

Anti-Corruption Regulation 2021

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Anti-Corruption Regulation 2021

Contributing editors**James G Tillen and Leah Moushey****Miller & Chevalier Chartered**

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Anti-Corruption Regulation*, 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.

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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.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, James G Tillen and Leah Moushey of Miller & Chevalier Chartered, for their continued assistance with this volume.



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RELEVANT INTERNATIONAL AND DOMESTIC LAW

International anti-corruption conventions

1 | To which international anti-corruption conventions is your country a signatory?

Japan is a signatory to the Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). This was signed on 17 December 1997 and ratified by Japan on 13 October 1998. Based on this, the Unfair Competition Prevention Act (Act No. 47 of 19 May 1993) (UCPA) was amended in 1998 to criminalise the bribery of foreign public officials.

Japan is also a signatory to the United Nations Convention against Transnational Organized Crime, which was signed in December 2000 and ratified on 14 May 2003, and the United Nations Convention against Corruption, which was signed on 9 December 2003 and ratified on 2 June 2006.

Foreign and domestic bribery laws

2 | Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Bribery of foreign public officials is criminally punishable under the UCPA. Violators may be imprisoned for up to five years or fined up to ¥5 million (article 21, paragraph 2 of the UCPA).

Bribery of domestic public officials is criminally punishable under the Penal Code (Act No. 45 of 1907).

The prohibitions on foreign bribery and domestic bribery are based upon different philosophies. That is to say, the former is aimed at securing and promoting the sound development of international trade, while the latter is aimed at ensuring the rectitude of the Japanese public service and maintaining people's trust in such rectitude. As a consequence of this difference, the prohibition of foreign bribery was not incorporated into the Penal Code, but in the UCPA.

Successor liability

3 | Can a successor entity be held liable for violations of foreign and domestic bribery laws by the target entity that occurred prior to the merger or acquisition?

A successor entity is not generally held liable for bribery of foreign public officials by the target entity that occurred prior to the merger or acquisition. When the target entity has been sentenced to a criminal fine, in the event that the target entity undergoes a merger after the decision becomes final and binding, the sentence may be executed on the successor entity's estate (article 492 of the Code of Criminal Procedure (Act No. 131 of 1948)).

Civil and criminal enforcement

4 | Is there civil and criminal enforcement of your country's foreign and domestic bribery laws?

Japanese foreign bribery laws are included in the UCPA. The UCPA was originally intended to prohibit unauthorised use of others' trademarks (registered or unregistered) or trade secrets, as well as other activities that are against fair competition. The UCPA defines such acts as 'unfair competition' (article 2), and there are special civil remedies and related treatments available for unfair competition, such as injunctions, presumed damages and document production systems, etc. However, foreign bribery is explicitly excluded from the definition of 'unfair competition', and there are no special civil remedies or related treatments available for the violation of foreign bribery restrictions under the UCPA.

Japanese domestic bribery laws are included in the Penal Code, but there is no provision regarding civil enforcement in the Penal Code.

Claims for damages and compensation may be possible based upon tort. However, in reality, it would be difficult for a plaintiff to prove the necessary causal relationship between the bribe and his or her loss of a business opportunity as well as the amount of damages. So far, there has been no case reported where victims of bribery (eg, competitors of a violator who lost business opportunities because of the violator's payment of a bribe) filed a civil lawsuit against the violator to recover the damages they suffered.

Dispute resolution and leniency

5 | Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?

Japanese criminal procedure does not have systems such as plea bargaining or settlement agreements. However, public prosecutors (who are, in principle, exclusively granted the power to decide whether or not to prosecute accused persons under article 248 of the Code of Criminal Procedure), may choose an immediate judgment procedure where a hearing and a judgment will be issued within a day; provided, however, that these proceedings are conditional on the consent of the person to be accused (article 350-2, paragraph 2 of the Code of Criminal Procedure).

