



GETTING THE  
DEAL THROUGH 

# Government Investigations 2017

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# Japan

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## Enforcement agencies and corporate liability

### 1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

The government agencies principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses are:

- the Police Agency;
- the Public Prosecutor's Office;
- the Japanese Fair Trade Commission; and
- the Security and Exchange Surveillance Committee.

### 2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

#### The Police Agency

The Police Agency has the authority to investigate crime in general.

#### The Public Prosecutor's Office

The Public Prosecutor's Office has the authority to investigate crime in general. However, in most cases, the Public Prosecutor's Office deals with criminal cases that have been investigated primarily by the Police Agency. After receiving the case from the Police Agency, the Public Prosecutor's Office conducts further investigation and brings charges. The public prosecutor sometimes initiates investigations in cases such as those involving bribery, which involve high-ranking officials or politicians, because in such cases, independence from political influence is necessary to conduct a fair investigation.

#### The Japanese Fair Trade Commission

The Japanese Fair Trade Commission investigates violations of the Antimonopoly Act (the Japanese competition law), such as cartels. It has the authority to levy regulatory fines, and issue cease-and-desist orders on infringing parties. If it deems that the case is particularly egregious, it can file a formal complaint with the public prosecutor, requesting penal sanctions.

#### The Security and Exchange Surveillance Committee

The Security and Exchange Surveillance Committee investigates violations of the Financial Instruments and Exchange Act, such as insider trading. It has the authority to recommend that the Prime Minister and the Minister for Financial Services order regulatory fines on infringing parties. If it deems that the case is particularly egregious, it can file a formal complaint with the public prosecutor, requesting penal sanctions.

### 3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

In Japan, multiple government entities can simultaneously investigate the same target business. However, in general, they coordinate their investigations. They can share the information obtained from the targets.

With respect to most violations of the Antimonopoly Act, one cannot be charged criminally without a formal complaint by the Japanese Fair Trade

Commission. Therefore, the Japanese Fair Trade Commission initiates the investigation and files a formal complaint with the public prosecutor.

### 4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

Both civil and criminal charges must be brought to the courts.

### 5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

Japanese corporations, as distinct from natural persons, are not directly subject to Japanese criminal law. However, for some types of crime – such as bribery of foreign officials, cartels or insider trading – corporations may be held criminally liable if their officers, directors or employees committed a crime in the course of business, and if the corporations failed to put in place adequate measures to prevent such criminal conduct (in most cases, if the directors or employees commit a crime, the courts find that the corporations failed to put in place adequate measures to prevent such criminal conduct).

### 6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

In Japan, the public prosecutor holds the sole authority to bring criminal charges, with a few exceptions. The public prosecutor has wide discretion in deciding whether to bring charges or not. The public prosecutor considers various factors, such as the gravity of the crime, the remedial actions by the defendant and so on. There are no particular factors that the public prosecutor must consider in deciding whether to bring charges against a corporation.

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## Initiation of an investigation

### 7 What requirements must be met before a government entity can commence a civil or criminal investigation?

If the Police Agency or the public prosecutor deems that a crime has been committed, they will commence a criminal investigation.

The Japanese Fair Trade Commission and the Security and Exchange Surveillance Committee also commence regulatory investigations when they deem that there have been violations of the Antimonopoly Act or the Financial Instruments and Exchange Act.

There are no specific requirements to be met when these authorities commence investigations.

### 8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

With respect to crimes that involve a corporation, whistle-blowing often triggers the investigation.

With respect to a cartel, most of the investigations are triggered by a leniency application by the relevant parties.

With respect to a violation of the Financial Instruments and Exchange Act, the Security and Exchange Surveillance Committee surveys the transactions of the stocks, and gathers information from the securities company to investigate unjust transactions such as insider trading.

### 9 What protections are whistle-blowers entitled to?

The Whistle-blower Protection Act (Act No. 122 of 2004) provides comprehensive protection for employees who wish to blow the whistle. This protection includes:

- the nullification of the whistle-blower's dismissal (if the dismissal is a result of the whistle-blowing);
- the nullification of the cancellation of a worker dispatch agreement (if the cancellation of the agreement is a result of the whistle-blowing); and
- the prohibition of disadvantageous treatment, such as a demotion or reduction in salary (if the treatment is a result of the whistle-blowing).

### 10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

Typically, the Police Agency publicly acknowledges an investigation when it arrests a suspect, and when they send a case to the public prosecutor.

The public prosecutor typically publicly acknowledges an investigation when it arrests a suspect, and when it indicts defendants.

The Japanese Fair Trade Commission typically publicly acknowledges an investigation when it conducts an on-site investigation, when it levies regulatory fines and issues a cease-and-desist order on the infringing parties, or when it files a formal complaint with the public prosecutor, requesting penal sanctions.

