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# White-Collar Crime

**Japan: Law & Practice**

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## Law and Practice

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## 1. Legal Framework

### 1.1 Classification of Criminal Offences

#### Overview

Japanese law does not classify crimes into felonies, misdemeanours or other categories. The Penal Code of Japan provides for all the major criminal offences for individuals, and a lot of other laws also provide for criminal offences, including those for judicial persons. In addition to criminal sanctions, government authorities can impose administrative sanctions such as imposing a surcharge, revoking a licence for a regulated business, or disqualifying an entity from the bidding process for a governmental contract.

#### Elements of Crime

In order to establish a criminal offence, a public prosecutor must prove certain conduct by the defendant that meets the elements set forth in the relevant statute, as well as the criminal intent or negligence of the defendant. The illegality of conduct and criminal liability are also elements of an offence, and the prosecutor must prove such elements if the defendant raises the lack of such elements as a defence.

Many criminal offences require certain consequences of the defendant's conduct (eg, physical injury of a victim). However, an attempt to commit certain criminal conduct can be punishable even when it does not result in any consequences, if it is specifically criminalised under relevant statutes. Negligence could constitute a criminal offence if it causes physical injury or another serious consequence, and is specifically criminalised under the Penal Code or other laws. Additionally, the Act on Punishment of Organised Crime and Control of Crime Proceeds criminalises the conspiracy to commit certain crimes.

### 1.2 Statute of Limitations

The enforcement limitation period starts from the time when the criminal act ceases. Regarding a case of complicity, the period with respect to all accomplices starts from the time the final act of all accomplices ceases (Article 253 of the Code of Criminal Procedure – the CCP). The limitation periods are stipulated according to the type and range of the statutory penalty under Article 250 of the CCP. For example, the CCP stipulates that the statute of limitations runs out after five years with regard to crimes that are punishable with imprisonment of less than ten years, other than for crimes causing the death of a person. Where two or more separate criminal conducts are deemed a single criminal act in substance, the limitation period with respect to the entire crime starts from the time that the final act of the entire crime ceases. The limitation period is tolled if an offender is outside Japan or is in hiding, making it impossible to serve a transcript of the written indictment or notify the summary order (Article 255 of the CCP).

### 1.3 Extraterritorial Reach

Articles 3 and 3-2 of the Penal Code stipulate that persons who have committed certain serious crimes outside Japan are punishable. For example, counterfeiting official Japanese government documents can be classified as a crime, regardless of the nationality of the offender and the location of the conduct. Certain crimes against Japanese nationals committed by non-Japanese offenders outside Japan are also punishable.

However, Japanese enforcement agencies do not have any jurisdiction to enforce their authority outside Japan, and can obtain evidence outside of Japanese territory only through voluntary co-operation with investigations or through mutual legal assistance, as described in 2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation.

### 1.4 Corporate Liability and Personal Liability

#### Dual Liability

In principle, only a natural person is criminally liable under Japanese law, and the Penal Code does not set forth any crimes of a judicial person. A judicial person may be held criminally liable only when there are specific provisions for punishment prescribed in the form of a dual liability provision (*ryobatsukitei*) under the laws. A dual liability provision makes entities, including corporations, punishable together with the natural person that is employed or otherwise retained by the entity and actually committed the offence, unless the judicial person proves that it was not negligent in appointing or supervising that natural person, or that it was not negligent regarding the measures it took to prevent the crime.

In addition to dual liability, when there is a triple liability provision, the representative of the entity in which the offender is employed may be held liable if they did not take the necessary measures to prevent the crime. The Act on the Prohibition of Private Monopolisation and the Maintenance of Fair Trade (the “AMA”) and the Labour Standard Act contain provisions to this effect.

There is no written public policy on when to pursue indictment against an entity or an individual, or both. While an entity can be convicted only if a certain natural person is criminally liable, a prosecutor sometimes indicts only a natural person and suspends an indictment against an entity when the activities of the entity are found not to be egregious. On the other hand, a prosecutor may only indict an entity and suspend an indictment against a natural person when the activities of the relevant corporate executives or employees are found not to be egregious.

#### Successor Liability

There seems to be no intensive discussion about criminal successor liability in Japan because only a natural person can be

liable in the criminal context, and this issue has not been contested in any notable court cases. While the successor may not be held liable for the predecessor's conduct in an asset deal, in theory the successor's liability cannot be ruled out in the case of a merger.

#### **Administrative Sanction Against Entity**

Administrative sanctions such as a surcharge can be imposed on an entity without a dual liability provision or an establishment of illegal conduct by a natural person.

