Corporate Crime in Japan: An Overview

Naoya Iwao

Abstract

Until now, academic have believed that Japan should respond to corporate crime based on the concept of the individual deterrence model. However, with the recent rise of technology companies and other large corporations, the Ministry of Economy, Trade and Industry (METI) has proposed that we should address corporate crime through strict liability and Deferred Prosecution Agreements. A set of these ideas is entirely different from previous discussions and deserves further attention. This note summarizes appropriate measures taken in response to corporate crime in Japan.

Keywords: corporate crime, criminal sanctions, digital business platforms, society5.0

1. Introduction

Since Edwin H. Sutherland proposed the concept of “white collar crime,” attention has been focused on crimes associated with corporate activities in every country.[(1)] James William Coleman also observed that corporate culture dominates presidents. They cannot resist it.[(2)] In Japan, there has been little analysis of

（1） Edwin H. Sutherland (1983). *White-Collar Crime: The Uncut Version*, Yale University Press.

（2） James William Coleman (2006). *The Criminal Elite: Understanding White-Collar Crime*. 6th ed, Worth Publishers.

criminological theories surrounding corporate crime. However, some have similarly analyzed that organizational culture influences individual executives and employees in some way and commits illegal acts.[3]

Corporate crime is a concept that encompasses the entire economic crime phenomenon, including corporate activities. It refers to crimes committed during or as part of a company's business activities. This definition is instrumental in analyzing the current state of the crime phenomenon. Corporate crime today differs from classical crime in several respects. First, because perpetrators commit corporate crimes during a company's business activities, the distinction between corporate crimes and legitimate economic transactions of a company is often blurred.

Second, offenders often commit corporate crimes through complex mechanisms and means, making them difficult to detect and investigate.

Third, today's corporate business activities are globalized, and businesses often operate in multiple countries with different legal systems, making the legal criteria for punishing corporate misconduct increasingly complex. For these reasons, the traditional legal system based on classic crimes is insufficient to deal with modern corporate crime. New legal responses to corporate crime, in other words, efforts that respond to the changing times, are required.

2. Criminal and Administrative Sanctions

Legal sanctions against corporate crime include criminal and administrative measures.

In addition, a civil sanction system orders compensation for damages to the victim. Criminal punishment here includes penalties against criminal offenses as

（3） Kento MAEJIMA (2020). *Nihon no Howaito Kara Hanzai* [Japanese White Collar Crime], Gakubunsha.

defined in the Penal Code and penalties under the penal provisions of administrative regulations. Criminal Laws relating to violations of administrative regulations have a known name, what we call, Administrative Criminal Law. Thus, criminal punishment includes both criminal sanctions under the narrowly defined criminal code and criminal sanctions under the Administrative Criminal Law.

On the other hand, administrative sanctions, refer to non-criminal administrative sanctions for violations of administrative regulations. However, illegal acts of a company in violation of administrative regulations can also be subject to criminal sanctions as a criminal case. Because of this close relationship between administrative and criminal proceedings, an important question is whether a case that is the subject of an investigation through administrative proceedings is also the subject of an investigation through criminal proceedings. Therefore, both criminal and administrative sanctions are essential for corporate crimes since administrative and criminal sanctions for corporate misconduct have a continuous relationship in terms of content and procedure.

In 2005, the surcharge system (*Kacho-Kin-Seido*) incorporated a surcharge reduction and leniency system (leniency system) under Japan's Antimonopoly Law. Up to five companies were supposed to benefit from the reduction or exemption of surcharges if the business operator who committed the violation reported that he or she discovered the breach to the Fair Trade Commission before the incident and submitted materials related to this fact. However, the 2019 amendment to the law abolished the limitation of eligible businesses by introducing the discretionary surcharge system.

The advantage of introducing a discretionary surcharge system is that if business operators actively cooperate with the Fair Trade Commission investigations, they can obtain a reduction in the surcharge. Therefore, incentives to cooperate with investigations will be secured, facilitating faster and smoother investigations of illegal

activities and encouraging operators to more proactively formulate and implement compliance programs[4].

In this way, we should develop a way of legal regulations that do not violate Justice while providing incentives to companies.

What are the cases in which companies can be penalized? The following is a brief overview.

