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Corruption and Bribery in Japan

Against the background of an increasingly competitive and globalised business environment, the enforcement of legal compliance standards by Japanese authorities vis-à-vis foreign and domestic companies has become more strict in recent years. In particular, corruption and bribery committed by company executives and employees has increasingly moved into the focus of Japanese investigative authorities (i.e., public prosecutors, the police and supervisory administrative agencies), in some cases resulting in severe criminal sanctions against the companies and individuals involved. This newsletter briefly highlights some of the legal aspects to be observed by companies in general business practice and specifically when engaging in certain business transactions in the public and private business sector.

A. Public Sector

When engaging in business with the public sector or in business transactions requiring or entailing the involvement of public officials, the observance of the following basic rules and precautions should be ensured:

1) As a general rule, offering any benefits, not only benefits of a pecuniary nature (i.e., monetary gifts etc.), to Japanese public officials is subject to criminal liability (as stipulated in the Japanese Criminal Code and other related laws and regulations).

To this end, the term “public official” is interpreted in a very extensive manner. This notion encompasses not only civil servants and government officials, but also employees of institutions not directly affiliated with the government who perform certain public duties stipulated in laws and regulations (such as employees of certain educational and research institutions or employees of the Bank of Japan, etc.).

2) There is no socially acceptable sphere (or any other exception) for any gratuities made to public officials in relation to their duties.

3) The offering of benefits to foreign public officials in Japan and abroad is also subject to criminal liability.

4) In recent years, corruption involving government officials, in particular offering of bribes to or accepting of bribes by national public servants, have increasingly become the target of criminal investigations. Investigative authorities receive high social appraisal in Japan when such bribes are successfully established as criminal cases; thus, the investigative authorities put much effort in the uncovering of these cases, generally placing high priority on them.

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B. Private Business Sector

When engaging in business activities in the private business sector, i.e. in business transactions between and among companies and other private commercial entities or individuals not involved in the performance of public duties, the following general rules and standards should be observed:

1) Japanese law does not impose a general prohibition on the exchange of benefits (monetary gifts etc.) in the private business sector. However, the Japanese Companies Act ("JCA") stipulates in Article 967 a penal provision which makes it a criminal offence for, inter alia, directors, statutory auditors, managers and certain employees (who have been bestowed the task of a specific matter), in relation to their duties to receive or demand (or enter an agreement on receiving) a "benefit of a pecuniary nature" in response to an unlawful solicitation/request. The JCA also stipulates that the act of providing, offering, or entering into an agreement on the basis of such benefits constitutes a criminal offence for the person offering such benefit, as well. Therefore, it is highly recommendable to generally refrain from extending any benefits of a pecuniary nature (i.e., cash gifts etc.) to (potential or actual) business partners, i.e. persons in the private business/commercial sector, such as managers, directors and employees of companies, in order to avoid the risk of criminal liability.

2) Furthermore, offering benefits (whether pecuniary or not) to persons in the commercial sector may furthermore be subject to criminal liability if the donor acts in violation of his fiduciary duties vis-à-vis his employer in order to benefit himself or a third party (criminal breach of trust).

3) As a general rule, criminal liability as described above applies to the person offering such benefit and the recipient of the benefit (this also applies to the public sector). If, for example the manager of a company causes his company to conclude agreements with suppliers that pay cash gifts to such manager based on terms specifically favourable to those suppliers, and thereby causes damage to the company, etc.; in such case, not only the manager but also the individuals extending the cash gifts to the manager may be subject to criminal liability.

4) However, offering meals or entertainment to persons in the commercial sector is in principle regarded socially common (see also below C.) and adequate (as long as – inter alia – it does not constitute a breach of fiduciary duties as mentioned above). This also applies to the practice of extending traditional seasonal gifts of a non-pecuniary nature such as year-end presents ("o-seibo") or Bon festival presents ("o-chugen") to business partners. Such gifts are very common and socially accepted (as long as the value of such gifts remains within a reasonable scope).

5) The legal effectiveness of a contract based on corruption is not immediately affected.

6) Under certain conditions, competitors that incurred losses due to corruption (bribery) by another company's employee may seek damage compensation under Japanese civil law.

C. Rules and Standards for Offering Benefits to Business Partners

In order to ensure compliance with the above-mentioned rules and standards regarding bribery and corruption, it is generally advisable that such standards (and the prohibition of certain acts) should be reflected in internal rules etc. of companies. Thus, company working rules should stipulate certain conduct standards and precautionary measures accordingly. This is especially important with regard to the private business sector, where companies often encounter difficulties in distinguishing between socially generally accepted practices and legally prohibited actions. To this end, the following general standards and examples may be considered when stipulating internal regulations of companies:

1) In principle, the benchmark for offering benefits (monetary gifts and/or other gratuities) to business partners is as follows: in case any pecuniary benefits are granted to a business partner of the company, such provision of benefits would be generally deemed permissible if it is

- i) not conflicting with the penal provisions of the JCA and the Japanese Criminal Code (see above B.), and
- ii) within the scope of measures which can be regarded as reasonable and necessary to facilitate the business between the company and the business partner.

2) More specifically, the permissible scope of granting benefits to a business partner should be determined in light of generally accepted social norms which are often indicated by or exemplified in relevant laws and regulations. In this relation, taxation practice may serve as reference. According to the Japanese tax authority's official notice, the costs and expenses listed below are legally accepted as deductible "entertainment expenses" of a company; thus, they are generally considered to be within the permissible scope of benefits which may be offered to business partners, provided that such benefits are extended in a reasonable manner under the specific circumstances.

- i) Costs for common and reasonable activities with the aim of earning or granting the position of a subcontractor, distributor, dealer, etc.;
- ii) Costs for events, transportation, commemorative gifts etc., related to the business partner company's ceremony of its anniversary, opening of a new company building, etc.;
- iii) Costs for offering monetary gifts upon ceremonial or consolatory occasions of the business partner (i.e., in the event of bereavement or natural disasters etc.); and
- iv) Costs for entertaining customers, suppliers or any other persons related to the business of the company through dinners, etc. within a reasonable scope.

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