### **1.5 Damages and Compensation**

#### **Civil Remedy**

In addition to criminal disposition to a defendant, a defendant can be subject to civil remedies if his/her conduct constitutes a tort under the Civil Code. In principle, complaints claiming for damages in tort are filed with a civil division of the court and dealt with separately from the criminal case. A proceeding similar to a class action is available only for cases involving the violation of specific consumer protection laws. Parties other than qualified consumer groups cannot initiate this type of lawsuit and, as a result, the consumer group lawsuit is not actively used.

#### **Restitution Order**

The restitution order system is available for victims of crime who are suffering from physical injury, unlawful confinement or kidnapping, but victims of white-collar crimes cannot use this system to recover their economic damage. Under this system, complaints claiming for damages in tort may be filed to a criminal court and the judge presiding in the criminal case has the power to render a judgment ordering the defendant to pay damages after the court has found the defendant guilty.

#### **Remission Payments for Organised Crime**

When a judicial decision is made to confiscate property damaged by organised crimes (eg, fraud or usury by a criminal group) as set forth in the Act of Punishment of Organised Crime, the prosecutor may set up a remission fund to restore the property to the victims under the procedure set forth in the Act on Issuance of Remission Payments Using Stolen and Misappropriated Property.

### **1.6 Recent Case Law and Latest Developments**

The plea bargaining system described in 2.7 **Deferred Prosecution** and 2.8 **Plea Agreements** was introduced in June 2018, and is the most notable development in Japanese criminal procedure in recent years. While only a few publicly reported cases have used this system so far, such cases are also noteworthy as white-collar crime precedents in various aspects.

#### **Case of Foreign Bribery in Thailand**

In July 2018, the special investigation team of the Tokyo Public Prosecutors Office indicted three executives of a Japanese manufacturer of power generation plants for bribing public officers in Thailand. The mass media reported that the company co-operated with the investigation by public prosecutors, which started before the introduction of the plea bargaining system, and entered into a plea agreement with the prosecutor. This is the first reported case of plea bargaining in Japan, which shows that a company – and not just natural persons – can be a party to a plea agreement in which it co-operates with the investigation and indictment against its employee. At the first instance, the Tokyo District Court found all three defendants guilty of bribery. However, one of the defendants, who is a former director, contested the ruling and the Tokyo High Court at the second instance found that he was not a main offender but just assisted in the bribery. Both parties appealed the ruling of the Tokyo High Court and this case is currently subject to the Supreme Court's review.

#### **Case of Securities Fraud and Other Corporate Fraud**

A former CEO of a major global automobile manufacturer was arrested in November 2018 and prosecuted by the special investigation team of the Tokyo Public Prosecutors Office for (i) false statements regarding his compensation in annual securities reports of the company, and (ii) an aggravated breach of trust by transferring the financial obligations of his asset-holding company to the company. This is the second publicly reported case that used the Japanese plea bargaining system for investigation. The defence counsel for the former CEO argued that the plea agreement is illegal because it was used for the dismissal of the former CEO as a result of a power struggle in the company. The former CEO was detained for more than three months through a series of arrest and rejection of bailment, so that his long-term detention drew attention and controversy internationally. In December 2019, the former CEO fled abroad during his bail, and the criminal proceeding has been suspended since the middle of the pre-trial arrangement procedure.

## **2. Enforcement**

### **2.1 Enforcement Authorities**

#### **Investigative Authorities**

##### *Police officers*

Under the CCP, police officers are the primary investigative authority. After conducting an investigation, police officers will then send the case to the public prosecutors.

##### *Public prosecutors*

Public prosecutors can – and often actively do – investigate cases of white-collar crime by themselves or by instructing

police officers. In particular, the special investigation team of the Tokyo and Osaka Public Prosecutors Office often deals with high-profile investigations, such as those against politicians.

### *Other administrative officers*

Officers of some administrative agencies have investigative authority over certain white-collar crimes. For example, officers of the Japan Fair Trade Commission (JFTC) can investigate specific criminal violations of the AMA, and the Securities Exchange Surveillance Commission (SESC) can investigate securities fraud and other violations of securities regulations. After conducting a criminal investigation, the administrative agency could file an accusation with the public prosecutors.

Each investigative authority may conduct investigations at its discretion within its authority. While there is no rule on how to allocate cases, administrative officers specialising in the certain area of white-collar crime often take the lead in an investigation.

