



Japan's plea bargaining system

17 April 2018

A new plea bargaining system – offering reduced penalties to companies that report certain violations and cooperate with government investigations – will come into effect in Japan this June, reflecting an amendment to the Code of Criminal Procedure passed in May 2016.

This new system (the 2018 Revised System) will allow companies to negotiate reduced criminal sentences in exchange for providing information regarding third parties suspected of or charged with particular offences – including bribery, fraud, and embezzlement.

The implementation of the 2018 Revised System represents Japan's increased efforts in investigating and enforcing white collar crime and stands to substantially change the way companies operating in Japan enhance their compliance programmes and engage with Japanese government authorities.

How the 2018 Revised System works

The 2018 Revised System essentially entails three components.

1. Is the offence of the third party under government investigation a "specific crime?"

Companies should be careful to note that the 2018 Revised System is not per se a self-reporting mechanism.

The 2018 Revised System only applies to certain offences committed by another company or individual under government investigation (the Suspect Third Party). These offences – called "specific crimes" under the Criminal Procedure Code – include bribery, fraud, violations of the Antimonopoly Act (AMA), embezzlement, tax law and antitrust offenses, and crimes related to narcotics and firearms. Destruction of evidence required for government investigations is also included as a "specific crime."

2. Cooperation by a company or individual in relation to the third party under government investigation.

There are various ways in which a company/individual (the Cooperating Party) can cooperate with Japanese government authorities in relation to the Suspect Third Party, including (i) assisting with the collation of evidence; (ii) responding truthfully and fully in government investigation interviews; and (iii) providing full disclosure of information in a government authorities' investigation or in a court trial.

In cooperating with government authorities, it may be that the information disclosed relates to a "specific crime" wholly unrelated to the Cooperating Party. However, it is more likely that the Cooperating Party will disclose information about "specific crimes" to which they are co-conspirators. In other words, the Cooperating Party will also be subject to a "specific crime" or a derivative criminal penalty. In other countries where similar measures have been introduced, such as Brazil, prosecutors have been successful in using leniency agreements to increase their leverage in investigations.

For example, a company's senior management suspected of a "specific crime" may find its current or former employees becoming the Cooperating Party to disclose information related to the company's senior management to obtain reduced penalties they themselves may be facing. On the other hand, a company could be the Cooperating Party by disclosing evidence of corrupt or fraudulent employees which it has collected through an internal investigation.

Government authorities hope that the Cooperating Party will therefore provide an alternative source of evidence collection where in the past prosecutors were known to rely heavily on direct interrogation of individual suspects. This reflects the original purpose of the 2018 Revised System's implementation which was "to optimize and diversify the evidence collection process in criminal proceedings and to enrich trial proceedings."¹

To safeguard against a Cooperating Party from providing false information about a Suspect Third Party in the hopes of a reduced penalty for itself, a Cooperating Party which is found to have provided false information will be subject to criminal sanctions including imprisonment of up to five years. The threat of a five-year prison sentence for false information may have a chilling effect on a potential Cooperating Party, particularly where they may lack concrete evidence. How prosecutors leverage that threat will bear watching as the law is enforced.

3. Negotiation and plea bargaining with the public prosecutor.

In return for cooperation, the Cooperating Party can negotiate with the public prosecutor a wide range of possible reduced penalties including (i) non-filing for prosecution, (ii) dismissal or reduction of the criminal charge, (iii) recommendation to the court for a lighter penalty, (iv) petition for an expedited trial, and (v) request for summary order.

In deciding whether to negotiate such reduced penalties, the public prosecutor will consider (i) the significance of the evidence obtained through the cooperation, (ii) the seriousness, circumstances, and relevance of the related crime, and (iii) other factors.

There are still ambiguities about how negotiations with the public prosecutor will work in practice² but it is evident that the 2018 Revised System significantly changes the role of counsel by increasing the amount of access the Cooperating Party have with their counsel. Traditionally, counsel have been excluded from witness interviews conducted by the prosecutor, but under the 2018 Revised System, defence counsel must be present during negotiations with the prosecutor and co-sign the final plea bargaining agreement.

Therefore, the welcoming of defence counsel into negotiations may substantially change how Japanese prosecutors operate and increase the value of experienced defence counsel in government investigations. Japanese prosecutors have a notoriously high success rate³, which

¹ See Ministry of Justice's "Overview of the Amendments to the Criminal Procedure Code" (in Japanese) [here](#).