The Security and Exchange Surveillance Committee publicly acknowledges an investigation, typically when it conducts an on-site investigation, when it recommends that the Prime Minister and Minister for Financial Services order regulatory fines on the infringing parties, or when it files a formal complaint with the public prosecutor requesting penal sanctions.

### Evidence gathering and investigative techniques

#### 11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

Usually, there is a covert phase before the authorities approach the target. The period of the covert phase varies case by case. The authorities often spend more than a year on the covert phase.

#### 12 What investigative techniques are used during the covert phase?

During the covert phase, the authorities typically interview the people who have knowledge about the cases, and gather information that can be collected without notifying the target, such as bank records.

Although the authorities can use wiretapping for some types of crimes, they rarely use it for covert-phase investigations.

#### 13 After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

When a target corporation becomes aware of an investigation, it should conduct an internal investigation and understand what has happened in the case. To avoid the authorities' misunderstanding that the target corporation is obstructing the investigation, it is preferable for outside legal counsel to conduct an internal investigation. If the authorities have already approached the target corporation, the authorities should be informed that the corporation will conduct an internal investigation; otherwise, this may cause discord with the authorities.

Where the authorities have already approached the target corporation, some information can be obtained by a legal counsel who has a good relationship with the authorities. Even though the authorities will not disclose any details of the investigation, they often disclose some facts, or give some hints to understand the case.

In a cartel case, an internal investigation should be conducted as quickly as possible. Under the Antimonopoly Act, five parties can apply for leniency applications (the first-place party can receive immunity from regulatory fines, the second-place party can receive a 50 per cent reduction of the regulatory fine, a third-place party can receive a 30 per cent reduction of the fine, and the fourth- and fifth-place parties can receive a 30 per cent reduction of the fine, if they provide information and evidence that the authorities did not previously have. After the on-site investigation,

three parties can apply for a leniency application and receive a 30 per cent reduction if they provide information and evidence that the authorities do not have).

For certain violations of the Financial Instruments and Exchange Act (such as insider trading, in which a listed corporation deals with its own stocks, failing to submit security reports, or submitting a false security report), if a corporation voluntarily reports the facts to the Security and Exchange Surveillance Committee before it requests that the corporation submit a report, or before it conducts an on-site investigation, the corporation can receive a 50 per cent reduction of the regulatory fine.

#### 14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

There are no statutory obligations to preserve documents, recorded communications and other materials in connection with a governmental investigation. However, if someone other than the targets destroys or hides the evidence of the crime, it can constitute a crime (article 104 of the Penal Code). Destruction by the targets themselves does not constitute a crime. However, in the case of a crime that involves a corporation, if an officer or an employee who is not a target of an investigation destroys the evidence of a crime by other officers or employees, it can constitute a crime. In addition, even though the destruction by the target itself does not constitute a crime, such conduct will be an aggravating factor in deciding whether to bring charges or not, or deciding the penalty.

Therefore, in practice, the target corporation should preserve relevant documents, recorded communications and any other materials relevant to the investigation.

#### 15 During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

The governmental authority can seize any type of materials if the authority acquires a seizure warrant from a judge.

In Japan, there are no laws that target the protection of data privacy. In this area, Japan only has the Act on the Protection of Personal Information. However, the Act on the Protection of Personal Information will not affect the conduct of investigations because it provides that the restrictions on the treatment of personal information do not apply in cases where the handling of personal information is necessary for cooperation with a state organ, a local government, or an individual or a business operator entrusted by either of the former two in executing affairs prescribed by laws and regulations, and in which obtaining the consent of the person is likely to impede the execution of the affairs concerned.

#### 16 On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

If the authorities obtain a seizure warrant from a judge, the target business cannot oppose the seizure. There is no concept of legal professional privilege in Japan. Authorities can seize the documents or other evidence that relate to the communications between the defendants and the attorneys, if they obtain a warrant from a judge.

#### 17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

The authorities cannot compel employees to be interviewed unless the authorities arrest and detain such employees (if they are arrested and detained, the authorities can compel them to accept the interview). It is rare in practice, but under the Code of Criminal Procedure, the authorities can request testimony before the court during the course of an investigation. In such a case, the employees must show up in court and testify. If they do not show up in court, they will be detained pursuant to a warrant issued by the judge.



In many cases, the authorities try to encourage employees to voluntarily cooperate with the investigation and interview them. If the employees are not cooperative, the authorities sometimes approach the corporation and ask that it persuade the employees to cooperate with the investigation.

During the interview by the authorities, no one can be compelled to make a statement.

During the testimony, the witness has a duty to testify, but he or she can refuse to answer a question that incriminates him or her.

