

Government Investigations 2022

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Government Investigations 2022

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Government Investigations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, John D Buretta of Cravath, Swaine & Moore LLP, for his assistance with this volume.



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ENFORCEMENT AGENCIES AND CORPORATE LIABILITY

Government agencies

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

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

- the Public Prosecutors Office (PPO) and the Police Department;
- the Japan Fair Trade Commission (JFTC);
- the Security and Exchange Surveillance Commission (SESC) and Financial Services Agency (FSA);
- the Consumer Affairs Agency; and
- the Personal Information Protection Commission (PIPC).

Scope of agency authority

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?

Police Department and PPO

Investigations of criminal offences such as fraud, bribery and money laundering are primarily conducted by the Police Department under the supervision of the PPO. The Police Department has the authority of search, seizure and arrest under a warrant issued by the court. In some high-profile or complex white-collar crime cases, the PPO, specifically its Special Investigation Department, may initiate an investigation on its own.

JFTC

The JFTC has the authority to conduct investigations into violations of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended, Antimonopoly Act (AMA)), Japanese competition law.

The JFTC may conduct investigations on a voluntary basis with enforcement power, and impose administrative sanctions including cease-and-desist orders and administrative surcharges. These sanctions may be imposed without court involvement (the party may challenge the enforcement in court).

However, criminal sanctions may only be imposed by a judgment of the court, and the JFTC needs to hand over the case to the PPO to file an action.

SESC

The SESC has the authority to regulate the securities market and to monitor Financial Instruments Business Operators (FIBOs) such as brokers, dealers, securities companies, investment managers and investment advisers. This includes investigation into misconduct in

the stock exchange and other securities markets, inspection of disclosure by listed companies, supervision of securities companies and brokerage, and monitoring FIBOs and unregistered business operators. The SESC has statutory power to recommend administrative actions, administrative surcharge payment orders or criminal charges to the FSA, as regulated under the Financial Instruments and Exchange Act (Act No.25 of 1948, as amended (FIEA)).

FSA

The FSA has the statutory power to make detailed regulations for financial matters such as banking, securities, insurance, and cryptocurrency, and to supervise bank, securities, insurance and other financial business and regularly conducts off-site and on-site monitoring.

PIPC

The PIPC has the authority to enforce Japanese privacy laws, namely the Act on the Protection of Personal Information (Act No. 57 of 2003, as amended) (PPI) and investigates any violation thereof. The PIPC can delegate its investigative power to other government agencies in charge of specific industries (eg, the FSA in the financial sector) to investigate potential misconduct regarding the PPI. Recently, the PIPC has been active in investigating violations by corporations. The PIPC has jurisdiction to investigate companies located outside Japan, and recent revision reinforces its investigative tools (eg, mandatory request against foreign companies for information).

Simultaneous investigations

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?

Yes, government entities may simultaneously investigate the same target business when the target business is suspected of violating multiple laws or regulations. No law prevents the government entities from sharing information and coordinating their investigation.

At criminal charge stage, the PPO and other government entities work together to collect evidence and prepare for the trial.

Civil fora

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

Civil charges can be imposed as administrative sanctions without the involvement of a court. Government agencies can directly issue administrative orders, including cease-and-desist order, business suspension order, and administrative surcharge, as allowed in each law and regulation. If a target company is not satisfied with the application of an administrative order, the company can appeal to the court.

Japanese law requires that criminal charges be examined in criminal court proceedings, and the PPO has the exclusive power to bring a criminal charge.

Corporate criminal liability

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?

A corporation can be held criminally liable only if the laws or regulations applicable to the alleged misconduct provide criminal liability (ie, a criminal fine) for corporations on top of criminal liability for individuals. The AMA and the FIEA as well as a number of industry-specific regulations provide criminal liability for corporations.

A corporation is criminally liable when its legal representative, officers or employees commit the relevant crime in connection with the business of the corporation.

On the other hand, crimes under the Penal Code (Act No. 45 of 1907, as amended) do not have the reach of corporate liability.

Bringing charges

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

Once the case is referred to the PPO, the Public Prosecutor has the sole discretion to determine whether to bring criminal charges. There are no published guidelines or standards for the PPO's determination. When bringing charges, Public Prosecutors consider various factors, including pervasiveness of wrongdoing, corporate history of misconduct, and timely and voluntary disclosures.

