



Bribery & Corruption

2021

Eighth Edition

Contributing Editors: **Jonathan Pickworth & Jo Dimmock**

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PREFACE

We are pleased to present the eighth edition of *Global Legal Insights – Bribery & Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 20 countries and one region worldwide.

This edition sees the addition of new chapters relating to Kenya, Liechtenstein and Turkey.

In addition to addressing the legal position, the authors have sought to identify current trends in enforcement, and anticipated changes to the law and enforcement generally.

Incidents of bribery and corruption often involve conduct and actors in several different jurisdictions. As enforcement activity increases around the world, attention is being focused on particular problems companies face when they seek to resolve cross-border issues. This focus has been disrupted by the coronavirus pandemic which has caused many countries to cut costs and redirect resources.

Coordinating with multiple government agencies can be challenging at the best of times, and can be even more difficult when dealing with bribery and corruption laws that have been amended or have just entered into force. Sometimes a settlement in one jurisdiction can trigger a further investigation in another. The recent Deferred Prosecution Agreement with Airbus SE saw a global settlement between the company and authorities in the US, the UK and France following a joint investigation conducted by authorities in each jurisdiction. This is a good illustration of what cooperation between authorities can achieve. Stewarding a company through these sorts of crises involves not only dealing with today's challenges, but thinking about the next day, the next week, the next month, and beyond, on a global stage.

We are very grateful to each of the authors for the contributions they have made. We hope that the book provides a helpful insight into what has become one of the hottest enforcement topics of current times.

Jonathan Pickworth & Jo Dimmock
White & Case LLP
November 2020

Japan

Hui Xu, Catherine E. Palmer & Junyeon Park
Latham & Watkins

Background

Japan is widely perceived to be one of the least corrupt countries in the world. Transparency International ranked Japan as the 20th least corrupt country out of 198 in the most recent *Corruption Perceptions Index*.¹ The World Justice Project's 2020 Rule of Law Index ranked Japan as the 13th least corrupt country out of 128,² and the US State Department has characterised the direct exchange of cash for favours from Japanese government officials as “extremely rare”.³

Corruption had been a part of Japan’s post-war economic boom. Some of the most notorious scandals of that era include: the Lockheed case (1976), which led to the conviction of former Prime Minister Kakuei Tanaka (and was partly responsible for the creation of the US Foreign Corrupt Practices Act); the Recruit case (1989), which brought down the administration of Prime Minister Noboru Takeshita; the Zenecon (general contractors) cases (1993–1994), which resulted in several prefectural governors along with dozens of others being convicted, and the death of one governor by suicide; and the Bank of Japan (“BoJ”) and Ministry of Finance (“MoF”) cases (1997–1998), which led to the arrests, resignations and suicides of several high-ranking finance officials.

The type of conduct in these cases included firms seeking to win lucrative contracts through massive cash payments (Lockheed, Zenecon); firms offering highly lucrative insider stock information to win influence (Recruit); and officials receiving lavish entertainment, sometimes of a sexual nature, in exchange for favours (BoJ/MoF).⁴ Japan’s economic downturn through the 1990s soured the public’s patience for such behaviour, and increasingly became the focus of blame for the nation’s woes.⁵ In response, the Japanese government enacted various reforms, including requiring disclosure of politicians’ assets, bringing more transparency to political contributions, and imposing stricter ethical rules on public officials.⁶

In addition, especially during the past 20 years, Japanese firms have instituted codes of conduct that prohibit giving or receiving inappropriate payments, gifts, or entertainment, not only to government officials, but in business transactions generally. Today, the websites of nearly every listed Japanese firm trumpet their commitment to compliance and corporate social responsibility. While some challenges remain, as discussed in the Recent events and Current issues sections below, bribery is now widely understood in Japan to be impermissible.