### **Authority for Prosecution**

Public prosecutors are basically the sole authority for the prosecution of any crime. As an exception, the Committee for Inquest of Prosecution can bring a verdict that a certain case should be prosecuted. If the public prosecutor still does not agree to prosecute, the Committee can bring a verdict to compel prosecution of the case by a verdict of a supermajority vote. In such case, an attorney specially appointed in place of the public prosecutor will prosecute the case.

### **Administrative Sanction**

Certain administrative authorities have the power to impose surcharges (*kachokin*) and other sanctions on specific violations of certain regulations. For example, the JFTC has the power to impose surcharges on “unreasonable restraint of trade” including a cartel, bid rigging affecting prices, private monopolisation and other unfair trade practices violating the AMA and the Financial Services Agency has the power to impose a surcharge on violations of securities regulation after recommendation from the SESC.

Furthermore, in certain regulated industries, even if a surcharge or criminal sanction is not applicable, the competent regulatory authority could request a reporting of potential misconduct and revoke the licence of such regulated business operators. The authority could also issue a business improvement order and other instructions to such business operators.

## **2.2 Initiating an Investigation**

An investigative or administrative authority may initiate an investigation at its discretion, and there is no rule or guideline that specifically governs or clarifies the threshold for the initiation of an investigation. The investigative authority initiates

investigations based on various triggers, such as a complaint, an accusation, a report from another administrative organ, or a surrender.

## **2.3 Powers of Investigation**

### **Warrant for Compulsory Investigation**

Police officers and prosecutors as described in **2.1 Enforcement Authorities** have authority for compulsory investigations, which include search, seizure, inspection, arrest and detention upon a warrant issued by a judge. Articles 33 and 35 of the Constitution state that no person shall be apprehended, searched or seized except upon a warrant is issued by a judge, unless he/she is committing or has just committed an offence.

### **Practice of Investigation**

Under the common practice of criminal investigation in Japan, when there is a need to gather documents, investigative authorities often request a relevant company to voluntarily produce documents or testimony first; companies often co-operate voluntarily with an investigation without a warrant. However, if a company declines to co-operate with an investigation, an investigative authority would conduct a search, seizure or inspection with a warrant issued by a judge. The investigative authority may choose a dawn raid first if it has concerns about the destruction or concealment of evidence by the suspects.

### **Interview of Employee or Officer of Company**

The investigative authorities cannot compel an employee, officer or director of a company to submit to questioning, nor can they compel the company to submit such individuals, unless they are under arrest or detention. Even when they are under arrest or detention and are obliged to submit to questioning, they have the right to remain silent. The questioning can take place at an office of the authority, at the company or at any other location.

## **2.4 Internal Investigations**

No statute or official guideline requires or suggests an internal investigation by a suspected company, nor consideration of such internal investigation in a decision to prosecute by the public prosecutor or a judgment of the court. However, in practice, an internal investigation that would help an investigation by the authority could be considered as an extenuating factor in a decision of prosecution or judgment. Furthermore, such internal investigation is virtually necessary when applying to a leniency programme under the AMA or when entering into a plea agreement with the public prosecutors.

## **2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation**

### **Mutual Legal Assistance**

When Japanese enforcement agencies request foreign enforcement agencies to conduct investigations and report the results of

the investigations, they rely on the co-operation of such foreign agencies based upon treaties or international comity with these jurisdictions.

Regarding the request of foreign authorities for investigative co-operation, the Act on International Assistance in Investigation and Other Related Matters (AIAI) provides requirements and procedures for investigative co-operation through either diplomatic channels or Interpol. The AIAI permits co-operation if all of the following requirements are satisfied:

- the offence is not a political crime;
- the offence would also constitute a crime under the laws of Japan if it were committed in Japan; and
- the requesting authority submits a statement that the co-operation is indispensable.

If such requirements are satisfied, prosecutors or police officers will conduct an investigation, and the evidence collected will then be provided to the requesting authority.

In addition, the Japanese National Police Agency also co-operates with foreign authorities as a member of the International Criminal Police Organisation if the first two requirements above are satisfied.

### Extradition

The Japanese government has entered into extradition treaties with the USA and Korea only. There is no publicly available information on the precedents of extradition.

## 2.6 Prosecution

Public prosecutors may initiate a criminal case by filing a written indictment (*kisojo*) with a competent court, which is usually located at the prefecture where the criminal conduct took place.

There are no written guidelines or standards governing the prosecutor's decision to charge an entity or individual with a crime. Public prosecutors exercise their discretionary power to decide whether to initiate prosecution considering the characteristics of the suspect, the gravity of the offence, his/her situation after the offence, and other circumstances (Article 248 of the CCP).