In some laws, including the AMA, the government agency responsible for enforcement must refer the case to the PPO if the agency deems criminal charges necessary. Some agencies disclose their guideline on what factors the agency will consider when determining the referral. For example, the JFTC has published its policy setting out the standards for referring criminal antitrust cases to the PPO. According to this policy, the JFTC will actively refer the case to the PPO for bringing a criminal charge for:

- malicious and serious cases that would have a pervasive impact on people's lives, or
- cases of repeat offenders or industries in which violations are repeated and where the JFTC believes that it is unable to achieve the purposes of the AMA through the pursuit of administrative sanctions.

INITIATION OF AN INVESTIGATION

Investigation requirements

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

Government agencies can conduct administrative investigations when necessary if the law gives the agency the power of investigation. Usually there are no requirements for initiating an administrative investigation (statutes may have a vague requirement such as that the investigation must serve purpose of the statute), and each agency has its own standard internally.

For criminal investigation, in specific areas including the Antimonopoly Act (AMA), the Public Prosecutors Office (PPO) can conduct a criminal investigation only after it receives an official criminal referral from the government entity that regulates the violation.

Triggering events

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

Government enforcement agencies have various ways of triggering investigation, both proactive and reactive, and different enforcement entities have their own triggering events. Typical examples of triggering events include, for example, tip-offs from a third party (eg, employees, competitors, or journalists), self-reporting to the agency, or general surveillance of the market.

The Japan Fair Trade Commission (JFTC) has utilised a leniency programme, which incentivises AMA violators to self-report wrongful conduct (ie, cartel and bid rigging). This programme has been successful in detecting cartels, and other laws, including consumer protection law, have resulted in the creation of similar systems.

The Security and Exchange Surveillance Commission (SESC) monitors securities companies and other regulated business. The stock exchange, security companies, and others conduct an examination of transactions and report their results to the SESC, which may show suspicious activity and trigger an investigation.

Whistle-blowers

9 | What protections are whistle-blowers entitled to?

Whistle-blowers are protected under the Whistle-blower Protection Act (Act No. 122 of 2004, as amended). The employer is prohibited from terminating, demoting, decreasing salary or taking any action that negatively affects employment conditions in retaliation of the employee's whistle-blowing activity. Wrongful termination in retaliation of the whistle-blowing becomes void.

In 2020, the Whistle-blower Protection Act was revised to strengthen the protection of whistle-blowers, which made it easier for employees to report corporate wrongdoing. The amendment requires companies operating in Japan to establish the necessary internal systems to address whistle-blower allegations properly. It also imposes an obligation on staff in charge of the investigation in receipt of the whistle-blower allegations to protect whistle-blower confidentiality and criminalises conduct that divulges confidential information in relation to whistle-blowers.

Investigation publicity

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?

There is no set of rules for government entities as to when they publicly acknowledge an investigation. In principle, criminal and administrative investigations are conducted in confidence, and the enforcement agency will not disclose the existence of the investigation. Often, when the agency takes any action conducted openly (eg, dawn raid), the press will obtain the information and cover the story. A listed company subject to investigation may disclose the investigation under the disclosure obligation.

EVIDENCE GATHERING AND INVESTIGATIVE TECHNIQUES

Covert phase

- 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?

Yes, government entities typically initiate the investigation covertly and, once a certain level of suspicion is reached, they approach the target business. The length of the covert phase depends on the complexity and scale of the case. Sometimes, government entities take months or even years in the covert phase to collect primary evidence. In cases where the government entity contemplates arresting relevant individuals to bring criminal charges, the government entity collects available evidence before approaching the business, because of the time limit of prosecution after the arrest as well as the risk that relevant individuals would destroy evidence or flee.

- 12 | What investigative techniques are used during the covert phase?

During the covert phase, government entities may, inter alia, obtain publicly available information or order a third-party information holder (eg, cell phone companies or banks) to produce relevant information to the extent the relevant law allows, interview informants such as whistle-blowers or competing business.

Investigation notification

- 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?