Recent events

From July 2013 to September 2020, a coalition led by the Liberal Democratic Party (“LDP”) under the leadership of Prime Minister Shinzo Abe dominated the Japanese government. The popularity of the Abe administration diminished over time due to alleged scandals involving associates of the Prime Minister.⁷

In August 2018, the Tokyo District Public Prosecutors Office decided not to prosecute a long-time aide to Shinzo Abe, who allegedly received JPY2 million (approximately USD19,000) in undeclared donations from a school operator.⁸ In the same month, a former director-general for international affairs at the ministry was indicted for allegedly receiving bribes worth about JPY1.5 million (approximately USD14,200) in the form of wining and dining. In December 2019, the Tokyo District imposed a three-year suspended sentence and a fine of JPY1.55 million (approximately USD14,700), which he decided not to appeal.⁹

In December 2019, LDP lawmaker Tsukasa Akimoto was arrested on suspicion of taking bribes related to a casino project. Akimoto was a senior vice minister in the Cabinet Office and oversaw the LDP's initiatives to legalise casinos at the time of the alleged bribery. Prior to Akimoto's arrest, the last arrest of an incumbent lawmaker was in January 2010, and the last arrest of an incumbent lawmaker for taking bribes in relation to public duties was in 2002. In September 2020, Akimoto was served with a fresh arrest warrant over new allegations of witness tampering in relation to the bribery charge.

In May 2020, more than 660 lawyers filed a criminal complaint with the Tokyo District Public Prosecutors Office against now former Prime Minister Abe and two aides, alleging Abe's office paid part of his supporters' expenses for a dinner party in 2018, scheduled on the previous day of a government-funded event known as the "cherry blossom viewing party". The claim alleged that Abe and his aides violated the election law by partially funding a party for supporters at a Tokyo hotel in April 2018 on the eve of the annual cherry blossom viewing party. In May 2020, the Tokyo District Public Prosecutors Office announced that the complaint was rejected due to procedural inadequacies.¹⁰

In June 2020, former Justice Minister Katsuyuki Kawai and his wife Anri Kawai, both serving as members of the Diet, were arrested for allegedly distributing cash to local politicians and supporters during Anri's campaign in the 2019 Upper House election.¹¹

In September 2020, after Prime Minister Abe announced he was stepping down for health reasons, thereby ending his term as the longest-serving Prime Minister in modern Japanese history, and Yoshihide Suga, Abe's Chief Cabinet Secretary, became the 99th Prime Minister. Prime Minister Suga outlined the priorities for his administration: ending the coronavirus pandemic; and rejuvenating the economy. Many in Japan will be watching to see if Suga's efforts to boost the economy will include a renewed focus on targeting and eliminating corrupt conduct.

Legal overview

Bribery of Japanese public officials

Article 197 of Japan's Penal Code prohibits a public official, defined (in Article 7) as "a national or local government official, a member of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations",¹² from accepting, soliciting, or promising to accept a bribe in connection with his or her duties. Article 197 also prohibits a person who is to be appointed as a public official or who runs for an elective post from accepting, soliciting, or promising to accept a bribe, in the event that he or she is appointed or elected. Furthermore, it is an offence under Article 198 to give, offer or promise to give a bribe to a public official or a person to be appointed a public official. So-called "legal persons" (i.e., firms and organisations) are not liable for bribery under the Penal Code. Non-Japanese nationals are liable for bribery under the Penal Code only if the crime is committed within Japan. Japanese public officials are liable for accepting bribes outside Japan.

The punishment for a public official (or a person to be appointed a public official) who accepts a bribe is imprisonment with work for up to five years, as well as confiscation of

the bribe or its monetary value. If a public official agrees to perform an act in response to a request, the sanction is imprisonment with work for up to seven years. Further, if such public official consequentially acts illegally or refrains from acting in the exercise of his or her duty, the sanction is imprisonment with work for a period within a range of one to 20 years. The sanction for offering or promising to give a bribe to a public official is imprisonment with work for up to three years, or a maximum fine of JPY2.5 million (approximately USD23,700). In July 2017, Japan amended the Act on Punishment of Organised Crime and Control of Crime Proceeds¹³ to criminalise conspiracies by organised criminal groups of two or more people to commit certain crimes, including giving and receiving bribes. According to the government, the amendment was necessary in order for Japan to ratify the United Nations Convention against Transnational Organised Crime.

