

New plea bargaining system in practice

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White Collar Crime, Japan

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Introduction

In June 2018 an amendment to the Criminal Procedure Code came into effect, thereby introducing the country's first plea bargaining system (for further details please see "New plea bargaining system: a new compliance risk for companies with operations in Japan?").**(1)** The new system allows suspects and defendants to enter into negotiations with prosecutors whereby evidence of others' criminal conduct can be provided in return for criminal charges being reduced or dropped. The system covers white collar crimes such as fraud, bribery and embezzlement and certain offences relating to tax matters and the trade in financial products and instruments.**(2)**

Since the system's introduction, Japanese prosecutors have used plea bargains in two cases, the second of which led to the dramatic arrest of Carlos Ghosn, former CEO and chair of Renault-Nissan, on the tarmac of Haneda Airport in November 2018. The one-year anniversary of the new system therefore seems an appropriate time to take stock of the first cases and examine the implications for the future.

Prosecutors' approach to plea bargaining

Shortly before the plea bargaining system was introduced, the Public Prosecutors Office (PPO) published a paper outlining how it intends to use the new system.**(3)** The tone adopted in the paper suggests a modest approach: prosecutors will consider entering a plea bargain only in situations where the public understands the desirability of granting suspects or defendants leniency in return for their cooperation with investigations into others' crimes.**(4)** Although it is unclear how the PPO intends to gauge the public's understanding, the wording seems to imply that prosecutors will use their new powers cautiously. The prosecutor general appeared to confirm this at a conference in September 2018 when he said that prosecutors will "take adequate time" to establish the foundations of the new system.**(5)**

The use of plea bargains in only two cases to date indicates that the PPO is using its new powers conservatively. **(6)** However, as a frame of reference, the frequency with which plea bargains have been used in Japan so far is not dissimilar to the UK Serious Fraud Office's use of its deferred prosecution agreement (DPA) powers, which have been deployed approximately once a year since the introduction of DPAs in 2014. **(7)**

Cases

Mitsubishi-Hitachi Power Systems

The first case in which a plea bargain was entered concerned the bribery of a foreign official. In February 2015 an employee of Mitsubishi-Hitachi Power Systems (MHPS), a Japan-based power plant construction company, paid approximately Bt20 million to a subcontractor. The expectation was that the funds would then be passed on to a Thai government official in exchange for the granting of a permit to use a port during the construction of a power plant in Thailand.

Shortly after MHPS discovered the bribe, it committed to conducting an internal investigation led by outside counsel and in June 2015 it disclosed the results of this investigation to the Tokyo District Prosecutors Office (at that time, the plea bargaining system had yet to be introduced). MHPS subsequently accepted an offer from prosecutors to enter a plea bargain in June 2018. **(8)** As a result of the plea bargain, three former executives of the company were charged with bribery of a foreign official. The company, and possibly certain other employees, avoided prosecution. **(9)**

Historically, charges regarding the bribery of foreign officials have rarely been brought in Japan, partly due to the onerous nature of collecting evidence from outside the jurisdiction. The new plea bargaining system may make this less of an obstacle to bringing a successful prosecution and help Japan to overcome the longstanding international criticism of not appropriately pursuing such cases. **(10)**

Nissan and Carlos Ghosn

The second case in which plea bargains have been used has received extensive international press coverage. On 19 November 2018 Ghosn, one of the most high-profile figures in the automotive industry, was arrested by the Special Investigation Unit of the Tokyo District Prosecutors Office for underreporting his compensation to the Japanese authorities. Ghosn, along with a close aide and the company, was charged in December 2018 and January 2019 for underreporting his pay by approximately Y9.1 billion over eight years. Ghosn denies the allegation on the basis that this element of his remuneration was unfixed and there was therefore no requirement to publicly report it in the company's financial statements. Further charges for aggravated breach of trust were subsequently brought against Ghosn in January and April 2019 in relation to an alleged misappropriation of company money. **(11)**

It has been reported that a senior executive officer and a former head of Nissan's company secretariat division agreed to give evidence against Ghosn in return for leniency from prosecutors. In May 2019 the PPO announced that plea bargains had been entered and that certain executives would avoid charges. The executives in question reportedly knew the whereabouts of critical evidence regarding the company's agreement to pay Ghosn a 'fixed' amount of remuneration after his retirement (ie, an amount that would have to be disclosed in company financial statements, but had not been classified as such). It is unclear whether the PPO would have been able to obtain this evidence without the assistance of the executives in question or whether it would have become aware of the conduct in question at all. At the very least, it seems that considerable investigative resources may have been saved and that the plea bargaining may have resulted in a more cost-effective investigation into one of the most high-profile corporate scandals in Japan in recent years.