Once a target business becomes aware of the investigation, it should immediately conduct an internal investigation to understand the relevant facts and application of laws. It is essential to retain outside counsel and other advisers, including forensic experts, to properly conduct an internal investigation. The internal investigation includes interviews with relevant employees, review of emails and other communication, and preserving documents and data to avoid destruction. Although Japanese law does not have the concept of 'litigation hold', the target business should take all necessary steps to prevent the destruction of evidence, because obstruction of an investigation is a criminal offence under most statutes, the destruction would give a negative impression to an enforcement agency and the destruction would prevent the target business from properly assessing the magnitude of potential misconduct.

Evidence and materials

- 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 is no explicit legal obligation for the target business to preserve documents, recorded communications, or any other materials in connection with a government investigation, but the target business should take all necessary means to prevent the destruction of documents or any other materials.

Leniency applicants under the Antimonopoly Act (AMA) may be required by the Japan Fair Trade Commission (JFTC) to make additional submissions and, if they do not satisfy this requirement, they may lose their leniency position. Also, if the target business decides to utilise a cooperation credit system under the new AMA, the target business will

be obligated to cooperate with the JFTC's investigation and failure to do so will result in no or less cooperation credit. Therefore, a target business that intends to apply for leniency or to utilise cooperation credit under the AMA must bear in mind that the destruction or disposal of relevant documents may negatively impact its leniency status.

Providing evidence

- 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?

Government entities can require the target business to provide virtually any kind of materials (including documents, records and recorded communications) during an investigation, as long as it may be relevant to the case. Many regulations vest in government entities the power to request that the target business produce relevant materials and, depending on the applicable statutes, non-compliance may result in criminal charges.

The Act on the Protection of Personal Information (PPI), the data protection and privacy law in Japan, does not impose any limitations on the government entity's requirement for disclosing such materials or provide any grounds for the target business to refuse government investigations. It even sets out that no consent from the data holder will be required for submission of personal data where the target business is obligated under a statute to produce the personal data (article 23(1) (i) of the PPI).

- 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?

Government investigations in Japan can be initiated by a request for the voluntary production of materials, in which case the target business can negotiate the scope of the materials that it provides.

However, if the government makes mandatory production demands based on statute, there is no legal ground on which the business may oppose the government's demand for materials.

There is no professional privilege under the Japanese law, except the one recently introduced only in AMA procedures. In practice, the Public Prosecutors Office (PPO) may seize any communication between in-house counsel and other employees. In a recent case, the press covered a story in which the PPO seized personal computers used by in-house counsel who had conducted an internal investigation of the case.

The revised AMA took effect in December 2020, which introduced attorney-client privilege applicable only to communications made in relation to suspected violations of the AMA within the scope of the leniency programme. Although this is a very important improvement for the defence of corporate clients in antitrust cases in Japan, the scope is still limited to the context of conduct subject to the leniency programme, and in-house counsel (with few exceptions) and foreign lawyers are excluded from the protection of attorney-client privilege.

Employee testimony

- 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 government (administrative agencies, police department and public prosecutors) may request that employees of the target business cooperate in interviews and give their statements voluntarily. The government may not compel statements of employees during a voluntary interview.

Where an employee's criminal liability is at stake, the employee has the right against self-incrimination protected under the Japanese Constitution. When the employee is arrested, the police department and the PPO may compel the employee to attend interrogations, but even in that situation the right against self-incrimination is upheld.

In practice, when government entities try to obtain necessary information, they issue an order to a corporation to report relevant information, based on the applicable statute. Failure to report, or false report, may result in criminal sanction.

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

Employees should obtain their own legal counsel where a conflict of interest with the target business is reasonably expected. If an employee becomes a target of an investigation that may lead to criminal liability, the employee should retain separate legal counsel. In practice, it has been rare for employees to retain their own counsel during the investigation into the target business, but this situation will likely change with the introduction of the criminal prosecutorial bargaining system in Japan, where an employee may report wrongdoing by an employer to obtain lenient treatment, which will create a conflict of interest between the employer and the employee.

Sharing information

- 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?**

Target businesses are not prohibited from sharing information to assist in their defence; however, targets should act carefully to avoid creating suspicion that they are trying to conspire to make false statements, or conceal or destroy evidence. Target business cannot assert privilege for any communication between target businesses (joint defence privilege does not exist in Japan).