“Deemed public officials” and other prohibitions against bribery of employees in public services
Under various laws specific to formerly or predominantly state-owned enterprises, certain employees of such entities have the status of “deemed public officials” (*minashi koumuin*). These laws expressly forbid anyone from bribing such persons, and forbid such persons from accepting bribes.¹⁴ In addition, without using the term “deemed public officials”, certain laws prohibit the employees of specific firms that perform public services from accepting or demanding bribes.¹⁵

Bribery of foreign public officials

Japan has been a member of the Organisation for Economic Co-operation and Development (“OECD”) since 1964. Japan implemented the 1997 OECD Anti-Bribery Convention in 1998, by amending the Unfair Competition Prevention Act (“UCPA”) to add Article 18, which criminalised bribery of foreign public officials. The UCPA was amended in 2004 to broaden the jurisdiction of Article 18 to cover conduct by Japanese nationals while abroad. The Japanese government also amended the Income Tax Act and the Corporation Tax Act in 2006 to prohibit deducting bribes paid abroad as business expenses. Unlike the Penal Code, Article 22(1) of the UCPA expressly imposes criminal liability on legal persons (firms and organisations).

Article 18 was intended to track the language of the Anti-Bribery Convention, and provides as follows:

No person shall give, or offer or promise to give, any money or other benefit to a Foreign Public Official, etc. in order to have the Foreign Public Official, etc. act or refrain from acting in relation to the performance of official duties, or in order to have the Foreign Public Official, etc. use his/her position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, in order to obtain a wrongful gain in business with regard to international commercial transactions.¹⁶

Originally, the penalty for bribing a foreign public official was imprisonment with work for up to three years or a maximum fine of JPY3 million (approximately USD28,500), or both, and the statute of limitations for natural persons had been three years. However, in response to the OECD’s recommendations, Japan increased the penalties to five years and JPY5 million (approximately USD46,500), and extended the limitations period to five years.¹⁷ In addition, if an individual bribed a foreign official in connection with the business of a legal person, such legal person could now be subject to a maximum fine of JPY300 million (approximately USD2.85 million). The UCPA law does not provide for confiscation of the proceeds of bribing a foreign public official. However, the amended Act on Punishment

of Organised Crime and Control of Crime Proceeds provides for confiscation of criminal proceeds, including undue benefit to a foreign public official under the UCPA.

In March 2019, the OECD Working Group reiterated its recommendations that Japan: (1) increase the level of sanctions and the limitation period for foreign bribery; (2) broaden its framework for establishing nationality jurisdiction over legal persons; (3) encourage its agencies to become more proactive in detecting foreign bribery; (4) ensure that the Ministry of Justice transmits and clarifies allegations of foreign bribery without creating delays in opening investigations; (5) ensure that the prosecution exercises its role independent from the Ministry of Justice and the Ministry of Economy, Trade and Industry (“METI”); and (6) ensure that both the police and the prosecution are more proactive and coordinated when investigating foreign bribery, including by reducing the reliance on voluntary measures and confession.¹⁸

METI administers the UCPA, including Article 18, but the Public Prosecutors Office handles prosecutions under Article 18. METI’s website includes a section dedicated to preventing the bribery of foreign officials (http://www.meti.go.jp/policy/external_economy/zouwai/index.html (in Japanese)) and provides a detailed “Guideline to Prevent Bribery of Foreign Public Officials” (“METI Guideline”) that explains the law, as well as how firms can prevent bribery.

The Japan Federation of Bar Associations (“JFBA”) proposed the “Guidance on Prevention of Foreign Bribery” in July 2016, as a supplement to the METI Guideline, with the purposes of clarifying: (1) the elements of an anti-bribery compliance programme necessary to fulfil the duty of firms to implement an internal control system; (2) the elements of an internal control system that may help firms seek mitigation of or relief from penalties; and (3) a practical approach to foreign bribery issues for firms and lawyers.¹⁹

The Japan International Cooperation Agency (“JICA”), an agency that coordinates Official Development Assistance (“ODA”) for the Japanese government, issued an Anti-Corruption Guidance in 2014, which describes various anti-corruption measures, including JICA’s anti-corruption consultation desk and required actions by governments, partner countries, executing agencies, and companies. JICA will reject an applicant for procurement for grant aid and ODA loan projects if it determines that it has engaged in corrupt or fraudulent practices in competing for the ODA-related contract. Likewise, it will debar an applicant for a particular period of time if it determines that the applicant has engaged in corrupt or fraudulent acts in competing for, or executing, a prior ODA-backed contract or if, under certain conditions, the company has been debarred by the World Bank Group.²⁰

