THE ASIA-PACIFIC INVESTIGATIONS REVIEW 2019

Published by Global Investigations Review in association with

AlixPartners

Archer & Angel

DLA Piper

FTI Consulting

Herbert Smith Freehills

Hogan Lovells

Morrison & Foerster LLP

Nishimura & Asahi

Nyman Gibson Miralis

Tilleke & Gibbins

WongPartnership LLP

GIR
Global Investigations Review
www.globalinvestigationsreview.com

The Asia-Pacific Investigations Review 2019

A Global Investigations Review Special Report

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2018
For further information please contact Natalie.Clarke@lbresearch.com

The Asia-Pacific Investigations Review 2019

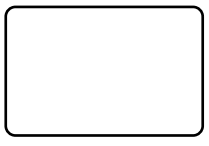
Senior business development manager Nicholas O'Callaghan
GIR Insight business development manager Edward Perugia
edward.perugia@globalinvestigationsreview.com
Tel: +1 202 831 4658

Head of production Adam Myers
Deputy head of production Simon Busby
Chief subeditor Jonathan Allen
Editorial coordinator Hannah Higgins
Production editor Gina Mete
Subeditor Charlotte Stretch

Editor, Global Investigations Review Marieke Breijer
Editor in chief David Samuels

Cover image credit: ismagilov/iStock/Thinkstock

Subscription details
To subscribe please contact:
Tel: +44 20 3780 4242
Fax: +44 20 7229 6910
subscriptions@globalinvestigationsreview.com



ISBN: 978-1-78915-108-4

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

The Asia-Pacific Investigations Review 2019

Published in association with:

AlixPartners

Archer & Angel

DLA Piper

FTI Consulting

Herbert Smith Freehills

Hogan Lovells

Morrison & Foerster LLP

Nishimura & Asahi

Nyman Gibson Miralis

Tilleke & Gibbins

WongPartnership LLP

Contents

Cross-Border Overviews

Country Chapters

Preface

Global Investigations Review is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. ***GIR*** gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers – the most readable explanation of all the cross-border developments that matter, enabling them to stay on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the GIR 100) and – after a successful court decision – obliged the DOJ to release the names of unsuccessful candidates for Foreign Corrupt Practices Act monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. All authors are leaders in their field and we are grateful to them all for their time and energy. We encourage readers and co-authors to share feedback and comments.

If you would like to get involved in future editions or have thoughts for us, please contact edward.perugia@globalinvestigationsreview.com.

We hope you enjoy reading *The Asia-Pacific Investigations Review 2019*.

Global Investigations Review
London
August 2018

Japan: Overview

Kaku Hirao
Nishimura & Asahi

Recent reform of Japanese criminal procedure – introduction of the Negotiation System

On 24 May 2016, the Act to Reform the Code of Criminal Procedure was approved at the Congress and was promulgated on 3 June 2016.[1]

The Act to Reform the Code of Criminal Procedure changes various aspects of criminal procedure and among these changes, the newly introduced Negotiation System will significantly impact investigations into white-collar crime. The Negotiation System came into force on 1 June 2018.

Background to the introduction of the Negotiation System

The Act to Reform the Code of Criminal Procedure was drafted based on recommendations by the special committee within the Legislative Council of the Ministry of Justice. The special committee was formed 6 June 2011 after a scandal involving a public prosecutor with the Osaka District public prosecutor's office who tampered with electronic evidence to get a favourable judgment. After the misconduct by the public prosecutor was revealed by the press, growing public opinion began criticise the current practice of investigations. The special committee was established to discuss reforms of the criminal procedure to better conform with modern Japanese society. During the discussions, the committee mainly focused on investigation measures which do not rely heavily upon interrogations. For a long time, confessions by suspects played a significant role in Japanese criminal procedure, and had been often criticised as subjecting suspects to undue and severe interrogation techniques. The committee concluded that, to ensure reasonable interrogation techniques were used, it was necessary to oblige investigative authorities to record the interrogation on DVD for certain serious crimes.

Investigative authorities argued that by recording the interrogation, suspects would be reluctant to speak honestly because they knew that what they said would be recorded, and argued that there should be new measures to collect evidence. The Negotiation System was introduced as a new measure for investigative authorities to gather evidence.