**18 Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?**

If the corporation has already obtained legal counsel, usually employees do not have to obtain legal counsel. However, if a conflict of interest arises between the employees and the corporation, the employees should obtain their own legal counsel.

**19 Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?**

Targets can share information to assist in their defence (there is no concept of legal professional privilege in Japan). However, there is a risk that if targets share information, the authorities might regard such exchange of information as collusion to obstruct the investigation. Therefore, such an exchange of information should be conducted by legal counsel.

**20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?**

Stock exchanges provide their rules on timely disclosure and listed companies must follow these rules. For example, under the Securities Listing Regulations of the Tokyo Stock Exchange, information related to the company's business, operations or performance that has a significant effect on securities investment decisions must be disclosed in a timely manner. The Securities Listing Regulations of the Tokyo Stock Exchange list the specific information that should be disclosed. According to that list, information about the cancellation of a licence, the suspension of business, or any other disciplinary action corresponding to these on the basis of laws and regulations by an administrative agency, or an accusation of a violation of laws and regulations, by an administrative agency, is listed as information that should be disclosed (article 402(2)f). Therefore, if the Japanese Fair Trade Commission of the Security and Exchange Surveillance Committee files a formal complaint with the public prosecutor, requesting penal sanctions (this corresponds to an 'accusation' above), the corporation must disclose that fact in a timely manner, unless the impact of that formal complaint is minimal (according to article 402(4) of the enforcement rules of the securities listing regulations, if the turnover of the business unit accused is less than 10 per cent of the total turnover of the corporation (which includes consolidated companies), timely disclosure is not mandatory).

Other than that, the Securities Listing Regulations of the Tokyo Stock Exchange provide that other important matters related to the operation, business, or assets of such listed company or related to listed stock certificates should be disclosed in a timely manner (article 402(2)x). Therefore, if the investigation is an important matter, that information should be disclosed. If the investigation has a significant impact on its business, a listed corporation often discloses information about the investigation when the corporation or its officers are arrested or indicted, or the fact is broadly reported by the news.

With respect to the content of the timely disclosure, article 402(2) of the enforcement rules of the securities listing regulations provides that the 'details' that should be disclosed, as a general rule, are the details of the occurrence of the facts; a summary of the facts which occurred; the future prospects related to the facts that have occurred; and other matters that are deemed by the exchange to have material significance for investment decisions.

**Update and trends**

On 24 May 2016, the act to reform the Code of Criminal Procedure was approved at Congress and it was promulgated on 3 June 2016.

The reformed Code of Criminal Procedure introduces a system that would enable the public prosecutor to negotiate with the defence counsel in certain cases, and if the defendant cooperates with the investigation against other parties, the public prosecutor is permitted to drop the case against that defendant, or request a reduced penalty from the court. The new cooperation system will be in force within two years from the promulgation of the act.

**Cooperation**

**21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?**

In a cartel case, there is a leniency system in Japan, and a corporation can mitigate the risk by voluntarily reporting the wrongdoing to the Japanese Fair Trade Commission (see question 13).

In addition, for certain violations of the Financial Instruments and Exchange Act (such as insider trading, in which a listed corporation deals with its own stocks, failing to submit security report, or submitting a false security report), if a corporation voluntarily reports the facts to the Security and Exchange Surveillance Committee before it commences the investigation, it can receive a 50 per cent reduction of the regulatory fine.

With respect to criminal investigations, at present there are no formal mechanisms by which a target business can cooperate with the investigation. A corporation can notify the Police Agency or Public Prosecutor's Office of potential wrongdoing before the investigation has started, and in general cooperation with the investigation is regarded as a mitigating factor for the prosecution, but a corporation should consider the fact that there is no formal system that assures that cooperation with the investigation mitigates the risk of a criminal procedure. On 24 May 2016, the act to reform the Code of Criminal Procedure was approved at Congress and was promulgated on 3 June 2016. The reformed Code of Criminal Procedure introduces a system that enables the public prosecutor to negotiate with the defence counsel in certain cases, and if the defendant cooperates with the investigation against other parties, the public prosecutor could drop the case against that defendant, or request a reduced penalty from the court. The new cooperation system will be in force within two years from the promulgation of the act.

**22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?**

In a cartel case, there is a leniency system in Japan, and a corporation can mitigate the risk by voluntarily reporting wrongdoing to the Japanese Fair Trade Commission. Under the Antimonopoly Act, five parties can apply for leniency applications. The first-place party can receive immunity from regulatory fines, the second-place party can receive a 50 per cent reduction of the regulatory fine, the third-place party can receive a 30 per cent reduction of the fine, and fourth- and fifth-place parties can receive a 30 per cent reduction of the fine if they provide information and evidence that the authorities do not have. After the on-site investigation, three parties can apply with a leniency application, and receive a 30 per cent reduction if they provide information and evidence that the authorities do not have.