Facilitation payments

The original METI Guideline issued in 2004 indicated that the UCPA does not explicitly exempt “small facilitation payments”, but that such payments would not be a criminal offence under the OECD Anti-Bribery Convention. The OECD criticised this (and METI’s attempts to explain its interpretation) as confusing, and METI updated the Guideline in September 2010 to clarify that facilitation payments would be illegal under Japanese law if the payments were intended “to obtain or retain improper business advantage in the conduct of international business”. The OECD subsequently criticised Japanese authorities for not actively encouraging Japanese firms to prohibit the making of even small facilitation payments, and METI removed the paragraph related to facilitation payments in its July 2015 revision of the Guideline.

The JFBA Guidance, noting that the issue of handling facilitation payments often arises both in business practices and in legal consultations, states that paying even small

sums to facilitate the smooth progress of ordinary administrative services is prohibited. Additionally, the JFBA Guidance suggests that Japanese companies cooperate with the Japanese embassy or consulate, chamber of commerce, Japan's Ministry of Foreign Affairs, and other institutions to press the local government to eliminate facilitation payments.²¹

Introduction of immunity agreement system

The amendments to the Code of Criminal Procedure that came into effect in June 2018²² introduced a new immunity system with respect to certain specified crimes, including bribery. This immunity agreement system is similar to the plea bargaining system operative in other countries. Under the system, a prosecutor may negotiate immunity agreements with a suspect or a defendant in exchange for information on another suspect or defendant, and reward informants with a recommendation for a lighter sentence or promise to drop his or her case altogether.

Notably, the first immunity agreement was reached in a case that involved employees of a major Japanese power plant construction firm bribing Thai officials. The firm cooperated with the Tokyo District Public Prosecutors Office by providing evidence that could be used to prosecute a former executive and his two subordinates for conspiring to bribe a Thai public official with approximately USD357,000 to speed up the clearance of cargo related to a local power plant project. This case garnered a mixed reaction: on the one hand, it showed the immunity agreement system to be a useful tool for prosecuting bribery of foreign public officials, for which gathering evidence overseas is often difficult; while on the other hand, there was concern of a firm's "scapegoating" its employees in return for escaping corporate liability. In July 2020, the Tokyo High Court overturned the Tokyo District Court's September 2019 ruling that suspended a custodial sentence imposed on the former executive and instead imposed a fine of JPY2.5 million (approximately USD23,700). The Tokyo High Court noted that the executive's subordinates' statements demonstrating that the former executive approved bribery were not sufficient to prove a conspiracy to bribe a senior Thai official, given that the executive also instructed them to find means other than bribery. Instead, the court ruled that the executive aided and abetted bribery by not actively opposing the bribery, notwithstanding his duty to prevent illegal activities. Both the former executive and the Tokyo District Public Prosecutors Office have appealed to the Supreme Court.

The second case under the immunity agreement system was reportedly reached in relation to an arrest of and charges against the then chairman of a multinational automobile manufacturer for violations of the Financial Instruments and Exchange Act. Two executives of the company are said to have provided the Tokyo District Public Prosecutors Office with materials relating to the charges against the former chairman for underreporting his director compensation. Reportedly, the two executives were not indicted, in exchange for their promises to submit all necessary evidence as well as to testify in court.

In December 2019, a third immunity agreement was reportedly reached with an employee of an apparel firm in relation to embezzlement of the company's funds. In return for a promise not to be indicted, the employee allegedly provided evidence relating to the embezzlement of the company's funds by a former president of the firm and another suspect.

Commercial bribery

Article 967 of the Companies Act prohibits commercial bribery. Under that statute, if certain specified types of corporate executive or employee, or an accounting auditor, accepts, solicits, or promises to accept property benefits in connection with such person's duties, in response to a wrongful request, the conduct is punishable by imprisonment with work of up to five years or a fine of up to JPY5 million (approximately USD47,400). In addition, the bribe or

its monetary value may be subject to confiscation. Giving, offering, or promising to give a commercial bribe is punishable by imprisonment with work of up to three years or a fine of up to JPY3 million (approximately USD28,500). This statute is analogous to Article 197 of the Penal Code, and the analysis of what constitutes a bribe may be based on that of the Penal Code.²³ However, prosecutors have not used this statute, instead preferring to go after managers who accept bribes based on “aggravated breach of trust” against the firm, under Article 960 of the Companies Act. Corporations are not liable for commercial bribery under the Companies Act.