3. Criminal Sanctions against Corporate Crime

(1) Dual liability provision (*"Ryobatsu-Kitei"*)

For nearly 100 years, Japan's laws have punished corporations under the dual liability rules. The dual liability provisions stipulate that when a juridical person's agent, employee, or other workers in connection with the business of the juridical person commit a crime, the juridical person as the business owner shall be punished along with the individual who committed the crime. Only when this dual liability provision exists can the juridical person be held criminally liable and punished.

As for the crimes covered, the two-punishment rule currently operates in numerous laws and regulations regulating business activities, such as the Antimonopoly Law (Article 95) and the Financial Instruments and Exchange Law (Article 207), numbering close to 700. The Penal Code, however, has no such provisions.

Thus, the crimes subject to juridical punishment in Japan are "many crimes other than those specified in the Penal Code." Thus, only a minority of countries in the world uniformly exclude from its scope the various crimes outlined in the Penal Code[5].

（4） Morikazu Taguchi (2022). *Keiji Sosho no Kozo* [The Structure of Criminal Procedure]. Seibundoh:p.308.

(2) The process for finding a corporation criminally liable

Regarding the basis for corporate punishment under the dual liability provision, the court decision[6] and the prevailing theory supporting it explains that "a corporation is presumed to be criminally negligent in failing to fulfill its duties of appointment and supervision as an employer toward an employee who commits a crime" (theory of presumption of criminal negligence). The corporation's representative can rebut the presumption of criminal negligence by proving that he or she exercised due care (i.e., no-fault). As is clear from this understanding, the recognition of criminal liability of a juridical person under the two-punishment provision indicates an "individual model" in which the representative is considered the same as the juridical person.

(3) Quality and Quantity of Penalties for Legal Entities

In Japan today, the only penalty for corporations is fine. In the past, the maximum amount was the same for individuals. In the 1990s, however, there was a growing awareness that fines against corporations could not be effective unless they increased, and since then, the maximum amount of fines against corporations has grown to 100 million yen or more under the two-punishment provisions of many laws and regulations. The current maximum fine is 1 billion yen under Article 22, Paragraph 1, Item 1 of the Unfair Competition Prevention Law and Article 72, Paragraph 1, Item 1 of the Foreign Exchange and Foreign Trade Law. Nevertheless, in more than 90% of the provisions, the maximum fines for corporations and natural persons remain the same.

（5） Tomomi Kawasaki (2021). "Ima, Naze 'Soshikibatsu' ka?:Hojinn Shobatsu no Saiteii," Hogaku Seminar No. 803, 56-61.

（6） The Supreme Court on 26.03,1965.

Compared with other countries, the amount of fines is low.

(4) Plea bargaining

U.S. prosecutors regularly resolve corporate criminal cases through the use of deferred prosecution agreements (DPAs), which enable prosecutors to impose substantial criminal sanctions without convicting the firm.(7)

On the other hand, Japan's plea bargaining system legally started in 2016. The main contents of this system include the following acts of cooperation by a suspect or the accused in the criminal case of another person: (ⅰ) making a truthful statement during an interrogation or witness examination, (ⅱ) submitting evidence or providing other necessary cooperation, or both (Article 350-2, Paragraph 1, Item 1 of the Code of Criminal Procedure)., The prosecutor's acts of disposition include: (ⅰ) not filing a prosecution, (ⅱ) canceling a prosecution, (ⅲ) filing or maintaining a prosecution based on a specific cause of action or penalty, (ⅳ) requesting the addition, withdrawal, or change of a specific cause of action or penalty, (ⅴ) stating his/her opinion that a specific penalty should be imposed on the accused in an argument, (ⅵ) filing a motion for summary judgment proceedings, and (ⅶ) filing a motion for summary judgment proceedings (Article 350-2, Paragraph 1, Item 2 of the Code of Criminal Procedure). Thus, the prosecutor's disciplinary actions cover a wide range. In addition, the target crimes are limited to two types of crimes: certain fiscal and economic crimes and drug and firearms crimes.(8) It applies to cases of violations of

（7） Specifically, the system allows prosecutors to defer prosecution and eventually drop charges if a company admits to illegal activities, agrees to pay a fine, promises to reform the company's organizational structure, and so on.