## 2.7 Deferred Prosecution

Under the CCP, there is no statutory system of deferred prosecution agreement or non-prosecution agreement. However, the Japanese plea bargaining system described in **2.8 Plea Agreements** can function as a deferred prosecution agreement or non-prosecution agreement to some extent, although it has significant differences to the plea bargaining system in the US or other jurisdictions. Under the Japanese plea bargaining system, a company can enjoy favourable treatment such as no prosecu-

tion in exchange for its co-operation with the investigation against its corporate executive allegedly involved in the criminal conduct, which is illustrated by the first case of plea agreement, as addressed in **1.6 Recent Case Law and Latest Developments**. However, for a plea bargaining, a prosecutor may not consider a company's compliance efforts or other measures to prevent recurrences, which are usually considered in plea bargaining in other jurisdictions.

## 2.8 Plea Agreements

### Co-operation for Investigation Against Other Party

A prosecutor may enter into an agreement with a suspect or a defendant, including a corporate entity, under which the prosecutor agrees to drop or reduce criminal charges, or to provide favourable treatment, only when the suspect or defendant co-operates in the investigation against other individuals or corporate entities. Plea agreements are not available merely if a suspect or defendant voluntarily decides not to contest and co-operate with the investigation of his or her own case. However, the prosecutor may consider a voluntary declination of a suspect or defendant when the prosecutor decides on an indictment or a recommendation of sentencing within his or her discretion.

### Specified Crimes

Plea agreement can be used only if both the crime for which the suspect or defendant is subject to investigation or prosecution and the crime for which the suspect or defendant co-operates in the investigation fall under certain categories of crimes specified by the statutes ("specified crimes"). Such crimes include bribery, embezzlement, tax fraud, and crimes under the AMA, the Financial Instruments and Exchange Act (FIEA) or other specific laws stipulated by the CCP, and relevant government ordinances. According to the CCP, co-operation in an investigation against other suspects or defendants includes making a statement of the true facts to the investigation authorities, testifying the true facts as a witness at court and providing evidence.

### Parties Involved

A prosecutor has wide discretion whether to enter into plea bargaining with a suspect or defendant taking into account the factors stipulated in the CCP. For example, a prosecutor will carefully examine the reliability of evidence submitted by a suspect or defendant while cooperating in the investigation and will enter into a plea agreement only if the prosecutor finds the evidence is substantially useful. Since waiving the defendant's right to defend the case could be a complex decision, the suspect or defendant must retain an attorney and a plea agreement cannot be entered without the consent of his/her attorney. The court has no authority to be involved with the plea bargaining in any case.

## 3. White-Collar Offences

### 3.1 Criminal Company Law and Corporate Fraud

The Companies Act (CA) imposes sanctions against fraudulent conduct by corporate executives in relation to a company's business, on top of the Penal Code. For example, when a director or other corporate executive commits an act in breach of their duties and causes financial damages to the company for the purpose of promoting their own interest or the interest of a third party, or inflicting damage on the company, such person is subject to imprisonment of not more than ten years and/or a fine of not more than JPY10 million (Article 960). Certain other misconduct by corporate executives that puts a company's property at risk is also criminalised under the CA and is subject to imprisonment of not more than five years and/or a fine of not more than JPY5 million (Article 963).

### 3.2 Bribery, Influence Peddling and Related Offences

The Penal Code provides that accepting, soliciting or promising to accept a bribe, or giving, offering or promising to give a bribe, in connection with the duties of Japanese public officers, is a punishable offence. Giving, offering or promising to give a bribe is subject to imprisonment with labour of not more than three years or a fine of not more than JPY2.5 million (Article 198). This penalty is not applicable to corporate entities.

The Unfair Competition Prevention Act (UCPA) provides that giving, offering or promising to give money or any other benefit to foreign public officers in order to have the officers act or refrain from acting in a particular way in relation to the duties of officers or in order to obtain a wrongful gain with regard to international commercial transactions is a punishable offence (Article 18). A violation of the UCPA by an individual is subject to imprisonment of not more than five years and/or a fine of not more than JPY5 million (Article 21). If a representative, agent or employee of a company commits such violation in the course of the company's business, the company is subject to a fine of not more than JPY300 million (Article 22).

