

## ENFORCEMENT PRACTICE AGAINST CORRUPTION IN JAPAN

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### I. INVESTIGATION OF CORRUPTION CASES

Japan has no specialized commission or agency which is responsible for investigating corruption cases. In Japan, there are two authorities that have responsibility for investigating all criminal cases: the first is the police, the second is the Public Prosecutors' Office. No other agencies have the power to investigate corruption cases; only the police and public prosecutors have the power to investigate.

#### A. Police

[Art. 189(2) Code of Criminal Procedure (CCP)]

A judicial police official *shall*, when he/she deems that an offense has been committed, investigate the offender and evidence thereof.

The police are obliged to investigate any crime including corruption offences.

#### B. Public Prosecutors

[Art. 191 CCP]

A public prosecutor *may*, if he/she deems it necessary, investigate an offense him/herself.

This article also provides public prosecutors with the power of criminal investigation; however, it leaves that power to the prosecutors' discretion. Thus, the police are the primary investigative organ in Japan, while public prosecutors have discretionary power to investigate all criminal cases.

#### C. Relationship between the Police and Public Prosecutors

Most criminal cases (over 99%) are initially investigated by the police, and the police must refer the case to public prosecutors with documents and evidence after they launch an investigation. The public prosecutor who receives the case from the police begins his investigation, which is supplementary to the police investigation and is undertaken with the cooperation of the police. The public prosecutor requests the police to conduct further investigation and to collect more evidence crucial to proving the offender's guilt. In addition, public prosecutors directly conduct interrogation of suspects and interview key witnesses of the case. Finally, public prosecutors determine whether to indict the suspect or not.

This framework also applies to investigations of corruption cases. Most corruption cases are first investigated by the police, and public prosecutors investigate the case supplementary. However, in a very small number of cases (less than 1%), public prosecutors conduct investigation independently, without the cooperation of the police. These tend to be the major corruption cases involving politicians, high ranking officers, and complicated economic crimes.

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## Statistics of Bribery 2011

	Newly received			Final disposition			
	Total	Initiated or received directly by public prosecutors	Referral from the police	Total	Indicted	Suspension of Prosecution	Other non-prosecution
Total	61	5	56	47	41	1	5
National Diet Members	-	-	-	-	-	-	-
Local assembly	18	1	17	6	5	-	1
Government officials	4	1	3	4	3	-	1
Local government officials	34	3	31	32	30	1	1
<i>Quasi-public officials</i> <sup>1</sup>	5	-	5	5	3	-	2

※White Paper on Crime 2012

The above statistics are about passive bribery (bribery-taking) suspects newly received and whose cases were disposed of in 2011. As shown, 56 suspects were investigated and referred to prosecutors by the police while 5 suspects were investigated by prosecutors independently.

### D. Structure of Independent Investigation of Corruption Cases in the Public Prosecutors' Office

In large offices, public prosecutors are divided into several departments and share the work. For example, there is the criminal department, traffic department and public security department which all handle the investigation of the cases referred from the police. There is also the trial department, which conducts the trials of the cases indicted by prosecutors in the above departments.

On the other hand, there is also the Special Investigation Department (SID). Public prosecutors in this department do not investigate cases referred by the police. They independently investigate major corruption cases and complicated economic cases by themselves. In Japan, there are three SIDs — in Tokyo, Osaka, Nagoya — and there are Special Investigation Units in 10 other district public prosecutors' offices. The most competitive prosecutors with great knowledge, skill and experience in corruption cases are assigned to these departments and units, especially in the SIDs of the Tokyo District Public Prosecutors' Office. For example, currently, around 30 public prosecutors and around 80 assistant investigators belong to the SIDs of the Tokyo District Public Prosecutors' Office.

<sup>1</sup> "Quasi-public officials": persons who are regarded as engaging in official duties pursuant to laws and ordinances, such as officers of the Bank of Japan and the Japan Broadcasting Corporation.

## II. PUBLIC PROSECUTORS' BASIC INVESTIGATION METHODS FOR CORRUPTION CASES

### A. Investigative Tools

Japan has not introduced any advanced investigative techniques for corruption cases. For example, Japan has no plea bargaining or immunity, no electronic surveillance, wiretapping or eavesdropping, and no undercover or sting operations. On the other hand, it is necessary for public prosecutors to obtain enough evidence to meet the high standard of proof, that is, "beyond the reasonable doubt", by making the best of all investigative methods permitted by law. In this sense, public prosecutors conduct "Intensive Investigation" in terms of physical evidence gathering and its analysis, interviewing key witnesses and interrogating suspects.