This immediate judgment procedure is not available for a case where the death penalty, imprisonment without term or imprisonment with a term of not less than one year may be applied (article 350-2, paragraph 1 of the Code of Criminal Procedure).

Public prosecutors may also choose summary proceedings at summary courts, where no hearings will be held and all examinations will be done on a paperwork basis; provided, however, that the summary

proceedings are also conditional on the consent of the person to be accused (article 461-2, paragraph 2 of the Code of Criminal Procedure). In this summary procedure, summary courts can only impose on criminals fines of up to ¥1 million and the summary courts cannot sentence the accused persons to imprisonment (article 461 of the Code of Criminal Procedure).

The prosecutorial bargaining system, whereby the public prosecutor can reach an accord with a suspect or defendant to refrain from prosecuting that person or suggest a lenient sentencing recommendation in return for his or her testimony regarding another person's crime, was introduced in June 2018. Companies can disclose violations of bribery laws to public prosecutors in exchange for lesser penalties.

FOREIGN BRIBERY

Legal framework

6 Describe the elements of the law prohibiting bribery of a foreign public official.

For bribery of a foreign public official to be punished under the Unfair Competition Prevention Act (UCPA), the bribe must be paid with regard to an 'international commercial transaction' (article 18, paragraph 1). An international commercial transaction means any activity of international commerce, including international trade and cross-border investment. The bribe must be provided to foreign public officials or others.

The prosecutor must then establish that the bribe was made 'to obtain illicit gains in business'. Here, gains in business means any gains that business persons may obtain during the course of their business activities, for example, the acquisition of business opportunities or governmental approvals regarding the construction of factories or import of goods.

Further, the prosecutor must establish that the bribe was made for the purpose of having the foreign public official or other similar person act or refrain from acting in a particular way in connection with his or her duties, or having the foreign public official or other similar person use his or her position to influence other foreign public officials or other similar persons to act or refrain from acting in a particular way in connection with that person's duties.

Not only is the giving of a bribe punishable, but also the offering or promising of a bribe are punishable under the UCPA.

Definition of a foreign public official

7 How does your law define a foreign public official, and does that definition include employees of state-owned or state-controlled companies?

Under the UCPA, it is prohibited to give bribes to foreign public officials and to other persons in a position of a public nature. Such persons are included in the definition of 'foreign public officials, etc.'

Article 18, paragraph 2 of the UCPA defines a foreign public official, etc. as:

- 1 a person who engages in public service for a foreign state, or local authority (a public official in a narrow sense);
- 2 a person who engages in service for an entity established under a special foreign law to carry out special affairs in the public interest (ie, a person engaging in service for a public entity);
- 3 a person who engages in the affairs of an enterprise:
 - for which the number of voting shares or the amount of capital subscription directly owned by one or more foreign states or local authorities exceeds 50 per cent of that enterprise's total issued voting shares or total amount of subscribed capital; or
 - for which the number of officers (including directors and other persons engaging in the management of the business)

appointed or designated by one or more foreign state or local authorities exceeds 50 per cent of that enterprise's total number of officers; and

- to which special rights and interests are granted by the foreign state or local authorities for performance of their business; or
- 4 a person specified by a cabinet order as an 'equivalent person' (ie, a person engaging in the affairs of an enterprise of a public nature);
- 5 a person who engages in public services for an international organisation constituted by governments or intergovernmental international organisations; or
- 6 a person who engages in affairs under the authority of a foreign state or local government or an international organisation.