Overview of the Negotiation System

Under the Negotiation System, suspects or defendants can negotiate with the public prosecutor, and if they agree that a suspect or a defendant will cooperate with the public prosecutor in an investigation or trial in relation to crimes committed by others, the public prosecutor would offer favourable treatment in return, such as promising not to prosecute a suspect or recommending a favourable sentence for the defendant etc (article 350-2 of the Code of Criminal Procedure).

'Crimes committed by others' include crimes committed by the co-conspirators. Therefore, if one co-conspirator cooperates with the public prosecutor in charging the other co-conspirators, there is a possibility that he or she can get favourable treatment from the public prosecutor.

Cooperation by a suspect or a defendant includes:

- making a true statement in front of the police or the public prosecutor during an interrogation to make it clear that the crimes were committed by others;
- giving true testimony to the court; and
- submitting evidence to prove crimes committed by others.

If a suspect or a defendant intentionally makes a false statement or submits fabricated evidence, he or she will be punished by imprisonment not exceeding five years.

On the other hand, favourable treatment which the public prosecutor can provide includes:

- not bringing a charge against a suspect;
- charging a suspect with less severe crimes;
- dropping a charge; and
- recommending a favourable penalty to the court.

The Negotiation System cannot be used for every crime, but it can be used for certain crimes (which are called 'specified crimes'). A public prosecutor can negotiate and recommend favourable treatment only if a suspect or a defendant involved in 'specified crimes' cooperates with the public prosecutor in an investigation or trial for 'specified crimes' committed by others.

The 'specified crimes' are set out in article 350-2 of the Code of Criminal Procedure and they include smuggling illegal drugs, bribery, money laundering, tax fraud, violations of the Financial Instruments and Exchange Act (such as insider trading), and violations of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (such as cartels). The list of specified crimes includes crimes which will be specified in a Cabinet Order. The Cabinet Order has not been drafted, but it is believed that bribing foreign officials will be included as a specified crime in the Cabinet Order. It should also be noted that if someone obstructs the criminal procedure by destroying evidence necessary for the investigation or a trial involving specified crimes, the act of destroying evidence becomes a specified crime. Therefore, for example, if an employee destroys evidence of a specified crime committed by his supervisor at the scene of a dawn raid, the public prosecutor can negotiate with the employee and suggest that he cooperate with the public prosecutor in investigating the specified crime committed by his supervisor while promising the employee that the public prosecutor will not charge him regarding the destruction of the evidence.

The process of a negotiation

Because it is difficult for a suspect and a defendant to negotiate with a public prosecutor on their own, it is necessary for defence counsel to participate in the negotiation. Once an agreement is reached, the public prosecutor, the suspect or the defendant and defence counsel draft an agreement letter. If the public prosecutor uses statements made by a suspect according to the agreement or a suspect testifies

during the trial of others, the public prosecutor has to present the agreement letter to the court. The agreement letter should also be presented at the trial of a suspect or a defendant who cooperates with a public prosecutor.

If the parties cannot reach an agreement, a public prosecutor cannot use statements by a suspect or a defendant during the negotiation to prove a crime by others. However, a public prosecutor can continue to investigate further based on statements made during negotiations and use evidence acquired through those investigations.

Comparisons with plea-bargaining in the United States

The Negotiation System often reminds people of the US system of plea-bargaining, but it is different from the US system. There are two types of plea-bargaining in the US. One involves a public prosecutor providing favourable treatment to a defendant if he admits his guilt, cooperates with the public prosecutor in the investigation of the crimes committed by him and promises to plead guilty. The other involves a public prosecutor providing favourable treatment to a defendant if he cooperates with a public prosecutor in an investigation or trial for crimes committed by others.

The purpose of each type of bargain is different. A bargain based on an admission mainly aims to reduce the cost of the Justice system. A public prosecutor can avoid lengthy jury trials if a defendant admits his guilt and receives favourable treatment in return. A bargain based on cooperation with an investigation, etc, of crimes committed by others mainly aims to get evidence of culpability.

The two types of bargaining are often used in conjunction with each other in the US.