### B. Typical Process of Investigation

#### 1. Main Elements of Bribery under Japanese Criminal Law

The main elements constituting bribery under Japanese criminal law are as follows:

- Delivery of a bribe / Flow of funds
- Connection between the bribe and the public official's duties ("quid pro quo")
  - Request of bribe-giver to bribe-taker
  - Favour of bribe-taker to bribe-giver
- Criminal intent ("*mens rea*")

Among those elements, the hardest to find and prove is delivery of a bribe, usually a flow of funds between a bribe-giver and a bribe-taker, because the source of the bribe is usually a secret account of a company. On the other hand, establishing a connection between the bribe and the public official's duties, "quid pro quo", is not so difficult as far as government officials are concerned because their official duties have been interpreted broadly enough to cover almost all corrupt activities.

#### 2. Outline of the Typical Process of Investigation

Investigation is roughly divided into four steps:

- 1) Collecting Clues
- 2) Non-Compulsory Investigation
  - Analyzing clues / voluntarily submitted evidence
  - Obtain further information and evidence to identify the crimes and suspects
  - Interview key witnesses
- 3) Compulsory Investigation
  - Search and Seizure
  - Interrogate suspects under arrest / detention
- 4) Indictment
  - Decision whether or not to indict the case

\* Collecting clues is important. When public prosecutors have good clues, they begin investigations to obtain more evidence. As the CCP in Japan requires that investigations must be conducted on a non-compulsory basis as much as possible, firstly, public prosecutors conduct non-compulsory investigations. In the non-compulsory investigation stage, public prosecutors gather as much evidence as they can without relying on compulsory investigation. Public prosecutors aim to gather enough evidence to indict suspects even though they deny the facts constituting the crime in the non-compulsory stage. In other words, if enough evidence was not collected in the non-compulsory stage, public prosecutors may move to compulsory investigation,

in particular by arresting suspects. Therefore, it usually takes several months and sometimes more than a year to complete the non-compulsory investigation stage.

The compulsory investigation stage follows if prosecutors succeed in identifying indictable corruption offences through non-compulsory investigation. Massive raids on relevant sites and thorough search and seizure take place. Public prosecutors also arrest suspects and interview them while in detention. Public prosecutors try to gather more evidence to be able to paint the whole picture of the corruption by introducing evidence at trial. Finally, at the termination of a suspect's detention, public prosecutors determine whether to indict the suspect.

### 3. Collecting Clues

The following are sources of information for gathering clues at the beginning of an investigation:

- Rumors / Media coverage / Internet accusations
- Criminal Complaints
- Informants / Whistleblowers
- STR / FIU (Suspicious Transaction Reports / Financial Intelligence Units)
- Investigation of other cases

However, good clues are hard to come by, especially direct indications of bribery. Public information such as rumors, media coverage and internet accusations are important as basic information rather than concrete clues. The SIDs receive many complaint letters or telephone accusations every day; however, most of them are frivolous. While informants or whistleblowers directly involved in corruption, especially bribery, are rare, sometimes their information of any wrongdoing is critical to corruption investigations.

The most important source of information is facts discovered through other investigations, for example, investigation of tax evasion referred by the Regional Taxation Bureau, securities fraud cases referred by the Securities and Exchange Surveillance Commission, and anti-trust cases referred by the Japan Fair Trade Commission. It is indispensable to investigate secret accounts and to follow the money trail connecting the people and companies concerned in those cases. The direct involvement of the Public Prosecutors' Office is a great advantage of Public Prosecutors' in such corruption investigations.

### 4. Non-Compulsory Investigation ① - Tracing the Flow of Funds

In the investigation of corruption cases, identifying and proving the flow of illicit funds, namely the source of the bribe, concealment, laundering or use of the bribe, is indispensable but very difficult. Sometimes the evidence that directly proves the flow of funds cannot be obtained until the final stage of the investigation through interrogation of suspects. On the other hand, even if one party to bribery confesses, evidence of the actual flow of the funds must be detected in order to corroborate the confession. Therefore a financial investigation to establish the flow of funds must be started at an early stage.

#### *( i ) Source of the Bribe*

Since the source of a bribe is usually a secret fund, corruption tends to be accompanied by "cooking the books", or the maintenance of false or forged financial records, of the bribing company. Such fraud frequently includes kickbacks and disguised expenditures. Through the examination of account books and other financial documents obtained in other investigations or submitted voluntarily, suspicious expenditures may be identified, and then prosecutors trace them more closely by directing further inquiries to financial institutions.

*( ii ) Inquiries to financial institutions*

Inquiries to financial institutions are one of the most important and widely used tools of investigation.