Current issues

Kansei dango

Despite the reforms discussed above, one type of corruption that remains deeply entrenched in Japan is government-led bid-rigging on public projects (*kansei dango*): a type of bid-rigging scheme in which a public official acts as an organiser to determine which firm will win. Typically, the official is a representative of the government entity that issued the bid request, who wishes to dole out favours to firms (especially in construction) that are major sources of political funds, or are potential sources of work after the official leaves government. After long acceptance, the government started prosecuting this type of conduct in the 1990s as part of the general trend towards anti-corruption. As the widespread nature of the practice became apparent, legal reforms were instituted in the early 2000s, including the passage of a law specifically prohibiting *kansei dango*, and amendments to the Anti-Monopoly Act.

But a flood of major bid-rigging incidents in 2005 and 2006, including those resulting in the arrests of three prefectural governors, led in 2006 to an accelerated passage of amendments to the existing law against *kansei dango*. Additionally, starting with a bid-rigging case on a steel bridge construction project in 2006, shareholders began suing corporate executives on the premise that the executives’ participation in the bid-rigging schemes had damaged their firm. Further, the Japan Fair Trade Commission (“JFTC”) found in three separate cases (2007, 2009, and 2012) that officials of the Ministry of Land, Infrastructure and Transportation (“MLIT”) were involved in bid-rigging, requiring the JFTC to demand improvements of the MLIT.

Despite these changes, new *kansei dango* cases continue to emerge.

- In April 2019, an Osaka City Construction Bureau employee was indicted and dismissed for receiving bribes amounting to JPY9 million (approximately USD85,400) in return for leaking information related to the city’s electricity construction projects. In February 2020, the Osaka District Court imposed a two-and-half-year sentence, a JPY5 million fine (approximately USD47,400), and forfeiture of the car received as a bribe.
- In July 2020, the Yamagata District Court imposed a two-and-a-half-year suspended sentence and a fine of JPY1.1 million (approximately USD10,400) on a former deputy mayor of Oishida Village, Yamagata Prefecture for receiving a total of JPY1.1 million in cash for selecting certain construction companies for village construction projects.
- In July 2020, the Sendai District Court imposed a two-year suspended sentence and a fine of JPY173,000 (approximately USD1,600) on a former officer of Tagajo City, Miyagi Prefecture for receiving a home renovation service in return for leaking bidding price information relating to the city’s construction project.
- While not exactly a *kansei dango* case in the sense of involving incumbent public officers, the long-term relationship of a utility company and a former mayor revealed in October 2019 surprised the public due to its sheer scale. Former Takahama deputy

mayor Eiji Moriyama, now deceased, worked in an advisory capacity and as a board member for companies that conducted construction, maintenance, and security work at Kansai Electric nuclear power plants in Fukui Prefecture. A damages lawsuit by the company against five former executives followed revelations that 75 former and current Kansai Electric employees, including those sued, had received cash and other gifts totalling JPY360 million (approximately USD3.4 million) from Moriyama, and Kansai Electric had awarded orders for nuclear power-related projects to companies based on Moriyama's requests.

Amakudari

A related issue is *amakudari*, which literally means “descent from heaven”, and refers to the practice of government officials retiring into lucrative positions in businesses they used to regulate. This practice has been identified as a significant cause for *kansei dango*, because bidders are populated by former officials of agencies requesting the bids, or providing future job opportunities for such officials.²⁴ Reportedly, for example, 68 bureaucrats retired from METI into top positions at Japan’s 12 electricity suppliers, which METI oversees,²⁵ and between 2007 and 2009, 1,757 bureaucrats were hired at organisations and firms that received subsidies or government contracts during 2008.²⁶

In the wake of the *kansei dango* scandals of the mid-2000s, in which collusion was found to have occurred between current and former government officials, the National Public Service Act (“NPSA”) was amended in 2007. The amendment prevents ministries from finding post-retirement jobs for their officials, limits job-hunting by officials while still in government, and prohibits former officials from recruiting activities. However, the reform has not been particularly effective, with many officials still being hired by firms and organisations they used to oversee.