In addition, for certain violations of the Financial Instruments and Exchange Act (such as insider trading, in which a listed corporation deals with its own stocks, failing to submit a security report, or submitting a false security report), if a corporation voluntarily reports the facts to the Security and Exchange Surveillance Committee before the Committee requests that the corporation submit a report, or before the Committee conducts an on-site investigation, it can receive a 50 per cent reduction of the regulatory fine.

Other than that, the principal government enforcement entities do not have formal voluntary disclosure programmes.

**23 Can a target business commence cooperation at any stage of the investigation?**

A targeted corporation can cooperate with the investigation at any stage. However, in criminal procedure, there is no formal system for cooperation that ensures preferential treatment of the corporation.

**24 What is a target business generally required to do to fulfil its obligation to cooperate?**

With respect to a cartel, parties who apply for leniency must submit a report or evidence requested by the Japanese Fair Trade Commission. If a corporation fails to comply with that request, it will lose the benefit of the leniency application.

Other than that, there is no formal system for cooperation by the target.

**25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?**

In practice, a corporation often pays attorneys' fees for its employees, and the public prosecutor rarely cares about who pays the attorney's fees for the employees.

**26 What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?**

Under Japanese labour law, if an employee refuses to cooperate with an internal investigation, he or she can be subject to disciplinary action, because the employee owes a duty to provide labour, and cooperation with the internal investigation can be regarded as a part of his or her labour if the topic of the investigation relates to his or her job. However, because Japanese labour law severely restricts the termination of employment, it is difficult to terminate employment merely because the employee refuses to cooperate with an internal investigation.

It can also be said that cooperating with a governmental investigation is a part of the employee's job, and the corporation may take disciplinary action against non-cooperating employees. However, because the employee is facing the risk of the investigation and must defend him or herself, it is quite rare that a company takes disciplinary action against an employee who does not cooperate with a governmental investigation.

In Japan, employees usually decide to cooperate with an investigation because they believe it will be better for them, because the cooperation will be a mitigating factor, or non-cooperation might lead the authorities to arrest them.

**27 How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?**

There is no concept of legal professional privilege in Japan.

**Resolution****28 What mechanisms are available to resolve a government investigation?**

In Japan, the public prosecutor has wide discretion with respect to whether to bring charges.

If the public prosecutor thinks that there is not sufficient evidence to prove a crime, he or she will drop the case before the indictment, and even in the case where there is sufficient evidence to prove the crime, the public prosecutor will often drop the case after considering various factors. For example, the public prosecutor may drop the case if it is relatively minor, the defendant admits his or her guilt, the defendant shows regret, or the defendant has no criminal record.

If the public prosecutor decides to indict the defendant, the trial begins, and the trial court decides whether he or she has committed a crime, and the penalty.

In Japan, there is no system of plea negotiations.

**29 Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?**

In Japan, there is no system of plea negotiations, and an admission of wrongdoing by the target is required during the process of an investigation.

If the target admits wrongdoing, the fact that it admits it can be used against it in civil litigation.

**30 What civil penalties can be imposed on businesses?**

There is no civil penalty system in Japan.

**31 What criminal penalties can be imposed on businesses?**

A monetary fine may be imposed on the corporation as a criminal penalty.

**32 What is the applicable sentencing regime for businesses?**

Under Japanese criminal law, an applicable sentence range is provided for each crime. The judges have discretion to decide the sentence within that sentence range. The public prosecutors make sentencing recommendations in the closing argument at the trial, but judges are not bound by the recommendation and decide the sentence considering the sentencing of similar preceding cases. There is no sentencing guideline in Japan.

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**33 What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?**

An admission of wrongdoing in itself does not affect a business's future participation in particular ventures or industries. However, an admission will end up as a guilty judgment unless the public prosecutor drops the case, and a guilty judgment will affect the business's future participation in particular ventures or industries. For specific businesses, a licence or permission from the authorities is required, and if a corporation or its officials or employees are found guilty, the licence or permission may be cancelled.

Therefore, it is necessary to check whether a judgment of guilt will affect a licence or permission that a corporation retains. In addition, if the corporation or its officials or employees are indicted or receive a judgment of guilt, a corporation may be excluded from public procurement (the details of the conditions of exclusion vary according to the owners (eg, each local government has its own rules).

Finally, if the corporation receives a judgment of guilt for an offence of bribery of foreign public officials, it may be excluded from financing from export credit agencies, such as the JBIC and IDB, and may also be excluded from projects for which the World Bank Group provides financing.



## Getting the Deal Through

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