The cabinet order referred to in (3) above (Cabinet Order No.388 of 2001) states that an 'equivalent person' is any person who engages in the affairs of the following enterprises (see below) to which special rights and interests are granted by foreign states or local authorities for the performance of their business:

- 7 an enterprise for which the voting rights directly owned by one or more foreign states or local authorities exceeds 50 per cent of that enterprise's total voting rights;
- 8 an enterprise for which a shareholders' resolution cannot become effective without the approval of a foreign state or local authority; or
- 9 an enterprise:
 - for which the number of voting shares or the amount of capital subscription directly owned by foreign states, local authorities or 'public enterprises' (defined below) exceeds 50 per cent of that enterprise's total voting shares or capital subscription;
 - for which the number of voting rights directly owned by foreign states, local authorities or public enterprises exceeds 50 per cent of that enterprise's total voting rights; or
 - for which the number of officers (including directors and other persons engaging in the management of the business) appointed by foreign states, local authorities or public enterprises exceeds 50 per cent of that enterprise's total number of officers.

The cabinet order defines 'public enterprise' as an enterprise as set out in (3) above, and as an enterprise as set out in (6) and (7) above.

An 'international organisation' referred to in (4) above must be constituted by a governmental or intergovernmental international organisation (eg, the UN, the International Labour Organization, the World Trade Organization). Therefore, international organisations constituted by private organisations are outside the scope of the foreign bribery regulations under the UCPA. According to the Guidelines for the Prevention of Bribery to Foreign Officials set by the Ministry of Economy, Trade and Industry (METI), which were most recently amended in 2017 (the Guidelines are available on METI's website), an illicit payment to an officer of the International Olympic Committee cannot be punished because it is constituted by private organisations.

Employees of state-owned or state-controlled companies may fall into the category of (3) above.

Gifts, travel and entertainment

8 To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The UCPA does not have any rules differentiating gifts, travel expenses, meals or entertainment from other benefits to be provided to foreign public officials. This means that the provision of any gifts, travel expenses, meals or entertainment could be considered as illegal bribery in the same way as the provision of cash or any other benefits.

Facilitating payments

9 | Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

The UCPA does not permit facilitating or 'grease' payments to foreign officials.

Payments through intermediaries or third parties

10 | In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments of bribes to foreign public officials are prohibited, whether they are made directly or through intermediaries. While the relevant provision makes no express reference to intermediaries, it is sufficiently broad to capture and punish the payment of bribes through intermediaries.

However, for a person to be held liable for paying a bribe to foreign public officials through intermediaries, such a person must recognise that the cash or other benefits provided by him or her to the intermediaries will be used for the payment of a bribe to such officials. For example, if a person appoints an agent to obtain an order from a foreign government and the appointer fully recognises that part of the fee he or she pays to the agent will be used to bribe an official of the foreign government, then the appointer may be punished. On the other hand, if the appointer was unaware of such fact, then the appointer will not be punished.

Individual and corporate liability

11 | Can both individuals and companies be held liable for bribery of a foreign official?

Yes, both individuals and companies can be held liable for bribery to foreign public officials (article 22, paragraph 1 of the UCPA).

Private commercial bribery

12 | To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

There is no provision that prohibits private commercial bribery in the UCPA.

Defences

13 | What defences and exemptions are available to those accused of foreign bribery violations?

There is no statutory defence or exemption that is available to those accused of foreign bribery violations.

Agency enforcement

14 | What government agencies enforce the foreign bribery laws and regulations?

There is no special government agency to enforce the foreign bribery laws and regulations. Like other criminal laws, the foreign bribery laws are enforced by the public prosecutor's offices and police departments of each prefecture.

Patterns in enforcement

15 | Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Although foreign bribery laws were once rarely enforced in Japan, Japanese authorities are now paying attention to corruption more than everbefore.

In 2007, two employees of a Filipino subsidiary of a Japanese construction company gave Filipino government officials golf sets, valued at approximately ¥800,000, in return for facilitating the subsidiary's entry into the Filipino market for digital fingerprint recognition systems. The two individuals were prosecuted for violation of the UCPA. Both admitted to the violation of the foreign bribery laws, and were fined, through the summary proceedings mentioned in question 5, ¥500,000 and ¥200,000, respectively.