Whether Ghosn is ultimately convicted and the plea bargains were effective from the PPO's perspective remains to be seen. Much has been written about the high conviction rate of the Japanese criminal justice system (purported to be 99%). This statistic suggests that convictions against defendants are nearly guaranteed once charges have been brought. However, Ghosn's case is exceptional for several reasons, which may give him more hope than a typical defendant in these circumstances. First, the issue of what constitutes fixed and unfixed remuneration has not been tested in the Japanese courts. There is therefore no judicial guidance on how the court is likely to interpret this. Second, Ghosn has been able to deploy considerable resources to defend himself and has instructed a team which includes several defence counsel who have secured acquittals of prominent clients in the past. For these reasons, a conviction is not guaranteed.

Reactions

Although the introduction of the plea bargaining system has yet to significantly change how prosecutors bring cases in Japan, the modest use of the system to date has not been without criticism. Some argue that the plea bargain in the first case, which allowed the company in question to avoid criminal penalties while a number of its executives were charged, was unfair. The company itself seemed to be alive to this criticism and the potential for it to cause reputational damage because it made clear in its press release that the decision to enter the plea bargain was based on the assumption that the three executives in question would have been charged regardless of whether the company entered the plea bargain.

In the Ghosn case, a number of senior individuals entered plea bargains. **(12)** This has led critics to suggest that the plea bargain system could be used as a tool to precipitate the removal of an undesirable member of management, thus tainting the integrity of the new system. The PPO denies this and has emphasised that it makes charging decisions based on whether it believes that it can secure a conviction. If Ghosn is ultimately convicted on one or more charges, the PPO may feel that its decision to enter plea bargains has been vindicated.

Implications

The implications from the cases to date are two-fold. First, Japan's plea bargaining system could potentially pave the way for the authorities to actively tackle instances of bribery of foreign officials. As highlighted by the first case, entering a plea bargain effectively removes the burden of collecting evidence outside the jurisdiction. Given that the Japanese authorities have long been criticised for their reluctance to investigate such cases, this may be the start of a new trend in tackling overseas bribery and corruption. However, it is too early to draw conclusions, and this potential implication should be revisited when more data is available.

Second, the plea bargaining system has arguably made directors and executives more vulnerable to criminal probes in Japan. Although prosecutors are taking a cautious approach for now, it is clear that the 'carrot' of a plea bargain puts the authorities in a stronger position to acquire highly sensitive and potentially incriminating evidence from companies and individuals within companies who may themselves be implicated in wrongdoing and therefore have an incentive to accuse more senior members of management of involvement in the alleged misconduct that is being investigated.

What effect this will have on non-Japanese executives who are considering taking on senior management roles in Japan remains to be seen. However, at the very least, Ghosn's long detention without charge and subsequent re-arrest while on bail will have highlighted the significant differences between Japan's criminal justice system and those of other advanced liberal democracies.

While it remains unclear whether the PPO will relax its cautious approach and use plea bargains more frequently, a successful prosecution in the Ghosn case may encourage the PPO to launch further white collar criminal investigations in the future. In particular, considering the PPO's limited investigative resources (there were fewer than 2,800 prosecutors nationally in 2018),⁽¹³⁾ cost-effective investigations assisted by an effective plea bargaining system may help to tackle more white collar crime in Japan. However, Japanese prosecutors are proud of their strong investigative tradition and may well be reluctant to plea bargain with those who they see as having broken the law and being deserving of punishment. If this view is too entrenched, the use of the new system will remain limited and, rather than fundamentally changing the way white collar cases are pursued in Japan, it may simply become an additional tool that prosecutors deploy in limited circumstances.

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Endnotes

(1) In Japan, a similar system (eg, leniency in antitrust law) has been in place since 2006.

(2) Criminal Procedure Code, Article 350-2(2).

(3) Supreme Public Prosecutors Office, April 2018, "*Goui Seido no Toumen no Unyou ni Kansuru Kensatsu no Kangaekata* [The Prosecutors' Approach on the Current Application of Plea Bargaining System]" *Gekkan Houritsu-no-Hiroba* (71-4) p 48.

(4) *Ibid.* II p 52

(5) Further information is available here.

(6) For instance, 7,940 fraud cases were prosecuted between June 2018 and April 2019 (further information is available here).

(7) One key difference between Japan's plea bargaining system and DPAs in the United Kingdom is that DPAs are available only to corporate entities.

(8) MHPS, 20 July 2018, "Regarding Prosecution of Company Executives and Employees Due to Violation of Unfair Competition Prevention Law".

(9) The identities of the individuals with whom the PPO enters plea bargains are not made public, although this information is disclosed to the court and defence counsel.

(10) There have been only four prosecutions since the provision to make foreign bribery an offence came into effect in 1999 (further information is available here).

(11) The maximum penalty for both underreporting remuneration and aggravated breach of trust is 10 years' imprisonment and a fine of ¥10 million (Sections 197(1) and 197-2(6) of the Financial Instrument and Exchange Act and Section 960(1) of the Companies Act).

(12) The identity of the ex-aides is unknown, but Sections 350-7, 8 and 9 of the Criminal Procedure Code require the PPO to adduce plea bargain statements as evidence at trial.

(13) As of April 2018. Public Prosecutors Office, "Kensatsu-Cho no Shokuin [Staff Member of Public Prosecutors Office]".

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