privilege. After the new AMA enters into force, companies will be able to request that the JFTC return certain types of attorney–client communications that were seized by the JFTC. Communications with in-house counsel will also be subject to attorney–client privilege if it is apparent that the in-house counsel conducts legal affairs independently from, and beyond the control of, his or her employer, after the violation in question is revealed and such independence and lack of control is pursuant to the employer's instructions. Further, communications with overseas attorneys will be subject to attorney–client privilege under certain circumstances.

RESOLUTION

Resolution mechanisms

28 | What mechanisms are available to resolve a government investigation?

As discussed in 'Notification before investigation', a new prosecutorial bargaining system came into force on 1 June 2018. Under the new system, the public prosecutor may close the investigation by entering into a non-prosecution agreement with a suspect in exchange for the suspect providing information regarding crimes committed by another natural person or corporate entity. Both natural persons and corporations can negotiate with the public prosecutor to enter into a non-prosecution agreement to resolve an investigation. This means that a corporation can enter into a non-prosecution agreement to avoid corporate criminal liability by providing evidence and other cooperation so that the public prosecutor can bring an enforcement action against the corporation's directors and employees.

Admission of wrongdoing

29 | Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

The public prosecutor is not required to obtain an admission of wrongdoing in order to bring criminal charges against any person irrespective of whether they are a natural person or corporation. In the case where a corporation admits an accused crime during an investigation and criminal trial, the corporation can still contest civil claims in related civil litigations. However, such admission in the criminal trial/investigation can be used against the company in certain circumstances. For example, if a company admits accounting fraud in the SESC's investigation and restates the financial statements, it would be difficult for the company to deny the existence of a material misstatement in the related civil litigation.

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Civil penalties

30 | What civil penalties can be imposed on businesses?

Administrative monetary penalties can be imposed by various government agencies on businesses as civil penalties. Typically, civil penalties can be imposed for breaches of the AMA, the FIEA and the UPMR.

Criminal penalties

31 | What criminal penalties can be imposed on businesses?

Monetary fines can be imposed on businesses as criminal penalties based on the court's judgment. Directors, officers and employees can also be charged with prison terms.

Sentencing regime

32 | What is the applicable sentencing regime for businesses?

The judge has the discretion to determine sentences within the range provided for under the law. In practice, the public prosecutor makes a recommendation as to sentencing during the closing arguments of a criminal trial, but the recommendation has no binding effect on the judge's decision. Generally, the range of the sentence is quite broad (eg, one month to 10 years for aggravated breach of trust) and there is no guideline for sentencing. In practice, however, the public prosecutor recommends a sentence and the judge determines the sentence by looking at precedents and exercising his or her own discretion. An unreasonable sentence can form the basis of an appeal, even if the sentence falls within the range provided for under the law.

Future participation

33 What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

An admission of wrongdoing does not affect the business's future participation in a particular venture or industry. However, legal violations can result in the cancellation of a business licence and approvals in the financial industry and other highly regulated industries. Furthermore, regulators can detect a legal violation based on an admission.

UPDATE AND TRENDS

Emerging trends

34 Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

Key developments of the past year

Much attention has been focused on how public prosecutors are using the new prosecutorial bargaining system (see 'Notification before investigation').

The first case involving the new bargaining system was a foreign bribery case in Thailand. A Japanese power plant manufacturing company undertook the construction of a thermal power plant in Thailand. In February 2015, an employee of the company was informed that, when ocean transport service providers attempted to unload the plant parts at the jetty near the plant construction site, a public officer of the local port authority blocked off the jetty and demanded the payment of 20 million Thai baht. The employee, in response to the demand, paid 20 million Thai baht to resolve the blockade of the jetty. In March 2015, the company became aware of this improper payment to the public official through an internal whistle-blowing procedure. After conducting an internal investigation, the company self-disclosed this foreign bribery case voluntarily to the Tokyo District Public Prosecutors Office in June 2015 and cooperated fully with the Office's investigation. Just after the prosecutorial bargaining system was launched in June 2018, the company entered into a bargaining agreement with the public prosecutor and, as result of the agreement, the public prosecutor indicted three former officers and decided not to prosecute the company itself.

This first case demonstrates how public prosecutors use the new system when they conduct criminal investigations in white-collar cases. It is expected that public prosecutors will actively utilise this system to collect evidence effectively, especially in white-collar cases.

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