**[Art. 197(2) CCP]**

**Public offices, or public or private organizations, may be asked to make reports on necessary matters relating to investigation.**

In Japan, jurisprudence has interpreted this statute as requiring financial institutions to respond to prosecutors' requests. It is not necessary to obtain a warrant or subpoena to ask for such reports. In the SID, there are many trained assistant investigators who assist prosecutors, and they are trained to make such inquiries for bank records. Also they know well where and what kind of records are kept in each financial institution. They actually go to banks and their warehouses to find and obtain necessary information and documents.

*( iii ) Secret funds*

By tracing suspicious expenditures, prosecutors may find the funds withdrawn somewhere in cash, which is highly indicative that the funds were being used for corrupt purposes. Then prosecutors prepare to conduct the most effective interview or interrogation of the suspects. In order to detect secret funds, accurate analysis of financial documents is essential. Many prosecutors and assistant investigators in the SID have bookkeeping qualifications. To trace the flow of funds between many bank accounts exactly, we usually integrate all transaction records into one tabular form. On the completed table of transaction records, investigators can trace the flow of funds connected with bribery.

*( iv ) Pseudonymous Bank Accounts*

It is important to discover pseudonymous bank accounts in the investigation of corruption cases because they are likely to be highly connected with bribery. To find them, public prosecutors and assistant investigators in the SID ask financial institutions to voluntarily submit the application documents for opening the bank account, and analyze them carefully. Also, public prosecutors interview bank clerks, the person who opened the bank account, and persons who remitted the funds to the bank account.

5. Non-Compulsory Investigation ② – Interviewing Key Witnesses

*( i ) Importance of interviewing key witnesses*

It is important to find witnesses who are willing to cooperate with the investigation. They will be the key players to support the prosecutions' claims at trial. At the same time, the key witnesses might be the suspect's coworker, a close partner, boss or subordinate of many years. Investigators should make every effort to take statements from such persons because we often face difficulty in detecting where the important evidence is without their statements.

Also, the credibility of statements of the witness should be carefully evaluated, taking into account all factors, such as his/her position, character, knowledge, memory, integrity, relationship with suspects, and so forth.

Once witnesses cooperate with the investigation, they often testify to important facts not only in interviews but also in court. However, sometimes, they refuse to testify in court because they are intimidated by the defendant, who is seated in front of them. To cope with such situations, public prosecutors always obtain signed and sealed written statements during interviews.

*( ii ) Exception to the Hearsay Rule*

The Code of Criminal Procedure of Japan has adopted following exception to hearsay rule.

[Art. 321(1) ii CCP]

A document, which contains a statement of a person given before a public prosecutor, with the person's signature and personal seal, is admissible as evidence in the following conditions:

- He or she does not appear or testify on the date either for preparation for the trial or for the public trial for inevitable reasons; or
- He or she gives testimony contrary to or materially different from his or her previous statements: This shall apply only where there exists special circumstances, because of which the court may find that the previous statements are more credible than the testimony given mentioned above.

If the witness gives testimony at trial which is contrary to or materially different from his/her previous statement during the investigation, public prosecutors try to prove special circumstances, namely that the previous statements in investigation were more credible than the testimony in court, and request judge to admit the written statements made during the investigation stage.

Special circumstances are, for example:

- where the witness has a close relationship with the suspect
- where the witness shared a common interest with the suspect for a long time
- where the defendant is an influential person, such as a politician, and the witness is not expected to tell the truth in front of the defendant.

Therefore, in case the witness cannot testify truthfully, public prosecutors submit the written statement of the interview after proving the existence of such special circumstances.

6. Compulsory Investigation ① – Search and Seizure

*( i ) Simultaneous seizure*

For effective search and seizure, simultaneous execution of search and seizure warrants is the best, because the more time it takes, the more risk of concealment / destruction of important evidence.

To realize effective search and seizure, the public prosecutor in charge of the case should consider:

- Where and how many places should be searched
- What kind of evidence should be seized at each place
- How many public prosecutors and assistant investigators are necessary to complete the search and seizure

If the search is not properly carried out, it will result in the failure to seize crucial evidence, and would lead to destruction of such evidence by those involved.

*( ii ) Arranging an effective search team*

In order to effectively execute a search at many sites at the same time, it is important to establish a good search team that can communicate well. Also, a good leader should be assigned who can give prompt and appropriate direction to the team. In order to allocate appropriate

persons at each site, public prosecutors in charge of the case should have a clear idea of the number of sites to be searched, their scale and locations.