On the other hand, in Japan, the Act to Reform the Code of Criminal Procedure does not introduce a bargaining system whereby a public prosecutor provides favourable treatment to a defendant if he or she admits guilt. A public prosecutor can give credit to a suspect or a defendant only when he cooperates with a public prosecutor in relation to crimes committed by others.

During discussions in the special committee, there was also a discussion about whether bargaining based on an admission should also be introduced. However, the special committee concluded that it is too early to introduce bargaining based on an admission since the committee was afraid that Japanese society would deem it unjust that a defendant avoid a penalty by admitting his guilt, and such bargaining might contradict the notion of 'justice' in Japanese society.

Impact of the Negotiation System

Enhancing the investigation power of Japanese authorities

Unlike other countries such as the US, currently, Japanese criminal procedure does not have a bargaining system. In the past, the Supreme Public Prosecutor's Office of Japan tried to collect evidence by promising favourable treatment to suspects.

There was a bribery case in which a US company bribed a Japanese prime minister to acquire a government contract. The Japanese prime minister was indicted for bribery and the public prosecutor tried to get a statement from the executives of the US company. At that time, the executives resided in the US and the Japanese trial court asked the US district court to call these executives to testify in front of the US district court and provide a record of the testimonies. Under these circumstances, the executives demanded assurance from the Japanese public prosecutor's office that it would not prosecute them in Japan. The Supreme Public Prosecutor's Office gave that assurance and the executives testified in front of the US court.

However, the Japanese Supreme Court concluded that the record of testimonies was not admissible as evidence in a Japanese trial since the Japanese Code of Criminal Procedure did not provide for a procedure whereby a public prosecutor could gather evidence by promising a suspect favourable treatment.[2] Therefore, currently, Japanese public prosecutors cannot negotiate with a suspect or a defendant to get evidence in return for favourable treatment, which often makes it difficult for a public prosecutor to collect evidence by voluntary cooperation.

However, after the Negotiation System comes into force, a public prosecutor can negotiate with a suspect or a defendant to get evidence in return for favourable treatment. It will give a public prosecutor greater power to carry out investigations. For example, if the investigative authority investigates a tax fraud case by a consultant, it may find unaccounted-for expenditure. If there is a suspicion that the unaccounted-for expenditure was used for bribery, a public prosecutor can negotiate with the consultant and offer him favourable treatment regarding his tax fraud offence if he provides the public prosecutor with information regarding the bribery case (bribery is a crime committed by others, because it also involves public officials and often involves co-conspirators, if any). Without the Negotiation System, there is no incentive for the consultant to voluntarily provide information regarding the bribery case because it means that he or she might also be indicted for bribery offences and increase his or her penalty. The Negotiation System will give a suspect or a defendant an incentive to cooperate with a public prosecutor's investigation.

Can a company be a party of the Negotiation System?

Unlike the US or the UK, under Japanese criminal law, a company as distinct from natural persons, is 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 corporation 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).

Because a company itself cannot be subject to criminal liability, this raises the issue of whether a company can be an independent party to the Negotiation System. During the discussions regarding the 'Act to Reform the Code of Criminal Procedure etc.' in the Congress, the Director-General of the Criminal Affairs Bureau of the Ministry of Justice clearly explained that a company itself can be an independent party to the Negotiation System. This will give a company an ability to control risks when its executives or employees become a target of an investigation for a crime a company can also be criminally liable. A company can carry on an internal investigation and offer a public prosecutor evidence it acquired through the internal investigation. By doing so, a company can negotiate with a public prosecutor to avoid a criminal prosecution against a company. Whether a company itself can avoid a criminal prosecution is often crucial for a company. For example, because of anti-bribery policies among international financial institutions such as the World Bank, the Japanese Bank of International Cooperation, if a company is found guilty of bribing foreign officials, it can be locked out of projects to which these international financial institutions provide funds. This might have a significant business impact on a company. Under the Negotiation System, a company can control such risks through negotiations with the public prosecutor.

Effects on the strategy of a company

The Negotiation System might change the strategy of a company that finds a crime has been committed by its executives.