In 2008, two officers and one high-level employee of a Japanese construction consulting company were prosecuted for violation of the UCPA. They repeatedly bribed a Vietnamese official, totalling approximately ¥90 million, to win an Official Development Assistance business (highway construction) opportunity. In 2009, the three individuals were each sentenced to imprisonment for 18 months to two years, with their sentences suspended for three years. In addition, the company was fined ¥70 million.

In 2013, an ex-director of a Japanese car silencer company was prosecuted for violation of the UCPA because he bribed a Chinese official to overlook the illegal operation of Futaba Industrial Co Ltd's local Chinese factory back in December 2007. The bribe included cash amounting to HK\$30,000 as well as an expensive ladies' handbag. This case was dealt with through summary proceedings and the ex-director was fined ¥500,000. Media reports suggested that there were further bribes of more than ¥50 million paid to several people, including customs officers, but because of the statute of limitations, those were not followed up.

In 2014, three former executives of a Japanese railway consultancy company were prosecuted for violating the UCPA because they offered railway officials ¥144 million in kickbacks in connection with Japanese government-funded railway projects in Vietnam, Indonesia and Uzbekistan. The company was prosecuted as well and the defendants pleaded guilty. In 2015, each of the three individuals was sentenced to imprisonment for periods ranging from two to three years, with their sentences being suspended for three to four years. In addition, the company was fined ¥90 million.

In 2018, three former executives of a Japanese power plant manufacturer were prosecuted for violating the UCPA. Allegedly, they bribed a Thai official, offering him 11 million baht to speed up the clearance of some cargo in connection with a local power plant project. The case constitutes Japan's first prosecutorial bargaining.

Prosecution of foreign companies

16 | In what circumstances can foreign companies be prosecuted for foreign bribery?

Like Japanese nationals and companies, foreign companies can be prosecuted for foreign bribery because article 22, paragraph 1 of the UCPA does not make any distinctions between domestic companies and foreign companies. However, this does not mean that foreign companies can be prosecuted with no jurisdictional basis. Under the Japanese criminal law system, any crime committed within the territory of Japan should be punishable (article 1 of the Penal Code), and it is generally considered that when all or part of an act constituting a crime was conducted in Japan or all or part of the result of a crime occurred in Japan, such a crime is deemed to have been committed within Japan and, therefore, is punishable.

For example, if an employee of a US company, who may or may not be a Japanese national, invites a public official of the Chinese government to Japan and provides a bribe to that official in Japan in violation of the UCPA, then not only the employee, but also the US company can be punished under the UCPA. However, from a practical point of view, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against such a foreign company if it has no place of business in Japan or no business activities in Japan.

Another possible circumstance where foreign companies can be prosecuted under the UCPA is where a foreign company hires a Japanese national and the Japanese national gives a bribe to a foreign official on behalf of his or her employer (the foreign company), either inside or outside of Japan. This is because the UCPA stipulates that Japanese foreign bribery laws shall apply to any Japanese nationals who commit foreign bribery not only in Japan, but also outside of Japan (article 21, paragraph 6 of the UCPA and article 3 of the Penal Code).

For example, if a US company, which has no Japan-based business, hires a Japanese national in the United States and the Japanese national gives a bribe to an official of the US government in the United States, then we could not deny the theoretical possibility that the US company could be prosecuted under the UCPA of Japan. From a practical point of view, however, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against foreign companies in such circumstances.

Sanctions

17 | What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals violating the foreign bribery laws may be imprisoned for up to five years, or fined up to ¥5 million, or both (article 21, paragraph 2 of the UCPA). When a representative, agent or any other employee of a company has violated the foreign bribery laws with regard to the business of the company, the company may be fined up to ¥300 million (article 22, paragraph 1 of the UCPA).