### 3.3 Anti-bribery Regulation

No statute imposes criminal or administrative sanctions on a failure to prevent the bribery of employees, nor on a failure to establish a compliance programme for that purpose. On the other hand, the CA requires the directors of a company to establish an internal control system, including a system to prevent illegal conduct; failure to establish such system could constitute a breach of a director's duty of care as a good manager and cause a director's civil liability against the company.

### 3.4 Insider Dealing, Market Abuse and Criminal Banking Law

#### Insider Trading

##### *Insider trading by corporate insiders*

The FIEA provides that officers, employees and agents of a listed company (including its parent company and subsidiaries) and other statutorily defined corporate insiders who know any non-public material fact pertaining to the business or other matters of a listed company ("Material Facts") are prohibited from making a sale, purchase or other transfer for value, or from accepting such transfer for value of shares of the listed company, until and unless such facts have been publicly disclosed.

Material Facts are statutorily defined as:

- decisions by those who are responsible for executing operations of a listed company to carry out certain important matters;
- the occurrence of certain important events in a listed company;
- the significant difference between the latest publicised forecasts of sales, current profits, net income or other account titles of a listed company and new forecasts prepared by the company; and
- any other important matters that would have a significant influence on investors' decisions.

Such facts regarding the subsidiaries of a listed company are also included in the definition of "Material Facts".

Insider trading is subject to imprisonment of not more than five years and/or a fine of not more than JPY5 million.

##### *Insider trading in connection with a tender offer*

The FIEA provides that purchasers of shares who know facts concerning a launch of a tender offer, and sellers of shares who know facts concerning a termination of a tender offer, are prohibited from trading shares of the listed company until and unless such facts have been publicly disclosed. The applicable criminal penalty is the same as that listed above.

##### *Tipping*

The FIEA provides that corporate insiders are prohibited from tipping a non-public Material Fact to other persons, and from recommending other persons to engage in trading for their own profit or avoidance of loss. The applicable criminal penalty is the same as that listed above.

**Market Manipulation**

The following are prohibited as “market manipulation” under the FIEA:

- conducting a series of trades that mislead other investors into thinking that the trading of a certain listed security is active, with the purpose of having other investors be willing to trade such security;
- conducting a series of trades to influence the market price of such security for the same purpose; and
- making trades without the intention of effecting a transfer of rights (wash sales), or conspiring with others on certain trades (collusive trading) with the purpose of misleading other investors, such as leading them to believe that the trading is active.

Disseminating information in connection with the sale of securities that is inconsistent with the facts and/or has no rational basis, for the purpose of trading or influencing the price of securities, is prohibited by the FIEA as “spreading rumours”.

The applicable criminal penalty is the same as that listed above.

**Banking Crime**

Various fraudulent conducts by financial institutions against the regulator or customers are prohibited under the Banking Act or other relevant regulations. For example, fraudulent advertisement and providing fraudulent explanatory documents prior to contract are subject to imprisonment of not more than six months and/or a fine of not more than JPY500,000.

**3.5 Tax Fraud**

Tax evasion is punishable under the laws prescribed for each type of tax, as well as back taxes and additional penalty tax. For example, intentional evasion of corporate income tax or receiving a refund through deception or other wrongful acts, such as making false documents or creating a secret bank account, constitutes a criminal offence. There is no legal obligation for an entity to prevent tax evasion by its executives or employees in the criminal context, but a company may be subject to a criminal fine if an individual executive or employee is found guilty of a tax offence for corporate income tax and the company cannot establish that it has exercised due care to prevent the occurrence of such misconduct.

**3.6 Financial Record-Keeping****Companies Act**

Under the CA, when a director or other applicable person of a company fails to prepare accounting books or record balance sheets, such person will be subject to an administrative monetary penalty (*karyo*) of up to JPY1 million (Article 976 of the CA). Additionally, a director (or other applicable person) who

produces documents that contain false statements about material when soliciting subscribers for shares of the company will be subject to imprisonment with work for up to five years, or a fine of up to JPY5 million, or both (Article 964 of the CA). The act of illegal earnings manipulation with illegal dividends also constitutes a crime (imprisonment with work for up to five years, or a fine of up to JPY5 million, or both (Article 963 of the CA)).

**Financial Instruments and Exchange Act (FIEA)**

Under the FIEA, a failure to submit any required documents including certain financial statements (such as a tender offer report or an annual securities report) will be subject to a penalty, as will producing documents containing false statements about material matters, depending on the type of document (Articles 197 and 197-2 of the FIEA). Additionally, a company may be subject to a criminal fine if an individual executive or employee is found guilty of the above offences and the company cannot establish that it has exercised due care to prevent the occurrence of such misconduct.

