



Daiwa Foundation

**Japanese 1st “plea bargaining” case and
potential proposal to improve the new
regime**

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1. First case: Mitsubishi-Hitachi Power Systems (MHPS)

- The first case where a plea bargain was entered concerned the bribery of a foreign official in Thailand.
- **Nature of the case**
 - In February 2015, an employee of MHPS paid approximately Bt20 million to a subcontractor. It was alleged that the funds would then be passed on to Thai government officials in exchange for such officials to grant the permission to use a port during the construction of a power plant in Thailand.
 - Reportedly, MHPS learned about the case through a whistleblower and reported it to prosecutors in 2015.
- **Who entered into the plea bargain?**
 - MHPS, possibly along with certain employees, entered into a plea bargain with a prosecutor and avoided prosecution.
- **Who were prosecuted as a result of the plea bargain?**
 - **Two former executives** and one manager of the MHPS were prosecuted.
 - One of the former executives and the manager have already been convicted but one of the former executives has plead not guilty claiming that he did not allow employees to offer bribes. His prosecution is ongoing.

2. Reception of the MHPS case by Japanese media and society

- Many of the Japanese media outlets have made comments critical of the MHPS case since they claim that MHPS avoided prosecution by “sacrificing” individuals.
- **Nikkei (July 22, 2018): Questionable first case of plea bargain**
 - *Although it can be said that the new system contributed to the prosecution of a bribery case which was hard to prove in the past, that did not sound right to us.*
 - *It seems that this is not a case of “tail shedding” as those who were prosecuted were senior managers, however, the result of the bargain was that the company avoided prosecution while only individuals bore criminal responsibility.*
- **Nikkei Business (July 27, 2018): Plea Bargain – age of “selling” employees has arrived**
 - *The first plea bargaining case is somewhat surprising, where a company “sold” its employees.*
 - *The former executives who allegedly committed bribery did it for the company, not for their own interest. A company usually understands this and thus has not taken severe actions against its employees. That is the traditional attitude of Japanese companies. Japanese society is also broad-minded about the crime committed “for a company”.*

3. Reactions from Japanese practitioners

- Reactions from Japanese practitioners are mixed. But some practitioners pointed out that **the first case may be** a message from the investigative authority that they will intensify crackdown on corporate crimes through the new regime.
- **A company, not an individual, was a party of the plea bargain**
 - Encourage companies to make a voluntary disclosure to the investigative authority and cooperate with an investigation
- **Overseas bribery and corruption case**
 - Respond to the criticism that Japanese authorities have been reluctant to investigate overseas bribery and corruption issues
- **Importance of preparing effective compliance programs, including a whistle-blowing system**
 - Preparing effective corporate policing function makes it possible for a company to detect compliance issues at the early stage and to have an opportunity to address it in a timely manner

4. Problems: Uncertainty and lack of negotiation structure

- **While** the Japanese plea bargaining system can potentially be an effective tool to address corporate crimes, there are several issues to overcome in order for the system to work effectively.
- **Uncertainty about the policy**
 - Comments of the Public Prosecutors General: *“We will only use the new system in the cases where we can gain public support and trust and the information/statement provided is reliable”.*
- **Lack of the established structure of negotiation**
 - There are no guidelines as to the structure or factors to be considered for the negotiation between lawyers and prosecutors when discussing the plea bargain.

5. Possible approach to address these problems

- A possible approach to address these issues is to increase the transparency of enforcement policy, including the use of plea bargains, and to establish a basic negotiation structure to discuss the case.
- **Increase the transparency of enforcement policy**
 - **In order for the new system** to work effectively and to provide companies an effective incentive to improve their corporate policing function, the benefit they can obtain through these efforts should be as clear as possible.
 - To achieve this, the investigative authorities should provide a clearer message regarding their enforcement policy including the attitude about the use of plea bargains.
- **Establish a basic negotiation structure to discuss the case**
 - Similarly, in order to facilitate fair and productive discussions between defense lawyers and prosecutors, there must be a basic negotiation structure and guidance which are publicly available, such as “Principles of Federal Prosecution of Business Organizations” (referred to as the Filip Factors) as described in the U.S. Justice Manual.

6. Other potential issues to be discussed in the future

- Aside from the topics discussed so far, there are several additional issues to be discussed in the future in order for the system to effectively address corporate crimes.
- **Reform of corporate governance/compliance program**
 - Whether, within the framework of negotiation and agreement, prosecutors should be allowed to require the company to conduct the reform of corporate governance and/or compliance program
- **Disgorgement**
 - Whether, within the framework of negotiation and agreement, prosecutors should be allowed to require the company to disgorge any profits obtained from the alleged crime/misconduct
- **Compliance defense**
 - Whether the government should provide an affirmative defense for effective compliance programs or give substantial credit, at the charging and sentencing stages, for effective compliance programs