Recent decisions and investigations

18 | Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In 2011, the OECD Working Group conducted the Phase 3 evaluation of Japan's implementation of the OECD Convention. At that time, there had been only two cases (the Kyushu Electric Power Co case and the KK Pacific Consultants International case) where anyone had actually been prosecuted for violation of the UCPA. Accordingly, the December 2011 OECD Phase 3 Report on Japan stated that prosecutions of only two foreign bribery cases in 12 years appears to be a very low figure in view of the size of the Japanese economy. After this evaluation, Japanese investigative authorities made efforts to detect foreign bribery cases and prosecuted two further cases (the Futaba Industrial Co Ltd case and the Japan Transportation Consultants Inc case).

The February 2014 OECD Follow-up to Phase 3 Report stated that Japan is further recommended to establish and implement an action plan to organise police and prosecution resources to be able to proactively detect, investigate and prosecute foreign bribery cases. A foreign bribery case in Thailand (the Mitsubishi Hitachi Power Systems Ltd case) was detected by using the new prosecutorial bargaining system in 2018.

In 2019, the OECD Working Group published the Phase 4 Report, which pointed out that the number of the detected foreign bribery case is particularly low given the size of Japan's economy and the high-risk regions and sectors in which its companies operate and the police and the prosecution lack proactivity in their foreign bribery investigations. The Report appreciated Japan's 2017 amendment of its Act on Punishment of Organised Crimes and Control of Crime Proceeds which introduced the possibility to confiscate the proceeds of foreign bribery and criminalised the laundering of the proceeds of foreign.

In other jurisdictions, it was announced that the US Department of Justice (DOJ) had granted both JGC Corporation (a well-known Japanese engineering company) and Marubeni Corporation (a well-known Japanese trading company) immunity in exchange for paying fines of respectively US\$218.8 million and US\$54.6 million under the

US Foreign Corrupt Practices Act (FCPA) in connection with suspected bribery of a Nigerian official relating to a liquid natural gas plant project in 2011 and 2012. It was also announced that the DOJ had granted Bridgestone Corporation, a well-known Japanese rubber manufacturer, immunity in exchange for paying a fine of US\$28 million under the FCPA in connection with the suspected bribery of government officials of Central and South American countries in relation to marine hose sales.

In 2014, it was announced that Marubeni Corporation entered a guilty plea for its participation in a scheme to pay bribes to high-ranking government officials in Indonesia to secure a power project, and paid a fine of US\$88 million under the FCPA.

In 2015, it was also announced that the US Securities and Exchange Commission (SEC) had granted Hitachi Ltd, a well-known Japanese multinational conglomerate, immunity in exchange for paying a fine of US\$19 million under the FCPA in connection with inaccurate records of improper payments to the African National Congress, the ruling political party in South Africa, in relation to contracts to build two multibillion-dollar power plants.

In 2016, it was announced that the DOJ had granted Olympus Latin America Inc, a subsidiary of Olympus Corporation (a well-known Japanese precision equipment manufacturing company), immunity in exchange for paying a fine of US\$22.8 million under the FCPA in connection with improper payments to health officials in Central and South America.

In 2018, it was announced that the DOJ and SEC had granted Panasonic Avionics Corporation, a subsidiary of Panasonic Corporation (a well-known Japanese electronics company), immunity in exchange for paying a fine of over US\$280 million under the FCPA in connection with a scheme to retain consultants for improper purposes and conceal payments to third-party sales agents.

To the best of our knowledge, however, there is no information suggesting that the Japanese authorities are going to prosecute these matters under the UCPA.

FINANCIAL RECORD-KEEPING AND REPORTING

Laws and regulations

19 | What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Laws and regulations that require companies to keep accurate corporate books and records, prepare periodic financial statements and, in the case of large companies, undergo external auditing include the Companies Act (Act No. 86 of 2005) and the Company Accounting Regulations. In addition, the Financial Instruments and Exchange Law (Act No. 25 of 1948) (FIEL) requires public companies to keep accurate corporate books and records, prepare periodic financial statements, and establish effective internal control systems.