If such violation is committed by an officer or employee of a company, the corporation will also be subject to a fine, the amount of which is determined based on the type of violation by the individual (Article 207 of the FIEA).

Separately, such violation may be subject to an administrative order or the imposition of an administrative fine by the FSA, depending on the type of violation (Articles 172 to 172-4 of the FIEA).

**3.7 Cartels and Criminal Competition Law****Administrative Liability**

The JFTC may impose cease-and-desist orders and administrative fines (surcharges, or *kachokin*) calculated based on a formula set forth in the AMA, which prohibits the following anti-competitive acts or practices:

- unreasonable restraint of trade (eg, cartels, bid rigging);
- private monopolisation;
- unfair trade practices:
  - (a) concerted refusals to trade;
  - (b) other refusal to trade;
  - (c) price discrimination;
  - (d) discriminatory treatment in the terms of trade;
  - (e) discriminatory treatment in a trade association;
  - (f) an unjustly low-priced sale;
  - (g) unjustly high-priced purchasing;
  - (h) luring customers by deception;
  - (i) luring customers through unjust benefits;
  - (j) tie-in sales;
  - (k) exclusive dealing;
  - (l) restrictive trading (eg, resale price maintenance);



- (m) unjust interference with the appointment of a counterparty's officers;
  - (n) interference with a competitor's transactions;
  - (o) interference with the internal operations of a competing company;
  - (p) abuse of a superior bargaining position; and
- certain mergers or other business integrations without the required notification, or the failure of such notification.

## Criminal Liability

If the JFTC determines that a case is particularly serious and malicious, and has a significant effect on people's lives, it may file a criminal complaint with the prosecutors' office. The penalty will be a fine of up to JPY500 million for a company and imprisonment with work for up to five years and a fine of up to JPY5 million for individuals (Articles 89 and 95 of the AMA).

## 3.8 Consumer Criminal Law

### Misrepresentation Prohibited by the Specified Commercial Transactions Act

The Specified Commercial Transactions Act (SCTA) prohibits the misrepresentation of prices or payment conditions, or an intentional failure to disclose such contract terms, and a violation thereof will be subject to an instruction of business improvement (*jigyo kaizen shizi*), a business suspension order (*jigyo teishi meirei*) or a business prohibition order (*jigyo kinshi meirei*) as an administrative disposition (Articles 8-2 and 62 of the SCTA). A person who violates the law will also be subject to a penalty of imprisonment for up to three years or a fine of up to JPY3 million (Article 70 of the SCTA).

### Misleading Representations Prohibited by the Act Against Unjustifiable Premiums and Misleading Representations

The Act against Unjustifiable Premiums and Misleading Representations (UPMRA) prohibits acts that could interfere with consumers' voluntary and rational choice-making by prohibiting certain acts, including the following:

- any representation where the quality, standard or any other particular relating to the content of goods or services is portrayed to general consumers as being significantly superior to that of the actual goods or services, or is portrayed as being significantly superior to those of other companies that supply the same kind of or similar goods or services, contrary to fact; and
- any representation by which price or any other trade terms of goods or services could be misunderstood by general consumers to be significantly more advantageous than the actual goods or services, or than those of other companies that supply the same kind of or similar goods or services (Article 5 of the UPMRA).

A violation the UPMRA will be subject to an order to cease the representation (*sochi meirei*) as an administrative disposition (Article 7). A person who violates the law will also be subject to a surcharge (*kachokin*), calculated based on a formula set forth in the UPMRA.

Deceiving customers may also constitute fraud and is subject to imprisonment for up to ten years under the Penal Code (Article 246 of the Penal Code).

## 3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

### Cybercrimes and Computer Fraud

The Act on Prohibition of Unauthorised Computer Access prohibits the use of an identification code of another person or other information or commands to a computer via telecommunications lines in order to operate a computer in a manner that is not allowed or authorised. Such act is subject to imprisonment for up to one year or a fine of up to JPY500,000 (Articles 6 and 12-3).

Obtaining profits from creating a false electromagnetic record by giving false information or a wrongful command to a computer is subject to imprisonment for up to five years or a fine of up to JPY500,000 under the Penal Code (Article 161-2).

Other misconduct conducted through the internet could constitute fraud or other traditional crimes.