² Available in Japanese [here](#).

It is worth noting, however, that there has been no guidance published as yet on how the prosecutor determines the significance of the evidence obtained, the seriousness of the crime, and the necessity of entering into the agreement. Furthermore, without sentencing guidelines, how the prosecutor decides on which reduced penalty to impose also remains unclear.

³ See Chart of Number and Types of Judgments ([Table 2-3-1-1](#)) from the Annual Report of Statistics on Prosecution which illustrates an approximate 99% conviction rate from 2006 -2015.

may be attributed to the lack of representation during interviews where confessions are made. A Cooperating Party may become more emboldened to resist threats of prosecutors when represented and protected by defence counsel, but may also be more likely to weigh the costs and benefits of cooperating under the 2018 Revised System.

What it means

Japan has faced continued criticism for its perceived lack of anti-bribery enforcement.⁴ Following on the heels of the Japanese Federation of Bar Association's (JFBA) publication of new guidelines on foreign bribery prevention (JFBA Guidelines) in July 2016⁵ and the Ministry of Economy, Trade, and Industry's (METI) revision of its "Guidelines for the Prevention of Bribery of Foreign Public Officials" in July 2015, the 2018 Revised System signals Japan's commitment to increased enforcement. While the JFBA Guidelines were aimed at detecting and preventing bribery and corruption, the 2018 Revised System's plea bargaining system is aimed at allowing prosecutors to gather more evidence to enforce bribery and other specific crimes. Whether the 2018 Revised System has any real teeth and lead to significant change remains to be seen, but it is indicative of the Japanese government being committed to increased enforcement.

Awareness of the importance of compliance and corporate governance for companies operating in Japan has been significantly rising in recent years, and it appears that the government is committed to this trend. Although only individuals are directly subject to criminal liability under the Japanese Penal Code, companies can become subject to criminal punishment if specific provisions are codified in law that subjects companies to liability as well. One such provision is that covering bribery and several other "specific crimes" covered by the 2018 Revised System. For those crimes, the company itself can be held liable if the court finds that its directors, officers, or employees committed a crime during the course of business and that the company lacked appropriate preventative measures. This expansion of company liability means that companies should focus more attention on their compliance programs and preventative measures regardless whether they are Cooperating Parties.

This is not the first system incentivizing cooperation that Japan has implemented. In fact, the Japan Fair Trade Commission (JFTC) implemented a leniency system for cartel regulation back in 2006.⁶ Therefore, Japanese enforcement agencies will be closely watched after the 2018 Revised System comes into effect to see how it compares to the leniency system set up by the JFTC, and more generally how it might impact on corporate malfeasance enforcement in Japan. We will provide further updates as they become available.

⁴ See OECD Working Group on Bribery's "Japan: Follow-Up to the Phase 3 Report & Recommendations," February 2014 (The Working Group on Bribery (WGB) continues to have significant concerns about the low level of foreign bribery enforcement in Japan)

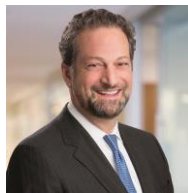
⁵ The JFBA Guidelines set out recommendations to companies operating in Japan to ensure compliance with Japan's Unfair Competition Prevention Act (UCPA), the United States' Foreign Corrupt Practices Act (FCPA), and United Kingdom's Bribery Act 2010 (UKBA).

⁶ Under JFTC's leniency system, the first company of those involved in a cartel to report the existence of the cartel before the JFTC starts its investigation is granted full immunity from pecuniary sanctions and the second company is granted a 50% penalty reduction. Subsequent companies, up to a maximum of five companies, are granted 30% penalty reductions. Once the JFTC initiates the investigation, only three companies are granted 30% penalty reductions for their cooperation, with the maximum number of companies to receive penalty reductions under the leniency system being five, the total number of those that reported before and after the investigation was initiated. Notably, the JFTC issues administrative penalties, as opposed to criminal prosecutions. The JFTC can also file criminal complaints with the Public Prosecutors Office if it believes criminal penalties should be imposed.

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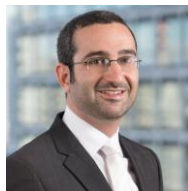
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