

ANTI-CORRUPTION (PRIVATE COMPANY ACQUISITIONS) Q&A: JAPAN

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This Q&A provides jurisdiction-specific commentary on *Practice note, Anti-corruption due diligence (private company acquisitions): Cross-border* and forms part of *Cross-border private company acquisitions*.

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Act on Punishment of Public Officials Profiting by Exerting Influence

Article 4 of the Act on Punishment of Public Officials Profiting by Exerting Influence (*Act No.130 of 2009, as amended*) (APPOPEI) prohibits a bribe to a member of parliament/senator or a member of a local assembly/governor of the local public entity (for more details on the offences under the APPOPEI, see *Question 3*).

Unfair Competition Prevention Act

Article 18 of the Unfair Competition Prevention Act (*Act No.54 of 1993, as amended*) (UCPA) prohibits bribery of foreign public officials (for more details on the offences under the Criminal Code, see *Question 3*).

Regarding the bribery of Japanese public officials, the Criminal Code and APPOPEI apply to:

- Any Japanese public official, regardless of where the alleged crime takes place.
- Any individual (Japanese or non-Japanese), including employees of foreign companies doing business in Japan, where at least part of the crime (that is, offering, dispatching or receiving the benefit) takes place in Japan.

Bribery of foreign public officials is outside the scope of the Criminal Code and APPOPEI.

The UCPA prohibits offering, giving and promising to give a bribe to foreign public officials, therefore extraterritorial application is possible. The UCPA applies to:

- Any Japanese national and Japanese incorporated companies.
- Any non-Japanese individual or company incorporated outside Japan, if a bribe has been granted, offered, promised or received in Japan, or a conspiracy to undertake any of those acts has occurred in Japan.

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ANTI-CORRUPTION

1. WHAT ARE THE MAIN LEGISLATION AND REGULATORY PROVISIONS RELEVANT TO BRIBERY AND CORRUPTION? IS THE APPLICABLE LEGISLATION EXTRATERRITORIAL?

The legislation regulating bribery and corruption in Japan is set out below.

Criminal Code

Article 198 of the Criminal Code (*Act No.45 of 1907, as amended*) prohibits giving bribes (for more details on the offences under the Criminal Code, see *Question 3*).



For example, the UCPA:

- Applies to a non-Japanese individual working for a non-Japanese company, who has dispatched a bribe to a foreign public official from Japan.
- Does not apply to a non-Japanese individual working for a Japanese company who commits an act of bribery in relation to a foreign public official during a business trip outside Japan, unless the conspiracy to commit bribery takes place in Japan.

In either case, the Japanese company employing the non-Japanese individual may be liable.

The UCPA does not apply to a foreign parent company of a Japanese incorporated entity (or of a foreign entity doing business in Japan) simply because the foreign parent company holds shares in a company that commits an act of bribery. However, if the foreign parent company has directed its Japanese subsidiary to commit an act of bribery, the parent company may be exposed to criminal liability.

Although the UCPA technically has extraterritorial reach, extraterritorial enforcement has not been actively pursued. Since enactment of the UCPA in 1998, as of January 2017 there have only been four cases of enforcement under Article 18 of the UCPA.

2. WHAT INTERNATIONAL ANTI-CORRUPTION CONVENTIONS APPLY IN YOUR JURISDICTION?

International anti-corruption conventions applicable in Japan are the:

- United Nations Convention against Corruption.
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

3. WHAT ARE THE SPECIFIC BRIBERY AND CORRUPTION OFFENCES IN YOUR JURISDICTION? CAN BOTH INDIVIDUALS AND (INCORPORATED OR UNINCORPORATED) ENTITIES BE HELD LIABLE FOR CRIMINAL OFFENCES?

Criminal Code

Under the Criminal Code, a person must not give, offer or promise to give a bribe to a public official, regarding their public office. The bribe needs to have some connection with the office or duties of the public official. Receiving a bribe is also prohibited.

A bribe includes any tangible or intangible benefit.

APPOPEI

Article 4 of APPOPEI prohibits giving a bribe (something of value) to and the receipt of a bribe by a member of parliament/senator or a member of a local assembly/governor of the local public entity, for the purposes of such public figures exerting pressure over other officials to act under their influence, irrespective of any violation of laws.

Unfair Competition Prevention Act

Under the UCPA, a person must not do any of the following:

- Give, offer, or promise to give any money or other benefit.
- To a foreign public officer (including employees of state-owned entities or those controlled by the government).
- For the purpose of influencing the foreign public officer to act or refrain from acting in a particular way, in connection with their duties.
- To obtain a wrongful gain.
- In business with regard to international commercial transactions.

The Criminal Code and APPOPEI only apply to individuals. The UCPA applies to both individuals and incorporated entities. An unincorporated entity is not subject to these regulations in its capacity as an entity, but individual members can be collectively liable as accomplices.

4. WHAT DEFENCES, SAFE HARBOURS OR EXEMPTIONS ARE AVAILABLE (IF ANY) AND WHO CAN QUALIFY?

Under the Criminal Code and APPOPEI, there is no specific defence, safe harbour or exemption.

Under the UCPA, conduct that is lawful under local regulations where the conduct occurred will not give rise to liability. Therefore, for example, a facilitation payment permitted under statute or judicial precedent in the jurisdiction of the receiving public official is not punishable under the UCPA.

In addition, the Guidelines for the Prevention of Bribery of Foreign Public Officials (Guidelines), based on Article 18 of the UCPA issued by the Ministry of Economy, Trade and Industry, state that threatened or actual danger against the body or property of an individual or company may exempt the individual or company from liability.