### Protection of Company Secrets

Under the UCPA, a person who uses or discloses a trade secret acquired by the following means is subject to imprisonment for up to ten years or a fine of JPY10 million, or both (Article 21 of the UCPA):

- an act of fraud or others (which means an act of deceiving, assaulting, or intimidating a person);
- an act of stealing a document or a data storage medium containing a trade secret;
- trespassing on a facility where a trade secret is kept, making an unauthorised access; or
- violating the control of a trade secret maintained by its holder in any other way, for a purpose of unfair competition, or conducting similar acts.

## 3.10 Financial/Trade/Customs Sanctions Customs Act

Under the Customs Act, exporting or importing prohibited items, receiving an exemption from customs duty through deception or other acts of falsification, exporting or importing goods by making a false declaration or producing falsified

documents, and other acts, are subject to administrative and criminal penalties.

### Foreign Exchange and Foreign Trade Act

Under the Foreign Exchange and Foreign Trade Act (FEFTA), undertaking a certain transaction with the objective of providing specified technology, or exporting a specific kind of good, without obtaining permission is subject to administrative and criminal penalties.

The FEFTA also prohibits certain investments in Japanese companies by foreign investors and certain investments in foreign companies by Japanese investors without the prior approval of the governmental authority. The government can impose economic sanctions, such as asset freezing, and transactions with sanctioned parties are prohibited under the FEFTA. The violation of such requirements or prohibitions is subject to administrative and criminal penalties.

### 3.11 Concealment

#### Concealment Prescribed by the Penal Code

Under the Penal Code, a person who harbours or enables the escape of another person who has either committed a crime punishable with a fine or greater punishment or has escaped from confinement, or who suppresses, damages, counterfeits or alters evidence relating to a criminal case of another person, or who uses counterfeit or altered evidence, is subject to imprisonment for up to two years or a fine of up to JPY200,000 (Articles 103 and 104). A witness who has been sworn in accordance with law and gives false testimony may be sanctioned with imprisonment with work for not less than three months but no more than ten years (Article 169).

#### Concealment Regarding Organised Crimes

For organised crimes prescribed under the Act on Punishment of Organised Crimes and Control of Crime Proceeds, known as the Organised Crime Punishment Act (OCPA), a person who disguises facts with respect to the acquisition or disposition of criminal proceeds, or conceals criminal proceeds, or disguises facts with respect to the source of criminal proceeds, is subject to imprisonment for up to five years or a fine up to JPY3 million, or both (Article 10).

### 3.12 Aiding and Abetting

#### General Offence for Aiding and Abetting

A person who commits a crime jointly with another person, or induces another to commit a crime, may be treated in sentencing as a principal under the Penal Code (Articles 60 and 61). A person who aids a principal is also punishable, but the punishment imposed on such person shall be reduced from the punishment for the principal (Article 62).

### Conspiracy of Organised Crimes

Conspiracy to commit terrorism or other organised crimes is punishable under the OCPA if any of the persons involved in the conspiracy conducted any preparatory actions, such as the arrangement of funds or goods based on such conspiracy (Article 6-2).

### 3.13 Money Laundering

#### Offences Related to Money Laundering

Money laundering is punishable based on the Anti-Drug Special Provisions Act and the OCPA. The former prohibits the concealment and receipt of drug crime proceeds, and the latter prohibits the following:

- concealing or attempting to conceal facts in relation to the acquisition and disposal of the criminal proceeds, or concealing or attempting to conceal the source of criminal proceeds (Article 10);
- accepting criminal proceeds with the knowledge thereof (Article 11); and
- managing an enterprise through the use of criminal proceeds (Article 9) (please also see **3.11 Concealment**).

#### Duty to Prevent Transfer of Criminal Proceeds

Under the Act on Prevention of Transfer of Criminal Proceeds, for the purpose of preventing money laundering, specified business operators, including banks and insurance companies, are subject to the following duties:

- conducting customer identification, etc, upon conducting a transaction (Article 4);
- preparing transaction records on customer identification data and preserving the records for seven years (Articles 6 and 7); and
- reporting suspicious transactions (Article 8).

If a specified business operator fails to observe such duties, a competent administrative agency may order the specified business operator to take necessary measures to rectify the violation (Article 18).

## 4. Defences/Exceptions

### 4.1 Defences

#### Lack of Intent

For crimes requiring a specific intent, acts made without such intent may constitute a defence (for example, for the bribery of foreign public officers stipulated under the UCPA, the purpose of having the officers act or refrain from acting in a particular way must be proved).

## **Negligence**

For the crime of negligence, the unpredictability or non-avoidability of the results constitutes a defence.

## **Dual Liability**

Several laws prescribe a company's dual liability clause, where a company is punished with the natural person who actually committed the crime. In such cases, the company is exempted from dual liability if it exercised due care in the appointment and supervision of the natural person (please also see **1.4 Corporate Liability and Personal Liability**).