During the administration of the Democratic Party of Japan (“DPJ”) from 2009 to 2012, further attempts to amend the NPSA stalled. In July 2013, the “Headquarters for Promotion of Reform to the National Public Service System”, which was founded in 2008 to implement the 2007 amendment, formally disbanded after its five-year term expired; in fact, it was virtually non-operational during the DPJ years. The LDP included the eradication of *amakudari* as one of its campaign promises in 2012, but has not pressed for new legislation on this issue to date.

In March 2017, the Ministry of Education, Culture, Sports, Science and Technology (“MEXT”) announced that it had confirmed 62 cases in which current or former ministry employees had illegally negotiated with universities to secure their colleagues’ post-retirement jobs. The Ministry’s discovery resulted in the resignation and penalisation of 43 senior ministry bureaucrats.²⁷ In response to this revelation, then Prime Minister Abe instructed that a government-wide review of *amakudari* be conducted, which found 27 cases of *amakudari*.

In July 2020, the Ministry of Defence announced that five ministry officers had been suspended for making *amakudari* arrangements by providing information of Ground Self Defence Force officers to companies, and warnings were given to 18 officers.

Low enforcement of UCPA Article 18

Since its enactment in 1998, UCPA Article 18 has been enforced only a few times,²⁸ in addition to the indictment of the employees of the power plant construction firm discussed above:

- In March 2007, two Japanese individuals were found guilty of bribing two senior Filipino officials with about JPY800,000 (approximately USD7,600) worth of golf clubs and other gifts, in an effort to win a government contract. They failed to win the contract, but the bribes were reported by a whistleblower. The individuals were fined

- JPY500,000 (approximately USD4,700) and JPY200,000 (approximately USD1,900), respectively. It appears that the firm they worked for (the Philippines subsidiary of a Japanese firm) was not prosecuted.
- In January and March 2009, four Japanese individuals were found guilty of bribing a Vietnamese official in connection with a highway construction project that was partly financed by ODA from Japan. The value of the contract was approximately USD24 million, and the total amount given to the official was about USD2.43 million, but the court specified the amount of the bribes at USD820,000, partly because the statute of limitations had expired on some of the earlier conduct. The court imposed imprisonment for two years and six months, two years, one year and eight months, and one year and six months, respectively, each with a three-year suspension on the individuals. The firm they worked for was fined JPY70 million (approximately USD664,300), and was also temporarily delisted by the Japan Bank for International Cooperation and JICA.
 - In September 2013, a former executive of a Japanese automotive parts manufacturer was fined JPY500,000 (approximately USD4,700) for bribing an official in China to ignore an irregularity at a subsidiary's factory in Guangdong Province.
 - In February 2015, the Tokyo District Court found a railway consulting firm and its three former executives guilty of violating the UCPA by bribing government officials of Indonesia, Uzbekistan and Vietnam with approximately USD1.2 million in order to obtain consulting contracts related to ODA projects in the three countries. The court imposed imprisonment for three years with a four-year suspension, imprisonment for two years with a three-year suspension, and imprisonment for two years and six months with a three-year suspension, on the three individuals, and fined the consulting firm JPY90 million (approximately USD854,000).

The OECD criticised the low level of enforcement activity, issuing a news release in March 2019, both in English and Japanese, declaring that Japan must step up enforcement of its foreign bribery laws and strengthen the capacities of its law enforcement agencies to proactively detect, investigate and prosecute foreign bribery offences. While noting positive developments, the OECD still emphasised that Japan's enforcement rate is not commensurate with the size and export-oriented nature of its economy or the high-risk regions and sectors in which its companies operate.

Perhaps in response to the OECD criticism, more UCPA enforcement efforts have been undertaken in 2020.