Disclosure of violations or irregularities

20 | To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Companies are not obliged to disclose violations of anti-bribery laws or associated accounting irregularities under the laws regarding financial record-keeping. In the case of public companies, if the associated accounting irregularities are considered so 'material' that the irregularities may affect the decision-making of investors, then the companies may be required to disclose such irregularities under the FIEL.

Prosecution under financial record-keeping legislation

21 | Are such laws used to prosecute domestic or foreign bribery?

They are not directly intended to be used for prosecution of domestic or foreign bribery. However, it would be possible to use such laws to indirectly punish bribery if a company engages in false bookkeeping to create large slush funds for the purpose of bribery.

Sanctions for accounting violations

22 | What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no specific sanctions for violating the accounting laws associated with the payment of bribes. However, if there is a materially false statement (eg, fictitious description or intentional omission concerning the amount of bribes) in securities reports to be submitted by a company under the FIEL, the person who submitted such securities reports may be imprisoned for up to 10 years or fined up to ¥10 million, or both (article 197, paragraph 1 of the FIEL), and the company may also be fined up to ¥700 million (article 207, paragraph 1 of the FIEL). Whether such false statements are deemed as 'materially' false statements will depend on the amount of the bribe, the financial condition of the company, the amount of potential penalties and other factors.

Tax-deductibility of domestic or foreign bribes

23 | Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. Article 55, paragraph 5 of the Corporate Tax Law (which applies to domestic corporations and also to foreign corporations mutatis mutandis pursuant to article 142 of the same law) stipulates that the amount spent for domestic or foreign bribes shall not be tax deductible. A criminal court need not determine that such expenditure took the form of a bribe in order for tax authorities to deny the deductibility of such expenditure.

DOMESTIC BRIBERY

Legal framework

24 | Describe the individual elements of the law prohibiting bribery of a domestic public official.

For bribery of a domestic public official to be punished under the Penal Code, the bribe must be paid in connection with the relevant public official's duties. In the Penal Code, the term 'public official' means a national or local government official of Japan, a member of an assembly or committee, or other employees engaged in the performance of public duties of Japan in accordance with laws and regulations (article 7, paragraph 1 of the Penal Code).

Cash, gifts or anything that satisfies one's desires or demands can be a bribe under Japanese domestic bribery law, provided that it is given in connection with the duties of a public official.

Scope of prohibitions

25 | Does the law prohibit both the paying and receiving of a bribe?

Yes, both paying for and receiving a bribe are prohibited by the Penal Code.

Definition of a domestic public official

26 | How does your law define a domestic public official, and does that definition include employees of state-owned or state-controlled companies?

A domestic public official is defined as a national or local government official, or a member of an assembly or committee or other employee engaged in the performance of public duties in accordance with laws and regulations (article 7, paragraph 1 of the Penal Code). Thus, employees of state-owned or state-controlled companies are not necessarily included within this definition. However, persons that are not included in this definition may be deemed a public official by specific statutes (eg, officers and employees of the Bank of Japan are deemed public officials (article 30 of the Bank of Japan Act (Act No.89 of 1997))).

In addition, some special laws deem officials of private organisations, which private organisations are closely related to the public interest, to be public officials, and bribes to such officials are also prohibited. Public officials so deemed include employees of the Nippon Telegraph and Telephone Corporation, professors of public universities and officials of public funds.

Gifts, travel and entertainment

27 | Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and the receiving of such benefits?

Even if gifts, travel expenses, meals, entertainment or other benefits are intended as a courtesy, they could be considered an illegal bribe (regardless of their value) if they are given for and in connection with the duties of the relevant public official.

Certain high-level national government officials are obliged to report any benefits from business entities if the value of such benefits exceeds ¥5,000 (article 6 of the National Public Service Ethics Act (Act No.129 of 1999)). Whether this reporting requirement applies is different from whether the benefits in question constitute bribes.