Moreover, in allocating personnel, the nature and the expected situations of each site should be taken into account. For example, if a site is large, it will take a long time to complete the search and seizure. If important evidence is expected to be hidden at the site, experienced investigators should be present. If the defence attorney is expected to be present at the site, prosecutors should be present, and so forth.

Sometimes, there are too many places to search at the same time by only public prosecutors and assistant investigators from SIDs. In such cases, many prosecutors and assistant investigators in other departments or other district public prosecutors are transferred to SIDs for limited periods to enable the SIDs to achieve simultaneous searches and seizures.

*(iii) Advance briefing – for successful search and seizure*

For successful searches and seizures, appropriate advance briefing of personnel is indispensable because, as mentioned above, there are usually a few personnel who do not know the case in detail, including what evidence should be seized at each place.

The objectives of advance briefing are as follows;

- Establish a chain of command, communication network and division of roles in each unit.
- Share common information and purposes among all personnel.
- Prepare for possible emergency situations on the site and effective measures against them.
- Finalize logistical matters (time and place for gathering, departure time, transportation of persons, vehicles for conveying seized evidence, meals for persons during the search, and arrangement of locksmiths).

Advance briefing is usually held just before the search in order to maintain confidentiality. Even staff prosecutors are not informed in advance of the time and date of the briefing, or where they will search.

In most cases, the public prosecutor in charge of the case first summarizes the case and the material evidence necessary to prove the facts. After this explanation each search team has its own meeting in preparation for their search.

*(iv) Analysis of seized evidence*

After finishing the search, analysis of the seized evidence begins immediately. Thorough and swift analysis of seized evidence and sharing the result of the analysis is the key to a successful investigation. This should be done systematically. Therefore, special units for analyzing evidence are often established.

In the initial stage of analyzing evidence, several analysis teams are established based on the location of the evidence. Each team is composed of public prosecutors and assistant investigators, and one public prosecutor is assigned as the leader in each team. For example,

- Team A - in charge of evidence collected at company E
- Team B - in charge of evidence collected at the residence of President F
- Team C – in charge of evidence collected at the office of politician G
- Team D - in charge of evidence collected at the residence of politician G

Sometimes evidence is divided by the issue or the person to which evidence is supposed to have a connection. Such organization is usually used for the second analysis after the initial stage. For example:

- Team A - in charge of account ledgers collected at company E
- Team B - in charge of evidence collected from President F's desks in his residence and the desks at company E
- Team C - in charge of evidence collected at company E, excluding the above president's desk.
- Team D - in charge of evidence collected at the office and residence of politician G

Also, it is not rare that analysis of evidence and interrogating/interview of the persons concerned are conducted at the same time. In that case, the information is always being relayed to the head prosecutor who is in charge of the case; thus important information is only concentrated on one public prosecutor in charge of the case.

*( v ) Sharing information on seized evidence*

To share the results of the analysis of an extensive amount of evidence, prosecutors and assistant investigators make a database. The data is called "The list of articles of evidence". Investigators can access the data from their PCs at any time. The data includes the following matters:

- Number, name and quantity of the evidence
- Name and address of possessor
- Where discovered
- Specific contents of the evidence
- The name of the officer in charge of the analysis
- Whether or not to retain the evidence

## 7. Compulsory Investigation ② – Interrogation of Suspects

*( i ) Importance of interrogation of suspects*

Interrogation of suspects is very important because bribery is conducted secretly between collusive parties. So usually there are no eye-witnesses or self-explanatory physical evidence. Even if we collected much physical evidence, it is necessary to explain what it means. Therefore, confessions have vital meaning. Confessions collaborated by overwhelming physical evidence are the most credible of all.

On the other hand, even if suspects do not confess, it is very important to hear and identify the suspect's excuses. This is because public prosecutors can use the defendants' excuses against them at the trial. In this sense, whether a suspect does or does not confess, interrogation of the suspect plays an important role.

*( ii ) Procedure after arresting the suspects – public prosecutors' investigation*

When public prosecutors have a suspect arrested under an arrest warrant, the prosecutors have to request a judge to issue a detention order within 48 hours after the arrest. During these 48 hours, public prosecutors conduct brief interrogation of the suspect and confirm mainly the suspects' excuses surrounding the alleged crime.



The judge considering the detention order reviews the case and interviews the suspect directly. The judge then decides whether to detain the suspect. If the judge issues a detention order, the suspect is detained for 10 days. During those 10 days, the public prosecutor interrogates the suspect every day.

After 10 days, the prosecutor must decide whether to prosecute the suspect. The prosecutor can indict the suspect at this time. But when there is an indispensable necessity, the prosecutor may request the judge for an order to extend the detention. The detention can be extended up to 10 days. Usually, in corruption cases, detention is extended because of the complicated nature of the cases.