Investor notification

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

Listed companies may be required to immediately disclose important government investigations under the securities listing regulations of the stock exchange (such as the Tokyo Stock Exchange, Inc). In this section, we only refer to the securities listing regulations of the Tokyo Stock Exchange (the Securities Listing Regulations). If the initiation of government investigations falls under 'material matter' it requires timely disclosure (section 402(2)(x) of the Securities Listing Regulations). It

must be decided on a case-by-case whether the initiation of investigation should be disclosed. In the very early stage of an investigation, especially in the covert stage, the target business may not disclose the existence of an investigation, because the result or the potential impact of the investigation is still unknown and the government agencies may request target companies not to disclose the existence or initiation of the investigation. Once the investigation is conducted openly (eg, the government agency conducts a dawn raid), the listed company usually discloses (and confirms) the mere fact that the investigation has been initiated without referring to any detail to avoid making misstatements.

In addition, unless a de minimis exemption is applied, the Securities Listing Regulations require the disclosure of the imposition of any other disciplinary action by an administrative authority or an accusation of a violation of the law or regulations by an administrative authority (see article 402(2)(f) of the Securities Listing Regulations). Therefore, disclosure is required immediately following the issuance of a final decision by an administrative authority relating to the investigation. When disclosure is required at this stage, the company must disclose the background of the occurrence, a summary, the future prospects and any other matters in relation to the investigation that the stock exchanges consider to be material to investment decisions.

Non-listed companies are not subject to these disclosure requirements. Thus, the target business has the discretion to decide what, when and how to disclose.

COOPERATION

Notification before investigation

- 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?**

Government entities may commence investigations by requesting that the target business cooperates with the government entity on a voluntary basis.

Some laws and regulations provide a mechanism for a target business to cooperate with the investigation. The most common example would be the leniency programme under the Antimonopoly Act (AMA), which is explained more in detail below.

Another example is the self-reporting programme under the Act against Unjustifiable Premiums and Misleading Representations (Act No. 134 of 1962, as amended) (UPMR), which prohibits misleading labelling or misrepresentation on goods or services to consumers.

The AMA

The AMA provides a leniency programme for self-reporting of cartel activities and bid rigging.

In 2020, the AMA was revised so that its leniency programme now creates more incentive for a target business to cooperate with the Japan Fair Trade Commission's (JFTC) investigation proactively. The revisions, which took effect in December 2020, include:

- the JFTC is given certain discretion to decide the reduction rate considering the degree of cooperation by target companies; and
- the limitation on the number of target companies that can apply for leniency was lifted so that as many target companies as necessary will have an incentive to cooperate with the JFTC's investigation.

The detailed chart of the revised leniency programme is as follows:

The timing of application	The order of application	Reduction rate according to the order of application	Reduction rate according to the degree of cooperation
Before the investigation start date	1st	100 per cent	
	2nd	20 per cent	
	3rd-5th	10 per cent	+ up to 40 per cent
After the investigation start date	6th and after in order	5 per cent	
	Up to three	10 per cent	
	Other than the above	5 per cent	+ up to 20 per cent

The Financial Instruments and Exchange Act

A company can voluntarily notify the relevant authority of its violations prior to the initiation of the investigation and be granted a 50 per cent reduction of administrative surcharge. This is limited to certain conduct such as insider trading of a company's own shares, failing to make mandatory financial reports or making false statements in mandatory financial reports.

Consumer protection

Under the UPMR, a 50 per cent reduction of administrative surcharges is granted if a voluntary report is made to the Consumer Affairs Agency prior to the initiation of an investigation into certain advertisements or labelling that would mislead or confuse consumers.

Voluntary disclosure programmes

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

Some laws and regulations provide a mechanism for a target business to cooperate with the investigation. The most common example would be the leniency programme under the AMA.

Moreover, even if the statute does not stipulate a formal voluntary disclosure programme, it may be advisable for a target business to cooperate with the investigation as the government entity often has discretion over what kind of administrative order the government will impose and self-disclosure may influence the government to make a lenient decision.