- In January 2020, a former president of the Vietnamese subsidiary of an electric wiring company was referred to the District Public Prosecutors Office by the Aichi Prefecture Police for violating the UCPA by bribing two officers of the Haiphong City Tax Department to avoid retroactive tax payments.
- In May 2020, a Vietnamese subsidiary of a Japanese plastic product company allegedly handed VND5 billion (approximately USD214,600) in cash to local government officers to avoid paying corporate and value-added taxes. After an internal investigation, the CEO of the parent company resigned, and the company also reported findings from the investigation to the Tokyo District Public Prosecutors Office.
- In June 2020, the Kobe Summary Court imposed a fine of JPY500,000 (approximately USD4,700) on a Vietnamese national for bribing a consul at the Consulate General of Vietnam in Osaka to obtain residence status for other Vietnamese expatriates in Japan, in violation of the UCPA. In December 2020, another Vietnamese national was arrested for bribing a consul at the Consulate General of Vietnam in Fukuoka to issue marriage certificates and other documents.

The greatest challenge for increasing enforcement of UCPA Article 18 is creating incentives for firms to self-report, or for whistleblowers to come forward. The type of whistleblower award programme instituted by the US Securities and Exchange Commission will be difficult to implement in Japan, considering the smaller potential recovery available (i.e., the amount of the potential reward is unlikely to offset the downsides of reporting on one's employer). Instituting a leniency-type system to reduce potential fines in exchange for cooperation may encourage some firms to self-report, but the maximum corporate exposure of JPY300 million (approximately USD2.85 million) may not be large enough to justify the trouble. In addition, the five decided cases seem to indicate that courts will impose a fine that is roughly equivalent to the amount of the bribe.

In June 2020, amendments to the Whistleblower Protection Act²⁹ were passed. The amendments require businesses to establish systems to properly respond to whistleblower reports and to designate a specific employee to respond to whistleblower reports. The designated employee is subject to confidentiality obligations regarding the whistleblower's anonymity. The amendment's definition of whistleblower now includes retired workers, temporary workers, and officers. Notably, however, the amendments did not create any criminal or administrative mechanisms for penalising companies that retaliate against whistleblowers. Furthermore, whistleblowers who can prove in court that they were fired for whistleblowing are only entitled to reinstatement, and no whistleblower rewards programme is available. A whistleblower who has suffered retaliation could file a tort claim, but whether such a claim would be successful remains unclear.

* * *

Hui Xu is a partner, Catherine E. Palmer is a counsel, and Junyeon Park is an associate, in the Litigation & Trial Department of Latham & Watkins. This article reflects the views of the authors only.

* * *

Endnotes

1. Transparency International, Japan (<https://www.transparency.org/en/cpi/2019/results/jpn>).
2. World Justice Project, Rule of Law Index 2020, Absence of Corruption (<https://www.worldjusticeproject.org/rule-of-law-index/country/2020/Japan/>). According to the overall Rule of Law Index, Japan is ranked as the country with the 15th strongest rule of law out of 128 countries.
3. US Department of State, Bureau of Economic and Business Affairs, Investment Climate Statements 2020 – Japan (<https://www.state.gov/reports/2020-investment-climate-statements/japan/>).
4. See Andrew Horvat, “MoF fries in ‘no pan shabu shabu’”, *Euromoney*, Mar. 1998 (<https://www.euromoney.com/article/b1320fdq16wkw9/mof-fries-in-no-pan-shabu-shabu>).
5. See Alan C. Miller, “Japan’s Money in the Mists”, *Los Angeles Times*, Nov. 24, 1998 (<https://www.latimes.com/archives/la-xpm-1998-nov-24-mn-47352-story.html>); “Japan: Away with the rogues”, *The Economist*, Sep. 21, 2000 (<https://www.economist.com/asia/2000/09/21/away-with-the-rogues>).
6. See Act No. 100 of 1992, Act No. 5 of 1994, Act No. 106 of 1994, and Act No. 129 of 1999.

