

Q&A IN RELATION TO BRIBERY OFFENCES IN JAPAN

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1. Legal Framework

What is the legal framework governing bribery in Japan?

The Criminal Code (the CC):

- The CC is the key legislation governing bribery. It applies to the bribery of public officials (komuin) (Article 197 and 198 of the CC).

The Unfair Competition Prevention Act (the UCPA):

- The UCPA regulates the corruption of a foreign public official and prohibits the giving, offering or other types of bribery to foreign public officials (Article 18 of the UCPA).

The Companies Act (the CA):

- Under the CA, a director or an officer etc. of a company who receives a property benefit based on an unlawful request in connection with his or her duty shall be punished (Crime of the Giving or Acceptance of a Bribe in relation to the Duties of a Director. Article 967 of the CA).
- In addition, the CA also stipulates that a person who has accepted, solicited or promised to accept property benefits in relation to the exercise of a right of a shareholder, in response to a wrongful request, is punished (Crime of the Giving or Acceptance of a Bribe in Relation to Exercise of a Right of a Shareholder. Article 968 of the CA).

2. What Constitutes a Bribe?

What constitutes a bribe?

Under the CC:

- Although there is no definition of bribery, any benefit, including anything that satisfies a person's desire, regardless of whether it is tangible or intangible, could be a bribe.
- The giving, offering or promising to give a bribe by a private individual to a public official in connection with the public official's duties constitutes the crime of bribery.

Under the UCPA:

- Bribery under the UCPA has the same meaning as under the CC as referred to above.

Under the CA:

- Under the CA, a bribe is a benefit which has monetary value (in contrast to the CC or UCPA, where any benefit, including one which does not have monetary value, can constitute a bribe).

What are the principal offences under this legal framework?

Under the CC:

- Requesting, agreeing to receive, or accepting a bribe by public officials (Article 197 of the CC)
- Offering, promising, or giving of a bribe to public officials (Article 198 of the CC).

Under the UCPA:

- Offering, promising, or giving of a bribe to foreign (non-Japanese) public officials (Article 18 of the UCPA).

Under the CA:

- With respect to the Crime of the Giving or Acceptance of a Bribe in relation to the Duties of a Director:
 - Requesting, agreeing to receive, or accepting a bribe by a director or an officer etc. (Article 967 Paragraph 1 of the CA)
 - Offering, promising, or giving of a bribe to a director or an officer etc. (Article 967 Article 968 Paragraph 2 of the CA)
- With respect to the Crime of the Giving or Acceptance of a Bribe in Relation to Exercise of a Right of a Shareholder:
 - Requesting, agreeing to receive, or accepting a bribe by a shareholder (Article 968 Paragraph 1 of the CA)
 - Offering, promising, or giving of a bribe to a shareholder (Article 968 Paragraph 2 of the CA)

3. Jurisdictional Reach

What is the jurisdictional reach of the legal framework?

Under the CC

- The Crime of the Giving of a Bribe shall apply to any Japanese national who commits the crime outside the territory of Japan (if a non-Japanese national commits same conduct outside the territory of Japan, such conduct does not constitute the Crime of the Giving of a Bribe) (Article 3 of the CC).

Under the UCPA

- The corruption of a foreign public official shall be applicable to both Japanese nationals and non-Japanese nationals if they commit the corruption of a foreign public official in the territory of Japan. In addition, if a Japanese national commits the crime outside the territory of Japan, they can be prosecuted.

Under the CA

- The Crime of the Giving of a Bribe to a director or an officer etc. or to a shareholder under the CA shall apply to any Japanese national who commits the crime outside the territory of Japan and they can be prosecuted (if a non-Japanese national commits the same crime outside the territory of Japan, such conduct does not constitute the Crime of Giving of a Bribe) (Article 971 of the CA).

4. Who may be liable?

Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

Under the CC

- Private individuals and public officials can be prosecuted.
- The definitions of public officials are as follows: a national or local government employee, a member of an assembly or committee or another employee engaged in the performance of public duties in accordance with laws and regulations constitutes a public official. Furthermore, officers and employees of government-related entities, including independent administrative agencies (*dokuritsu gyousei houjin*), local incorporated administrative agencies (*chihou dokuritsu gyousei houjin*), national university corporations (*kokuritsu daigaku houjin*), state-owned

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enterprises, and public hospitals are treated as public officials (quasi-public officials).