Timing of cooperation

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

Yes, a target business can commence cooperation at any stage of the investigation. However, benefit from leniency programme varies depending on the timing of reporting.

Cooperation requirements

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

A target business cooperating with government investigations is typically required to produce documents and data, to provide relevant information, and make its employees available for interviews to the extent possible.

Employee requirements

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?

As part of the employee's duty to the employer, a target business can require employees to cooperate with the response to the government investigation. This usually includes making himself or herself available for an interview by corporate counsel, submitting relevant documents or electronic data to the employer and, if necessary, making himself or herself available for an interview by the government entity.

In Japan, it is not unusual for a target business to pay employees' attorney fees when the employees retain their own legal counsel. Government entities do not usually consider the payment of attorney's fees negatively in evaluating the target's cooperation.

Why cooperate?

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?

The considerations for employees at the target business differ greatly depending on the type of misconduct at issue and the employee's involvement in the misconduct.

If the issue is an administrative charge against the target business and individual employees are unlikely to be subject to criminal charges, it is often in the employees' best interest to cooperate with the employer's internal investigation as well as reaction to the government's investigation. In cases where individual employees may be subject to criminal charges, the consideration becomes complicated and requires detailed analysis of the situation. This has become more prevalent after the introduction of the prosecutorial bargaining system on 1 June 2018, where the employee is entitled to cooperate with the criminal investigation separately from its employer.

The target business may request its employees to cooperate with a government investigation (eg, attending interviews, drafting a report, and producing documents as part of the duties under employment). If the employee does not cooperate, the target business may take disciplinary actions pursuant to its internal rules and policies. However, under the employee protections in Japanese labour law, dismissal may only be allowed under very limited circumstances.

Privileged communications

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 general concept of legal privilege in Japan. Thus, documents containing legal advice from legal counsel to a target business may be subject to production upon the government's request, if they are relevant to the investigation. In the litigation stage, civil procedure law and criminal procedure law confer some protection to information owned by the attorney. Specifically, the attorney has a right to refuse testimony in the court proceeding regarding confidential communication with the client.

As mentioned, the revised AMA will provide limited attorney-client privilege on communication during the administrative investigation stage. Under the revised AMA and its guidelines, confidential communication between an independent counsel and a target business related to legal opinion on the AMA related to conducts subject to a leniency

application will be protected under attorney–client privilege. The communication to be privileged must be separated from other documents and labelled as privileged communication (the specific method of labelling is clarified in the guidelines in detail). The guidelines also lay out procedures for a target business to claim attorney–client privilege.

RESOLUTION

Resolution mechanisms

28 | What mechanisms are available to resolve a government investigation?

A new prosecutorial bargaining system came into force on 1 June 2018. Under the new system, the public prosecutor may close the investigation by entering into a non-prosecution agreement with a suspect in exchange for the suspect providing information regarding crimes committed by another natural person or corporate entity. Both natural persons and corporations can negotiate with the public prosecutor to enter into a non-prosecution agreement to resolve an investigation. This means that a corporation can enter into a non-prosecution agreement to avoid corporate criminal liability by providing evidence and other cooperation so that the public prosecutor can bring an enforcement action against the corporation's directors and employees. Under the Japanese system, a corporation or individual is not allowed to use the prosecutorial bargaining system just by admitting its own wrongdoing (ie, providing information on a crime committed by others is required.)

In the Antimonopoly Act (AMA), a new commitment procedure in non-cartel investigation was also introduced. Under the commitment procedure, after the Japan Fair Trade Commission (JFTC) initiates an investigation into a non-cartel type violation, the JFTC may solicit the target company to propose a commitment plan to resolve competitive concern. If the target business proposes the commitment plan and the JFTC accepts the proposal, the JFTC will not issue a formal cease-and-desist order or surcharge payment order. Since its introduction, the commitment procedure has been used quite broadly in non-cartel antitrust cases to resolve matters quickly without any administrative penalty.

Admission of wrongdoing

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?

The target business is not required to admit wrongdoing in any circumstances as this is protected in the context of criminal procedures as privilege against self-incrimination under the Japanese Constitution.

