

Lost in translation: Japan urged to do more to combat foreign official bribery

The handful of foreign official bribery prosecutions that have taken place in Japan has not satisfied the Organisation for Economic Co-operation and Development (OECD) which in June this year renewed its pleas for the country to step up its battle against international bribery. This article examines Japan's responses to the OECD's demands, the latest developments in Japan's foreign official bribery laws, and the implications for Japanese multinational corporations and foreign companies who face potential exposure to Japan's Unfair Competition Prevention Act.

The offence

After Japan's accession to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Japan amended the Unfair Competition Prevention Act (UCPA) in 1998 (effective February 1999) to create the offence of foreign official bribery.

Article 18 of UCPA provides that it is illegal to give, offer or promise bribes to non-Japanese public officials. The UCPA, however, only penalises the giver of the bribe, not the recipient. Japanese nationals are liable for bribing foreign public officials whether they commit the bribe inside or outside of Japan. If a non-Japanese individual commits all or part of an act of bribery in Japan, they may be punished under the UCPA as well.

When a representative, agent or employee of a company violates the UCPA in relation to a company's business, the company itself may also be punished. If a representative, agent or employee is found to have

engaged in the bribery of a foreign official, in relation to a company's business, Japanese law will presume that the company was negligent in its selection or oversight of the representative, agent or employee and in preventing the person from committing illegal acts. In order to escape liability, the company must prove that it had exercised the due care necessary to prevent the violation. In this regard, there is some similarity to the offence under section 7 UK Bribery Act of failing to prevent bribery.

A non-Japanese company can be prosecuted if its representative, agent or employee bribes (in relation to the company's business) a foreign public official (ie a non-Japanese public official), or commits part of an act of bribery, whilst in Japan. Moreover, a non-Japanese company could also face liability if any of its Japanese national representatives, agents or employees bribe a foreign public official, inside or outside of Japan.

Key issues

- The Unfair Competition Prevention Act makes it illegal to give, offer or promise bribes to foreign public officials
- There have been only four prosecutions since 1999 when the law came into effect
- The OECD is urging Japan to do more
- New guidelines set out steps corporates should take to prevent bribery

The maximum penalty for an offence under Article 18 is five years' imprisonment and/or a fine of JPY 5 million (US\$ 42,000) for natural persons, and for companies a fine of JPY 300 million (US\$ 2.5 million).

Relations with the OECD

The OECD has repeatedly called on Japan to intensify its measures to combat foreign official bribery. The

latest exhortation came in June 2016, when the head of an OECD working group visited Japan and noted that Japan had not yet passed legislation allowing profits from bribery to be confiscated nor introduced fines for bribery offences high enough to, in effect, amount to profit confiscation.

In December 2013, the OECD recommended that Japan establish an action plan to organise police and prosecution resources to detect, investigate and prosecute foreign official bribery by Japanese companies. Japan took steps to implement an action plan in April 2014.

Japan passed new anti-money laundering laws, effective October 2016, which aim to strengthen the reporting obligations of specific business operators in relation to suspicious transactions.

In July 2015, the Ministry of Economy, Trade and Industry (METI), which administers the UCPA, revised its Guidelines for the Prevention of Bribery of Foreign Public Officials (the Guidelines). The Guidelines, which echo guidance published by the UK Ministry of Justice, describe the procedures commercial organisations should put in place to prevent bribery.

They also conclude that for a company to be discharged of liability of the acts of its representatives, the steps it takes must be in the form of proactive and specific information.

Despite the repeated OECD exhortations, only four cases of foreign bribery have been prosecuted in Japan since 1999.

Potential exposure

Given the repeated pressure from the OECD, it would not be surprising to

see Japan begin prosecuting more foreign bribery cases.

Japanese companies and foreign companies with potential exposure to UCPA should begin to take steps to prevent incidences of bribery by their representatives, agents and employees.

Appropriate measures

The Guidelines provide examples of steps a company should take to prevent bribery. These include:

- the formulation and announcement of anti-bribery policies and internal rules governing high-risk business activities, for example on the provision of entertainment, the appointment of agents and consultants etc and employee sanctions for engaging in bribery
- the development of organisational frameworks (eg the appointment of a compliance officer, establishment of hotlines and a system to follow up suspicions/concerns);
- the implementation of educational activities in the company;
- regular and irregular audits to assess whether preventative systems are functioning; and
- evaluation and review of the effectiveness of the preventative systems based on the results of regular audits.

The Guidelines note that it is important to keep in mind the importance of the attitude towards bribery shown by senior management, to take a risk-based approach and to ensure that effective preventative systems are not only well structured but well operated and regularly evaluated.

Although the Guidelines primarily deal with Japanese companies seeking to expand overseas, they still provide a useful reference point for other companies which also face potential liability under UCPA.

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