Under the UCPA

- Private individuals and legal entities can be prosecuted.
- Article 18 Paragraph 2 of the UCPA provides that the following categories of persons fall under the definition of foreign public official:
 - a person who engages in public services for a national or local foreign government;
 - a person who engages in services for an entity established under a special foreign law to carry out specific affairs in the public interest;
 - a person who engages in the affairs of an enterprise of which the majority of voting shares or capital subscription that exceeds 50% of that enterprise's total issued voting shares or total amount of capital subscription is directly owned by a national or local government of a foreign state, or of which the majority of officers (directors, auditors, council members, inspectors, liquidators and other persons engaged in the management of the business) are appointed or designated by a national or local foreign government, and to which special rights and interests are granted by the national or local foreign government for performance of its business, or a person specified by a cabinet order as an equivalent person;
 - a person who engages in public services for an international organization (which means an international organization constituted by governments or intergovernmental international organizations); or
 - a person who, under the authority of a foreign state or local government of a foreign state or an international organization, engages in affairs that have been delegated by that state or organization.

Can a parent company be liable for its subsidiary's involvement in bribery?

- No.

5. High Risk Areas

Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

- There is no provision in the UCPA that clearly allows facilitation payments. Therefore, bribery of foreign public officials will not be exempted from punishment just because the bribe is a small facilitation payment.

Does the legal framework restrict political and charitable contributions?

- A political or charitable contribution could be considered a bribe if it is given or received with the intention of inducing a person to act improperly, or as a reward for having done so.

Does the legal framework place restrictions on corporate hospitality?

- Although there is no definition of bribery, any benefit could be bribery. In accordance with precedent cases, the provision of certain gifts or benefits could be deemed to be merely a social courtesy if the gifts or benefits are not provided in connection with a public official's duties; however, there is no clear safe-harbor guideline or rule.

6. Legal Defences

Are there any defenses for bribery offences?

- There are no specific statutory defenses for bribery.

7. Regulatory and Enforcement Bodies

What are the key regulatory or enforcement bodies with regard to bribery?

- The police and the prosecutor are the key agents in Japan.

8. Legal Consequences

What are the legal consequences of being found guilty of bribery offences?

Under the CC:

- Private individuals will be punished by imprisonment with work for not more than three years or a fine of not more than JPY2.5 million (Article 198 of the CC).
- Under the CC, companies shall not be punished for the giving of bribe committed by its directors or employees etc.

Under the UCPA:

- Private individuals will be punished by imprisonment with work for not more than five years, a fine of not more than JPY5 million or both (Article 21 Paragraph 2 Item 7 of the UCPA).
- When a representative, an agent, an employee, or other worker of a company has committed corruption of a foreign public official with regard to the business of the company, in addition to the offender being subject to punishment, the company will be punished by a fine not more than JPY300 million (Article 22 Paragraph 1 Item 3 of the UCPA).

Under the CA

- A director or an officer etc. who requests, agrees to receive, or accepts a bribe will be punished by imprisonment with work for not more than five years or a fine of not more than JPY5 million (Article 967 Paragraph 1 of the CA).
- Private individuals who offer, promise, or give a bribe to director or an officer etc. will be punished by imprisonment with work for not more than three years or a fine of not more than JPY3 million.
- A shareholder who requests, agrees to receive, or accepts a bribe, and a private individual who offers, promises, or gives a bribe to shareholders will be punished by imprisonment with work for not more than five years or a fine of not more than JPY5 million (Article 968 Paragraph 1 of the CA).

9. Deferred Prosecution Agreements

Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

- Yes. A Japanese version of DPAs came into effect in June 2018. As to certain types of crimes specified by the Code of Criminal Procedure (CCP), which includes, among others, bribery, fraud, embezzlement and tax crimes, a public prosecutor may enter into an agreement with a suspect or a defendant to (i) not prosecute the case, (ii) withdraw the prosecution, (iii) prosecute the case with specified counts or penal statutes or maintain such prosecution, (iv) request addition or withdrawal of, or changes to specified counts or penal statutes, (v) state an opinion regarding the punishment with a lighter sanction than usual to the court after the examination of evidence, or (vi) prosecute the case under summary proceedings (Article 350-2 Paragraph 1 Item 2 of the CCP).
- A DPA may be executed if the public prosecutor considers it necessary after evaluating the importance of the evidence to be obtained from the suspect or the defendant by the below actions and other relevant factors. In order to enter into such an agreement, the suspect or the defendant must do one or more of the following actions: (i) state the true facts to the investigation authorities; (ii) testify the true facts as a witness in the court; or (iii)

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produce evidence or provide other assistance to the investigation authorities (Article 350-2 Paragraph 1 Item 1 of the CCP).

- The Japanese version of deferred prosecution shall only be made with the consent of the counsel for the suspect or the defendant. However, the approval of the court is not necessary (Article 350-3 of the CCP).

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