From a legal standpoint, a target business that admitted wrongdoing can contest civil claim in relation to the same case, as there are elements specific to civil claim that the target business can argue against civil litigants. Having said that, an admission made in the investigation stage can be used against the business in the subsequent procedures including civil claim, as the admission can be used as evidence to infer that the business committed wrongdoing.

Admission of wrongdoing at the early stage of investigation may have a positive effect. In many cases, the government agencies have discretion over whether any sanction should be imposed and how severe sanction should be, and early admission will show its sincerity to the government that can use its discretion for the benefit of the business. Thus, upon initiation of the investigation, the target business faces a difficult decision, considering the pros and cons of cooperation with the government's investigation.

Civil penalties

30 | What civil penalties can be imposed on businesses?

In Japan, government entities may impose administrative sanctions in accordance with applicable laws and regulations. This includes, for example, administrative surcharges under AMA, the Financial Instruments and Exchange Act and the Act against Unjustifiable Premiums and Misleading Representations. The amount of Japanese administrative surcharges is calculated so as to impose enough of a sanction to confiscate unjustifiable profit made by wrongdoing and can be substantial for the target businesses. The largest administrative surcharges ever imposed by the JFTC for violation of the AMA in a single case were ¥39.8 billion for eight target businesses combined and ¥13.1 billion for a single target business.

Criminal penalties

31 | What criminal penalties can be imposed on businesses?

In accordance with applicable laws, a target business may be subject to a monetary fine by way of a criminal penalty determined through a criminal trial. The amount tends to be much lower than in the United States or the European Union.

A natural person, including directors, officers and employees, can be sentenced to imprisonment or a fine separate from corporations, or both.

Sentencing regime

32 | What is the applicable sentencing regime for businesses?

In criminal trials, after a hearing is completed, the prosecutor makes a closing argument and offers a sentencing recommendation. Considering various factors, the judge (or a panel of judges) has a final say as to the amount of the criminal fine within the range of penalties provided in the applicable law. There are no codified standards or criteria to be referred to when sentencing and judges are not bound by the sentencing recommendation of the prosecutor. In practice, judges usually refer to judicial precedents to determine the amount of the criminal fine. A disproportionate or unreasonable sentence may constitute a basis for appeal.

Future participation

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

An admission of wrongdoing does not by itself prevent the target business from future participation in ventures or industries. However, violation of applicable law or regulations may result in suspension or withdrawal of business licences in regulated industries. Similarly, some licensing regimes require that the business not be charged with violation of the applicable law or regulations.

UPDATE AND TRENDS

Key developments of the past year

34 | Are there any emerging trends or hot topics that may affect government investigations in your jurisdiction in the foreseeable future?

The legal community continues to take a closer look at how the Public Prosecutors Office (PPO) uses the prosecutorial bargaining system in practice. In 2019, the second case using the prosecutorial bargaining system was reported. The case involved Nissan and its false disclosure in its security filings. It was reported that two executives of Nissan

used the prosecutorial bargaining system and submitted information to support the PPO to prosecute Carlos Ghosn, former chief executive officer of Nissan.

Businesses are also keeping a close eye on how the Japan Fair Trade Commission will operate the revised leniency programme, as well as protection of attorney–client privilege. This is the first system where government entities have discretion in determining the amount of administrative surcharge, and protect communication between independent legal counsel and businesses. The Japanese antitrust bar is quite interested in the development in practice.

Finally, enforcement of privacy law has become stronger than ever in Japan, following the global trend of vigorous enforcement. In 2019, the Personal Information Protection Commission (PIPC) made the first recommendation in its history against a business in relation to the mishandling of personal information by a recruiting company. Also, the number of investigations by the PIPC remains very high in recent years, including the mishandling of personal information in digital spaces. We expect the trend will continue and that the PIPC will expand its investigatory authority to foreign companies, which will assist the PIPC in enforcing Japanese privacy law globally.

Coronavirus

35 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Although the Japanese government has generally been very active in addressing the covid-19 pandemic, we have not seen any specific legislative action regarding governmental investigation in response to the pandemic. In practice, governmental agencies may be flexible in their approach to conducting investigations in response to the pandemic, such as avoiding face-to-face interviews or interrogations. Thus, it would make sense for a target business to consult with its lawyer and to negotiate with the agencies regarding their approach to investigations during the pandemic.



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