

Heightened OECD scrutiny leads to Japan's strengthening of its anti-corruption framework

March 15, 2018

The Japanese legislature is currently in the process of introducing a new leniency framework for bribery and fraud, known as the New System. This framework, a result of the increased attention being paid to strengthening the anti-bribery and anti-fraud framework, will come into effect in June 2018. Japan has faced increased scrutiny of its anti-corruption enforcement practices from the OECD Working Group over the years. The Netherlands faced similar criticism in 2013, emphasising its lax approach towards bribery enforcement. Despite the broad scope of the Japanese anti-corruption framework and intense media coverage of numerous allegations concerning Japanese companies, only four cases were prosecuted between 1999 and 2016.

The New System will apply to all companies incorporated or doing business in Japan. An important aspect is that it will offer leniency deals only to companies and individuals who hand over evidence against others in the spirit of cooperation. Companies in the infrastructure and technology sectors, as well as medical and pharmaceutical companies, should pay close attention to this increased scrutiny, as these sectors are increasingly attracting the attention of regulators worldwide.

Japan's current Code of Criminal Procedure includes the possibility of reaching a leniency deal with companies and individuals who actively cooperate with anti-corruption authorities. In effect, it means that these companies and individuals must hand over evidence implicating others.

The New System, which will enter into force in June 2018, addresses the process of negotiating for reduced penalties for, bribery, embezzlement and fraud (among other crimes). It gives prosecutors the discretion to dismiss or downgrade charges, and it recommends lighter penalties and summary judgments. The New System will affect companies doing business in Japan; that is, companies which are either incorporated in Japan, or conduct business there.

Under the new system, the suspect's lawyers cannot be present during interrogations by the prosecution. However, they are required to be present throughout the negotiation process and to co-sign the final agreement. This is particularly important given that Japan does not recognise legal privilege and the prosecution can obtain evidence using court-issued search warrants. Another factor stemming from Japan's non-recognition of legal privilege is that a suspect cannot waive privilege to cooperate. The New System consequently gives suspects the possibility of gaining leniency credits through other means. If the court chooses not to follow the action by the prosecution, the suspect has a right to

cancel the agreement. At the same time, the regime contains sanctions intended to punish those who abuse the system in an attempt to exonerate themselves.

The evidence required to obtain leniency can refer to the co-conspirators as well as other unrelated criminal matters. Companies and individuals seeking leniency will have to give statements to the prosecution during the investigation. They may also have to testify in court and provide evidence to support their claims. If the evidence they provide leads to self-incrimination, the suspect might be exempt from charges. However, this kind of agreement has to be approved by the court.

The New System is the most recent reform resulting from the review of the Japanese judicial system undertaken in 2011 by the Legislative Council for the Ministry of Justice. That review, in turn, was undertaken following an evidence-tampering scandal in the Public Prosecutor's Office. This reform also addresses the OECD's concern over lax enforcement of anti-bribery laws in Japan. According to the latest Transparency International [Corruption Perceptions Index](#), Japan ranks 20th (of 180) on the list of least corrupt countries. However, companies should be aware that the OECD will continue Japan's anti-bribery enforcement evaluation in 2019, which may lead to additional enforcement measures being implemented.

As mentioned above, so far only four cases were prosecuted in Japan between 1999 and 2016, despite intense media coverage of numerous allegations concerning Japanese companies. The most recent high-profile white-collar crime cases in Japan involved electronics companies Olympus and Toshiba, and concerned fraud and the falsifying of financial statements. Olympus former executives were fined USD 529 million (approximately JPY 56.5 billion) in 2017, and Toshiba JPY 7.37 billion in 2016. Earlier prosecutions included that of Japan Transportation Consultants, resulting in JPY 160 million in penalties, and Pacific Consultants International's JPY 70 million fine for corrupt practices in Vietnam, Indonesia and Uzbekistan.

Summary

The New System reforms are likely to strengthen the transparency and effectiveness of the anti-corruption enforcement system in Japan. Companies should be aware that the definition of cooperation under the Japanese regime differs from those commonly used elsewhere, and requires information on the criminal conduct of other entities and individuals. The New System, however, will allow disclosing companies to receive reduced penalties for non-compliance, which was previously not possible in Japan. Consequently, companies with Japan as their place of business or incorporation should familiarise themselves with the new procedure and, if necessary, ask for legal advice.

Companies operating in the infrastructure and technology sectors, as well as medical and pharmaceutical companies, should pay close attention to increased scrutiny, since those sectors have been attracting the attention of the regulators worldwide.