Facilitating payments

28 | Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Yes. Japanese domestic bribery law does not differentiate facilitating or 'grease' payments from other benefits, and such payments can constitute a bribe.

Public official participation in commercial activities

29 | What are the restrictions on a domestic public official participating in commercial activities while in office?

National public officials are prohibited from participating in commercial activities while serving as public officials, except when approved by the National Personnel Authority (article 103, paragraphs 1 and 2 of the National Public Service Act (Act No. 120 of 1947)). Local public officials must obtain similar approval from those who appointed them to their posts to participate in commercial activities (article 38, paragraph 1 of the Local Public Service Law).

Payments through intermediaries or third parties

30 | In what circumstances do the laws prohibit payments through intermediaries or third parties to domestic public officials?

Payments of bribes to foreign public officials are prohibited, whether they are made directly or through intermediaries. While the relevant provision makes no express reference to intermediaries, it is sufficiently broad to capture and punish the payment of bribes through intermediaries.

However, for a person to be held liable for paying a bribe to foreign public officials through intermediaries, such a person must recognise that the cash or other benefits provided by him or her to the intermediaries will be used for the payment of a bribe to such officials. For example, if a person appoints an agent to obtain an order from a foreign government and the appointer fully recognises that part of the fee he or she pays to the agent will be used to bribe an official of the foreign government, then the appointer may be punished. On the other hand, if the appointer was unaware of such fact, then the appointer will not be punished.

Individual and corporate liability

31 | Can both individuals and companies be held liable for violating the domestic bribery rules?

Only individuals can be held liable for violating the domestic bribery rules. The domestic bribery rules are not applicable to companies.

Private commercial bribery

32 | To what extent does your country's domestic anti-bribery law also prohibit private commercial bribery?

Japanese law does not impose a general prohibition on private commercial bribery. However, if a director, or similar official, of a stock corporation, in response to unlawful solicitation, accepts, solicits or promises to accept any benefit of a proprietary nature in connection with his or her duties, such person may be punished by imprisonment for up to five years or a fine of up to ¥5 million. In addition, the benefit received by such person shall be confiscated, while the person who gives, offers or promises to give the benefit may be punished by imprisonment for up to three years or a fine of up to ¥3 million (articles 967 of the Companies Act).

In addition, some special laws prohibit bribery to deemed public officials of certain private organisations.

Defences

33 | What defences and exemptions are available to those accused of domestic bribery violations?

There is no statutory defence and exemption that is available to those accused of domestic bribery violations.

Agency enforcement

34 | What government agencies enforce the domestic bribery laws and regulations?

There is no special government agency to enforce the domestic bribery laws and regulations. Like other criminal laws, the domestic bribery laws are enforced by the public prosecutor's offices and police departments of each prefecture.

Patterns in enforcement

35 | Describe any recent shifts in the patterns of enforcement of the domestic bribery rules.

The number of domestic bribery cases decreased rapidly over the past decade, with only 24 cases detected in 2018. Nevertheless, Japanese investigative authorities (especially the Special Investigation Department of the Tokyo District Public Prosecutors Office) have recently been very active in detecting domestic bribery cases including bribery of high-ranked public officials.

Prosecution of foreign companies

36 | In what circumstances can foreign companies be prosecuted for domestic bribery?

The domestic bribery rules are not applicable to companies (including foreign companies).

Sanctions

37 | What are the sanctions for individuals and companies that violate the domestic bribery rules?

A person who gives, offers or promises to give a bribe to a public official may be imprisoned for up to three years or fined up to ¥2.5 million (article 198 of the Penal Code). Companies are not punished for their employees' bribery under the Penal Code.

Sanctions against public officials are different, depending on the circumstances. A public official who simply accepts, solicits or promises to accept a bribe in connection with his or her duties may be imprisoned for up to five years (article 197, paragraph 1 of the Penal Code). If an official agrees to perform a certain act in response to a request, the sanction may be increased to imprisonment for up to seven years (article 197, paragraph 1 of the Penal Code).