With regard to a cartel offence, under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, five parties can apply for leniency (a first-place party can receive immunity from regulatory fines, a 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 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 leniency and receive a 30 per cent reduction, if they provide information and evidence that the authorities do not have). Under the Japanese system, the Fair Trade Commission can file a criminal complaint if it think that the case is serious and worth a criminal penalty. However, the Fair Trade Commission has made it clear that it will not file a criminal complaint against a first leniency applicant.

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 onsite investigation, the corporation can receive a 50 per cent reduction of the regulatory fine.

Therefore, with regard to cartel violations or certain other violations of the Financial Instruments and Exchange Act, it is common practice for a company that has found a violation to voluntarily report the fact to the authority as soon as possible.

In contrast, with regard to other crimes, there is no such formal mechanism to ensure a company safe harbour if it voluntarily reports the crime to the authority. Of course, cooperation with the investigation is regarded as a mitigating factor for the prosecution, but a company should consider the fact that there is no formal system that ensures that cooperation with the investigation mitigates the risk of a criminal prosecution. However, under the Negotiation System, a company can control risks to some extent by negotiating with a public prosecutor. This might give a company more incentives to voluntarily report the crimes it finds.

Remaining issues

Introduction of a bargaining system based on the pleading

As explained above, the Act to Reform the Code of Criminal Procedure does not introduce a bargaining system whereby a public prosecutor provides favourable treatment to a defendant if he or she admits his or her guilt. As stated earlier, it has been deemed too soon to introduce such a system considering the notion of Justice in Japanese society. However, by introducing the Negotiation System it may soon become obvious that Japanese society is well prepared to accept a bargaining system based on a plea.

Sentencing guidelines

Unlike in the United States, there are no sentencing guidelines in Japan. 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 prosecutor makes sentencing recommendations in the closing arguments at the trial, and practically it affects the sentencing by the judge to some extent. However, there is no guideline or standard for sentencing recommendations by a public prosecutor, and he or she decides the sentencing recommendation by comparing similar cases.

Under the Negotiation System, there are also no sentencing guidelines (and it seems the Ministry of Justice will not draft guidelines). It might give rise to a situation where a suspect or a defendant cannot decide whether the offer by a public prosecutor is reasonable or not. For example, even if a public prosecutor offers to recommend a sentence of five years' imprisonment as being favourable for a defendant, because there is no clear guideline or standard for sentencing recommendations, a defendant cannot judge whether five years' imprisonment is really favourable.

Therefore, it is necessary for the Negotiation System to introduce sentencing guidelines, or at least guidelines for sentence recommendations.

How prosecutors use the Negotiation System

At the time of writing, there has been no case in which the parties have used the Negotiation System. Recently, the Supreme Prosecutors Office released the guideline for prosecutors on how to use the Negotiation System. The guideline takes quite a conservative approach. For example, it says that the prosecutor will enter into the agreement when there is enough supporting evidence in addition to the statements the defendant provides. The Supreme Prosecutors Office also said that, for the time being, whether or not the prosecutor enters into the agreement will be decided under the supervision of the High Prosecutor's Office.

Considering these facts, the prosecutors will select cases for negotiation carefully, and we will see relatively few cases for a period of time until the negotiation practice becomes established.

Notes

1 www.moj.go.jp/keiji1/keiji14_00103.html.
2 Supreme Court Judgement 22 February 1995.

Kaku Hirao
Nishimura & Asahi

Kaku Hirao served as a public prosecutor for 13 years. During this time he worked for the Criminal Affairs Bureau of the Ministry of Justice and Special Investigation Division at Tokyo District Public Prosecutor's Office (which focuses on white-collar crime). In 2011, he joined Nishimura & Asahi and is now serving as a partner at the corporate crisis management team.

He deals with a variety of corporate crisis matters such as investigation by authorities to companies, misconduct by executives or employees, negotiation with investigative and administrative authorities, and civil and criminal litigation derived from corporate crisis. He also deals with cross-border issues such as investigations by foreign authorities.

He also advises clients on how to build up a strong compliance structure within companies, especially to prevent bribery or cartel activities.

He is a graduate of University of Tokyo and University of Illinois School of Law (LLM).

Law
Business
Research

ISBN 978-1-78915-108-4