7. “Kake Gakuen questions still unanswered”, *The Japan Times*, Jul. 26, 2017 (http://www.japantimes.co.jp/opinion/2017/07/26/editorials/kake-gakuen-questions-still-unanswered/#.WXRPH_mGOUI).
8. “*Shimomura Hakubun-shirawo Fukiso* (Hakubun Shimomura and others are not to be indicted)”, *The Asahi Shimbun*, Aug. 15, 2018 (<https://www.asahi.com/articles/ASL8H628CL8HUTIL030.html>) (in Japanese).
9. See “Ex-senior Japanese education ministry official given suspended term for corruption”, *The Japan Times*, Dec. 5, 2019 (<https://www.japantimes.co.jp/news/2019/12/05/national-crime-legal/ex-senior-japanese-education-ministry-official-given-suspended-term-corruption/>).
10. “Criminal complaint over Abe’s sakura parties rejected”, *The Asahi Shimbun*, May 28, 2020 (<http://www.asahi.com/ajw/articles/13410930>).
11. “Arrest of Japan’s ex-justice minister, wife in vote-buying scandal disappoints constituents”, *The Mainichi*, June 19, 2020 (<https://mainichi.jp/english/articles/20200619/p2a/00m/0na/029000c>).
12. Unless otherwise noted, translations of Japanese laws in this article are from the “Japan Law Translation” website of the Ministry of Justice (<http://www.japaneselawtranslation.go.jp/>).
13. Act No. 136 of 1999, as amended by Act No. 67 of 2017.
14. See Act No. 165 of 1947 (Japan Post); Act No. 89 of 1997 (Bank of Japan); Act. No. 205 of 1949 (Bar association); Act No. 112 of 2003 (national universities); Act No. 185 of 1951 (offices for vehicle inspection and registration); Act No. 141 of 1959 (National Pension Fund Association); Act No. 33 of 2015 (The Tokyo Organising Committee of the Olympic and Paralympic Games). This list of “deemed public officials” is not exhaustive.
15. See Act No. 69 of 1984 (Japan Tobacco); Act No. 85 of 1984 (NTT); Act No. 88 of 1986 (Japan Railways); Act No. 132 of 1950 (NHK); Act No. 124 of 2003 (Narita Airport); Act No. 37 of 2007 (International Criminal Court).
16. UCPA art. 18(1).
17. UCPA art. 21(2)(vii); OECD Working Group on Bribery, Japan: Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions (June 2006), at 11 (<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37018673.pdf>).
18. OECD, “Japan must urgently address long-standing concerns over foreign bribery enforcement”, Jul. 3, 2019 (<http://www.oecd.org/corruption/japan-must-urgently-address-long-standing-concerns-over-foreign-bribery-enforcement.htm>).
19. Japan Federation of Bar Associations, Guidance on Prevention of Foreign Bribery, Jul. 15, 2016 (<https://www.nichibenren.or.jp/en/document/opinionpapers/20160715.html>).
20. JICA, Anti-Corruption Guidance, Oct. 2014 (https://www.jica.go.jp/english/our_work/compliance/c8h0vm00009ulm1i-att/anti_corruption_guidance_en.pdf).
21. See endnote 19, *supra*.
22. Act No. 131 of 1948, as amended by Act No. 72 of 2017.
23. Seiichi Ochiai, ed., *Kaishaho Kommentar* (Companies Act Commentary) (2011), vol. 21 § 967, at 125 (in Japanese).
24. See “*Amakudari, Kouji Rakusatsu Ni Eikyo, Hitori Ukeire 0.7 Point Joushou* (Impact of ‘amakudari’ on winning construction projects – 0.7 point increase with one person hire)”, *Nihon Keizai Shimbun*, Feb. 21, 2017 (http://www.nikkei.com/article/DGXLA SDG20H6D_R20C17A2CC0000/) (in Japanese); “1,757 got jobs via ‘amakudari’ from ‘07

- to '09”, *The Japan Times*, Aug. 24, 2010 (<https://www.japantimes.co.jp/news/2010/08/24/national/1757-got-jobs-via-amakudari-from-07-to-09/>).
25. See “Utilities got 68 ex-bureaucrats via ‘amakudari’”, *The Japan Times*, May 4, 2011 (<http://www.japantimes.co.jp/news/2011/05/04/news/utilities-got-68-ex-bureaucrats-via-amakudari/#.UhWjsRtcXit>).
26. See endnote 24, *supra*.
27. “Amakudari Assen, Meru Keikini Hakkaku (Amakudari placements, revealed through emails)”, *Mainichi Shimbun*, Feb. 25, 2018 (<https://mainichi.jp/articles/20180225/k00/00m/010/175000c>) (in Japanese).
28. METI Guideline (rev. Sep. 2017) (http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GaikokukoumuinzouwaiBoushiShishin20170922.pdf) (in Japanese).
29. Act No. 122 of 2004, as amended by Act No. 51 of 2020.

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