The Guidelines also provide commentary on the scope of permissible gifts and services, in the context of greetings or social relationships exempt from Article 18 of the UCPA. The Guidelines give examples of small seasonal greetings based on local custom, tea and snacks at a meeting and reasonable dining expenses. Frequent gifts or gifts easily convertible into money and payments just before bidding are likely to be regarded as bribes. No particular threshold amount is specified.

The Guidelines encourage companies to establish internal standards and a system of supervision. While technically the Guidelines are not legally binding and operate as a de facto standard, it is unlikely that any company acting in accordance with the Guidelines would be liable.

5. WHAT DO COMPANIES USUALLY DO TO MITIGATE THEIR ANTI-CORRUPTION RISK IN YOUR JURISDICTION (FOR EXAMPLE, DO THEY IMPLEMENT ANTI-CORRUPTION POLICIES AND PROCEDURES AND ROLL-OUT TRAINING PROGRAMS FOR EMPLOYEES)?

Many companies have anti-corruption policies and procedures and training programmes for their employees, to mitigate risk and show their efforts to prevent their employees from committing corruption.

The Companies Act (Act No.86 of 2005, as amended) requires directors to maintain a corporate governance system, that ensures directors, employees and subsidiaries comply with applicable laws and regulations. This requirement is also referenced in the Securities Listing Regulations of the Tokyo Stock Exchange.

The Guidelines also encourage companies to establish compliance systems, including:

- Principal policies and internal rules.
- Internal corporate structures, including compliance departments, to manage compliance issues and to deal with whistleblowing.
- Training programmes for employees.
- Supervision.
- Regular compliance checks for managing personnel.

6. CAN ASSOCIATED PERSONS (SUCH AS SPOUSES) AND AGENTS BE LIABLE FOR THESE OFFENCES AND IN WHAT CIRCUMSTANCES?

Any party, including associated persons and agents, can be liable as accomplices when they take part in conduct that is a crime under the Criminal Code, APPOPEI or UCPA. A commitment to a conspiracy to commit a crime can create accomplice liability, even if the relevant person has no physical involvement in the crime.

7. WHICH AUTHORITIES HAVE THE POWERS OF PROSECUTION, INVESTIGATION AND ENFORCEMENT IN CASES OF BRIBERY AND CORRUPTION? WHAT ARE THESE POWERS AND WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE? WHAT ARE THE POSSIBLE OUTCOMES OF ANY INVESTIGATIONS, PROSECUTIONS AND OTHER FORMS OF ENFORCEMENT?

The Public Prosecutor's Office and National Police Agency have powers of investigation and enforcement. These powers include dawn raids, seizures of documents and data, questioning and interrogation and detaining persons, in each case with a warrant issued by a court. The public prosecutor has additional authority to conduct a public prosecution of the alleged case before a court.

Following an investigation, the public prosecutor has discretion to prosecute the suspect in a court trial before a judge.

8. WHAT ARE THE POTENTIAL PENALTIES (FOR EXAMPLE, CRIMINAL OR ADMINISTRATIVE) FOR PARTICIPATING IN BRIBERY AND CORRUPTION? CAN MATTERS BE RESOLVED BY A DEFERRED PROSECUTION AGREEMENT (OR SIMILAR ALTERNATIVE TO FORMAL PROSECUTION) OR CIVIL SETTLEMENT?

There are the following criminal penalties for breach of the legislation:

- Imprisonment of up to three years, or a fine up to JPY2.5 million (*Article 198, Criminal Code*).
- Imprisonment of up to a year, or a fine up to JPY2.5 million (*Article 4, APPOPEI*).
- Imprisonment up to five years and/or a fine up to JPY5 million for an individual. A fine of up to JPY300 million for a company (*Article 18, 21.2.7, UCPA*).

Criminal charges are only resolved through a public prosecution and court trial. Deferred prosecution agreements (DPA) and civil settlements are not used in Japan in relation to breaches of the above legislation.

However, an amendment of the Code of Criminal Procedure (*Act No.131 of 1948, as amended*) was approved by parliament on 24 May 2016, and will be enacted by June 2018. A form of non-prosecution agreement was introduced, under which the public prosecutor and the suspect can enter into an agreement for the suspect to co-operate with an investigation into another company's/person's crime (including offering bribes under Article 198 of the Criminal Code), in exchange for the public prosecutor refraining from or cancelling all or part of the prosecution.

9. ARE THERE ANY CIRCUMSTANCES UNDER WHICH PAYMENTS SUCH AS BRIBES, RANSOMS OR OTHER PAYMENTS ARISING FROM BLACKMAIL OR EXTORTION ARE TAX-DEDUCTIBLE AS A BUSINESS EXPENSE?

The Corporation Tax Act (*Act No.34 of 1965, as amended*) explicitly states that bribes under Article 198 of the Criminal Code and Article 18 of the UCPA are not included in the deductible expenses permitted by the act.

10. ARE ANTI-CORRUPTION WARRANTIES INSERTED IN SHARE PURCHASE OR ASSET PURCHASE AGREEMENTS? WHICH IS THEIR USUAL WORDING?

It is common for anti-corruption warranties to be inserted in share purchase or asset purchase agreements.

See *Standard clause, Anti-corruption warranties: Cross-border* as an example of representations and warranties for use in cross-border private company acquisitions. Jurisdiction-specific drafting notes (updated periodically) provide practical information for Japan, including revised wording where appropriate.

11. ARE THERE ANY OTHER PROVISIONS THAT SHOULD OR ARE COMMONLY SET OUT IN A SHARE PURCHASE OR ASSET PURCHASE AGREEMENT IN RELATION TO ANTI-CORRUPTION?

There are no other specific provisions that should or are commonly set out in a share purchase or asset purchase agreement in Japan, in relation to anti-corruption.

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