（8） Since the plea bargaining system started for the first time in Japan, it was limited to cases where the need to collect evidence was both high and easily understood by the public, including victims.

the Unfair Competition Prevention Law and the Financial Instruments and Exchange Law committed in connection with corporate (business) activities[(9)] and may deserve to function similarly to an agreement to defer prosecution. However, the contents of this system are essentially different from those of deferred prosecution agreements, such as the fact that it does not apply to self-incrimination type cases in which the accused admits the alleged facts against himself and cannot receive the benefits in the same way as DPAs.

(5) Summary of Conventional Japanese Law

"We thus have come to recognize that" (ⅰ) there are no crimes subject to corporate punishment under the Penal Code, (ⅱ) the "the individual model," which is the way of thinking that at least one natural person must identify himself, underpins the process for determining the criminal liability of a corporation, (ⅲ) the only penalty for a corporation is a fine, and (ⅳ) the DPA does not work.

(6) Digital business platforms

However, in recent years, with the digitization, complexity, and globalization of corporate and social activities, an environment of rapid change and complexity that makes it difficult to predict the future has arisen, and the recognition that the traditional "vertical" governance approach centered on the government is becoming dysfunctional. A new system of sanctions has emerged under the leadership of the Ministry of Economy, Trade and Industry (METI). This system is in recognition of

---

（9） The case that has attracted the most attention is the Nissan case. For the Nissan case, *see* Thisanka Siripala, Does Ex-Nissan Chief Carlos Ghosn's Detainment in Japan Point to Human Rights Abuse? (https://thediplomat.com/2019/01/does-ex-nissan-chief) (accessed 20.08.22)). Professor N.YOSHINAKA referred to the necessity of a defense lawyer's presence during interrogations.

the Digital business platforms (“DBPs”) called GAFA/GAFAM that are currently on the rise. Below is a brief overview of DBPs and METI’s proposal(10) .

DBPs have become indispensable to the economic activities of businesses and consumers’ daily lives, and offer a wide range of business opportunities beyond physical, temporal, and geographical constraints to user businesses. In addition, markets and economic activities related to the Internet tend to be actively competitive, with the exit of existing dominant businesses, because markets and technologies change rapidly and existing technologies are prone to obsolescence.

However, some DBPs operators have already surpassed a state’s profits and the scale of their economic activities. In some cases, they have become players in markets where there are many users and have profited by favoring their position in the same market, or they have exploited users in other markets by charging them high usage fees to gain a dominant market position.

In accumulating personal and business data that facilitates market dominance, it becomes possible to acquire personal data illegally or to use current and past data to monitor user businesses and anticipate their own sales strategies. They utilize personal sales history in the form of personalized pricing, which can manifest in eliminating competing businesses. In addition, advanced computer technology, including search systems cloud data aggregation facilities, and the considerable high investment required, create additional barriers to entry, making competition more difficult and creating a more concentrated user base, a negative cycle.

In Japan, criminal prosecution has been limited to cartels and bid rigging under the complementarity and modesty of criminal penalties. However, with the rise of DBPs operators, as discussed above, there is a debate as to whether criminal penalties

(10) Referring to the content of the oral presentation during the workshop of the Criminal Law Society held in May 2022, Hiroshi Nakazato discussed “Competition Law Challenges of Digital Platforms, Points of Contact with Criminal Law.”

should exercise against private monopolies. What should we think about such private monopolies?

4. Report of Society5.0

(1) An overview

In addition, the idea called “Agile Governance” has emerged in recent years. This concept requires that the traditional regulatory framework should change to a company-centered, management-driven approach based on the complexity of the system and the uncertainty brought about by Artificial Intelligence (AI), the slow response of regulatory authorities, and the atrophying effect of various regulations on technological development by business operators. The Ministry of Economy, Trade and Industry (METI) has been updating a series of documents that are a condensed version of this concept.

METI has previously published the Report “GOVERNANCE INNOVATION: Redesigning Law and Architecture for Society 5.0” (July 2020. Hereafter referred to as “Ver 1.0 Report”), the Report “GOVERNANCE INNOVATION Ver.2: A Guide to Designing and Implementing Agile Governance” (July 2021), and the Report “Agile Governance Update-How Governments, Business and Civil Society Can Create a Better World By Reimaging Governance” (August 2022). The Society 5.0 report, undergoing ongoing revision by a METI study group, notes that the speed of technology and business models is increasing, the data needed for monitoring is becoming more complex and diverse, AI is making many decisions, and social activities can easily cross borders. Then, while the governance model of the existing traditional system presupposes the assumption of rule formation by the state, monitoring by regulators, and enforcement by regulators and courts, the limitations of the existing system show the difficulties as follows:

(ⅰ) defining the obligation to act on a business model basis, (ⅱ) defining methods and indicators for monitoring, (ⅲ) clarifying who should be held responsible, (ⅳ) simply enforcing rules by a single government in cross-border cyberspace, (ⅴ) in protecting the interests of its citizens in cross-border cyberspace if only one government enforces the rules.