By the termination of the detention term, the prosecutor must decide whether to prosecute the suspect. If the prosecutor does not institute any prosecution by this deadline, the prosecutor has to release the suspect.

*( iii) Regulation on interrogation*

The suspect has a right to remain silent. Confessions must be voluntary to be admissible as evidence in court. If a suspect is compelled to confess by threat and assault by the interrogator, the confession is inadmissible. Therefore, public prosecutors pay attention to suspects' rights during interrogation.

In Japan, defence attorneys are not permitted to be present during the interrogation. However, defence attorneys have the right to access the defendant or suspect in detention. Investigators, including prosecutors, provide defence attorneys with reasonable time to meet the suspect anytime there is a request. Moreover, to ensure that the interrogation has been conducted properly, all suspect interrogations by the SID are currently video recorded.

*( iv) Credibility of confession*

When the suspect confesses, the credibility of the confession must be analyzed, taking into account various factors such as, consistency with other evidence, corroboration by objective evidence, disclosure of facts unknown to investigators, vividness and liveliness and so forth.

*( v) For effective interrogation*

Public prosecutors do not question suspects unprepared; they are armed with concrete evidence and information. For effective interrogations, careful preparations are indispensable. SID prosecutors often deal with politicians, high-ranking officials and corporate executives who are educated or trained to be accountable. So before interrogation, public prosecutors make careful and sufficient preparation for the interrogations.

Generally speaking, public prosecutors keep the following in mind when they interrogate suspects.

- Listening patiently and carefully
- Maintaining a resolute and determined attitude
- Creating an appropriate atmosphere in which to tell the truth
- Never showing prejudice
- Contemplating the best timing for showing evidence
- Thorough, persistent and timely questioning, especially when a suspect begins to confess

In addition, the timing for showing material evidence to a suspect is very important. If public prosecutors show important evidence to a suspect too early in the interrogation, the suspect has time to come up with good excuse.

### **III. WHY THERE IS NO SPECIAL AGENCY DEALING WITH CORRUPTION CASES IN JAPAN**

#### **1. Integrity of Police**

In Japan, the police maintain integrity and public confidence. In 2012, the total number of police officers was 293,588, and 458 police officers out of 293,588 were subject to disciplinary procedures. Most of those conduct resulting in discipline involved theft, misbehaviour under the influence of alcohol, inappropriate relations with the opposite sex, and loss of public money or criminal evidence. Of course the police are not entirely free of corruption, and there are corruption cases committed by police officers; however, the number is very small.

All 47 prefectural police in Japan have in their headquarters a division specializing in investigation of corruption with well-trained detectives, and they eagerly pursue corrupt officials. Japanese police enjoy high confidence from the citizens for their discipline and their investigative ability.

#### **2. Independence of Public Prosecutors**

Public prosecutors' political independence has been highly regarded. Public prosecutors' positions are secured by law. No arbitrary dismissal, suspension, or reduction of salary can be made. In regard to the investigation and disposition of individual cases, the Minister of Justice can control only the Prosecutor General, not each prosecutor, directly. For example, the Minister cannot directly interfere with prosecutors in charge of individual investigations and prosecutions.

Accordingly, it is said that this power of the Minister of Justice has been used only once in more than 60 years since its inception. In April 1954, when Public Prosecutors were investigating a big bribery case involving several high-ranking politicians and trying to arrest the Secretary-General of the majority party, the Minister of Justice, who belonged to the same party, ordered the Prosecutor-General to stop the arrest. Consequently, it led to termination of the investigation. However, since it produced severe criticism from the public through the mass media, the Minister himself resigned the next day, and the strong criticism of opposition parties backed by the media and the general public forced the whole cabinet to resign by the end of the year.

As you can see, in addition to prosecutorial independence, a strong opposition party in Parliament, active mass media and public confidence in the prosecution service all support anti-corruption efforts. Japanese prosecutors can investigate and prosecute central political figures with the highest degree of independence.

### **IV. CONCLUSION**

The following are recommendations of some important points for successful investigation of corruption cases.

- Impartiality, integrity and independence of investigative authorities

- Well-organized investigation
- Prominent leaders and investigators with experience and expertise
- Thorough search and seizure and analysis of physical evidence
- Building good relationships with key witnesses
- Thorough interrogation of suspects
- Confidentiality

Corruption offenders use various methods to tamper with evidence, and prosecuting corruption cases is a significant challenge; however, in Japan, the police and public prosecutors, especially those in SIDs, always endeavor to discover corruption and prosecute the offenders by means of intensive investigation.