## **Existence of an Effective Compliance Programme**

When a company has established an effective compliance programme, it may be useful to claim unpredictability and non-avoidability of the results in negligence, or the defence of dual liability as mentioned above.

## **4.2 Exceptions**

No industry or sector is exempt from compliance with white-collar crime requirements in Japan. There is no de minimis exception for anti-bribery regulations (including domestic bribery punishable under the Penal Code and bribery of a foreign official under the UCPA), but gifts or gratuities within the scope of social courtesy may not be interpreted as "bribes". The Penal Code does not have any de minimis exceptions.

## **4.3 Co-operation, Self-Disclosure and Leniency**

### **Surrender (Penal Code)**

The Penal Code stipulates that a criminal sanction may be reduced if the person who committed the crime surrendered himself/herself before being identified as a suspect by an investigative authority (Article 42). The court decides whether and how much to reduce the penalty, taking all the circumstances of the case into account.

### **Leniency Under the AMA**

With respect to unreasonable restraint of trade under the AMA, as mentioned in **3.7 Cartels and Criminal Competition Law**, the JFTC does not file an accusation to public prosecutors and does not impose surcharges against the first applicant who reported criminal activities to the JFTC before the JFTC's investigation has commenced. The second or later applicants for leniency could be granted some reduction of the surcharge.

### **Plea Bargaining**

As addressed in **2.8 Plea Agreements**, a plea bargaining could be available in the case of the voluntary disclosure of certain criminal conduct.

In addition to the above-mentioned legal systems, self-disclosure and co-operation with investigators or prosecuting authori-

ties may be considered as mitigating factors, as may other circumstantial factors of judgement determined by investigators, prosecutors or the courts.

## **4.4 Whistle-Blower Protection**

Under the Whistle-blower Protection Act (WBPA), an employer shall not dismiss, demote, reduce compensation for or otherwise unfavourably treat qualified whistle-blowers under certain circumstances.

In response to criticism that whistle-blower protection is inadequate, the government amended the WBPA in June 2020, to strengthen the protection of whistle-blowers.

### **Expansion of Scope of Qualified Whistle-Blowers**

Under the amended WBPA, qualified whistle-blowers include retired employees and corporate executives. The reporting of criminal conduct and misconduct is subject to administrative sanctions, added to the scope of protection.

### **Duty to Establish a Reporting System**

Under the amended WBPA, companies with more than 300 employees must establish a reporting mechanism to receive and respond appropriately to whistle-blowing reports, and companies with 300 or fewer employees must make efforts to establish such a system (Article 7).

### **Duty to Protect the Confidentiality of Whistle-Blowers**

The amended WBPA requests a person who is engaged in an internal investigation to protect the confidentiality of information that could identify the whistle-blower, and any violation may be subject to a criminal penalty. The violation of such statutory obligation of confidentiality is subject to criminal sanctions (Articles 12 and 21).

### **Exemption from Civil Liability for Damages**

The amended WBPA clarifies that a whistle-blower is exempt from civil liability for damages suffered by companies due to his/her report (Article 7).

## **5. Burden of Proof and Assessment of Penalties**

### **5.1 Burden of Proof**

In criminal court proceedings, prosecutors generally bear the burden of proof and must prove guilt beyond a reasonable doubt.

Under the Constitution, a defendant in criminal proceedings is presumed innocent until they are convicted.

## **5.2 Assessment of Penalties**

Courts impose punishment according to their own discretion, within the range set forth in the Penal Code or other laws. Under the CCP, if the prosecutor issues an indictment in breach of a plea agreement, such indictment must be dismissed by the court (Article 350-13).

# JAPAN LAW AND PRACTICE

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**Nagashima Ohno & Tsunematsu** is a full-service Japanese law firm with specialists in every field, more than 500 attorneys and six overseas offices in New York and Asian countries. The award-winning compliance/crisis management team at NO&T represents many of the most high-profile corporate regulatory and compliance cases related to the Japanese market or Japanese corporations. The firm has displayed particular strength in regulatory/compliance cases with a cross-border

element, leveraging its capabilities to resolve issues in multiple jurisdictions. Many of NO&T's representations have not only resolved serious crises for its clients, but have also shed light on industry-wide structural problems often leading to legislative and policy changes. The team has grown to more than 40 lawyers, including former prosecutors, accountants, government officials, PR specialists, and other specialists from various backgrounds.

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