In particular, regarding the positioning of AI, the value proposition is that autonomous decision making by systems and reliance on AI will essentially replace human decision-making. At the same time, the report states that the foreseeability and controllability of systems will become limited, and it is necessary to consider who will be responsible for damages caused by errors in judgment and how we deal with them.

It then clarifies that we need a multi-stakeholder governance model involving the private sectors, government, communities, and individuals. In particular, the private sectors are to be rule-follower, but rather to be actively involved in rule formation, monitoring, and problem-solving. On the other hand, the government is positioned as a facilitator to promote discussion in the rule formation process and to encourage appropriate monitoring and information provision by companies.

(2) Sanctions against companies

The report calls for governance through innovation and innovation to existing governance. Specifically, the report calls for strict liability for accidents involving highly uncertain products and services, Deferred Prosecution Agreements (DPAs), and immunity to prevent companies from overreacting to unpredictable accidents, which could stifle innovation. The proposal's core is introducing a Deferred Prosecution Agreement to prevent unforeseeable accidents. The core of the agreement is a system that defers prosecution in the event of the realization of unforeseeable uncertainties by requiring companies to provide information, cooperate in the

investigation of accidents, and promise to improve their products, services, and organizations, while imposing substantial fines and strict administrative sanctions, including cancellation of service certification, in the event of failure to provide information and cooperate in the investigation. In conjunction with this, it has shifted the traditional position of individual responsibility in criminal penalties and clarified that it does not seek to attribute responsibility to specific individuals.[(11)]

The report also points out that regulations inhibit innovation, but we must not forget the aspect that actions by DBPs operators instead inhibit the ingenuity of other operators (killer acquisition is a typical example).[(12)]

(3) Points of Contact with Criminal Proceedings

Focusing on the opacity and uncertainty of AI as a basis for freedom from personal responsibility, it is impossible to replace all business strategies and decisions of a business platform with AI, unlike the case of automated operations involving third parties. The process of implementation of individual businesses may disperse among multiple people in charge, but if we instead emphasize that a limited number of responsible departments and management teams are involved in decision-making in the formulation of essential management strategies and marketing instruments, such as competitor elimination policies[(13)] than the newly proposed method, which

---

（11） Ver. 1.0 Report, pp. 34-5.

（12） The Antimonopoly Law states in its purpose that it is to “allow businesses to exercise their creativity,” in other words, it plays a role in promoting technological innovation.

（13） Although this is the scene of a Killer Acquisition, where a potential competitor recognizes without market competitiveness, the CEO of Facebook (now Meta) provided evidence. In a June 2008 internal email, he allegedly stated “it is better to buy than compete”. First Amended Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission vs. Facebook Inc., (August 19, 2021) at 21. https://www.ftc.gov./system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf (accessed 20. 08. 22)

focuses on the organization itself. The same is true for the newly proposed method, which focuses on the organization.

5. Concluding Remarks

As discussed above, the debate over the regulation of corporate activities in Japan is mixed. There is a considerable gap between traditional theories and new policy proposals. According to the traditional understanding of Japanese criminal law theory, at least one person involved in illegal activities should be necessary, and in conjunction with that, the company deserves. On the other hand, as recently proposed by the METI, the idea of combining strict liability for corporations with a Deferred Prosecution Agreement has developed to promote corporate innovation while addressing the problems of modern society.

However, with today's globalization of corporate activities and the continued development of new technologies, it will be necessary for the future to focus on corporate organizational structures, products, services, and procedures to hasten their improvement.

In doing so, it is necessary to analyze the accumulated theories of conventional criminal law, define the scope of punishment, and, if new legislation is necessary, discuss it further.

In any case, the debate concerning corporate innovation and appropriate laws and regulations, which has come to understand its importance in recent years, is in flux and will continue developing.