If a public official commits any of the conduct described above and later actually acts illegally or refrains from properly acting in the exercise of his or her duty, he or she may be imprisoned for one year or longer (article 197-3, paragraph 1 of the Penal Code).

A former public official may be imprisoned for up to five years, if he or she received a bribe in connection with his or her illegal performance of a duty or inaction in response to a request during his or her public service in the past (article 197-3, paragraph 3 of the Penal Code).

These are typical circumstances of domestic bribery, and some derivative circumstances are also punished under the Penal Code.

A bribe accepted by a public official will be confiscated. If all or part of the bribe cannot be confiscated, then an equivalent sum of money shall be collected (article 197-5 of the Penal Code).

The Companies Act prohibits commercial bribery and individuals may be punished by imprisonment for up to three years or a fine of up to ¥3 million (articles 967 of the Companies Act).

Recent decisions and investigations

38 | Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In 2016, the Tokyo District Court handed down a prison sentence of 18 months, suspended for four years, to a former welfare ministry official for receiving a ¥1 million bribe to favour an information technology company in obtaining research service contracts related to the social security and tax number system.

In 2018, a former senior official of the Ministry of Education, Culture, Sports, Science and Technology was prosecuted on charges of accepting bribes from a medical university that, allegedly, gave the

official's son backdoor admission in return for putting the university in an advantageous position to win the ministry grant. Another former senior official of the ministry was prosecuted on grounds of accepting excessive entertainment totalling approximately ¥1.4 million from a former executive of a medical care consulting company. Following these bribery scandals, several high-ranking officials, including the Administrative Vice-Minister, were subject to disciplinary action. The Administrative Vice-Minister admitted to his responsibility by resigning from his post.

In 2020, a member of Congress, who involved in making the casino resort policy, was indicted for accepting more than ¥7 million in bribes altogether (including about ¥700,000 in expenses for his family's trip) from a Chinese gambling operator than what was already suspected. He was also indicted for witness tampering cases in which he attempted to bribe witnesses in exchange for false testimony in the trial.

The number of domestic bribery cases decreased rapidly over the past decade, with only 23 such cases detected in 2019. Nevertheless, Japanese investigative authorities have recently been very active in spotting and following up on such cases.

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UPDATE AND TRENDS

Key developments of the past year

39 | Please highlight any recent significant events or trends related to your national anti-corruption laws.

In June 2018, the prosecutorial bargaining system, whereby the public prosecutor can reach an accord with a suspect or defendant to refrain from prosecuting that person or suggest a lenient sentencing recommendation in return for his or her testimony regarding another person's crime, was introduced. In July 2018, for the first time, the public prosecutor reached a plea bargain agreement with a power plant manufacturer in connection with a bribery case in Thailand. The prosecutors and the company entered into a plea bargain agreement whereby the latter would escape prosecution in exchange for cooperation with the investigation. The prosecutors indicted three former executives, but dropped the charges against the company. Two of the defendants were found guilty in the Tokyo District Court, but the other defendant denied the charge and the case is pending in the Supreme Court.

Coronavirus

40 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 7 April 2020, the government issued the declaration of a state of emergency to combat the coronavirus, requesting refraining from going out, cooperating in actions to prevent infection (such as masks and handwashing), and cancelling the event (the declaration of a state of emergency was terminated on 25 May). There is no emergency legislation or amendment of existing laws and regulations to address the pandemic in the area of crisis management.

The influence of the coronavirus has slowed criminal investigations by investigative authorities. However, the special investigation department of the public prosecutor's office is continuing to investigate corruption cases intensively and a large-scale IR-related bribery case has been prosecuted. It is expected that corporate crimes due to the influence of coronavirus will increase in the future. It is thought that the number of white-collar cases detected will increase as the investigation by the investigative authorities steps up.

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