application for issuing it is limited to persons entered on the registration and other persons having an interest to seek the certification.

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5. Criminal Law and Procedure

Act for Wiretapping in Criminal Investigation

Law No. 137, Aug. 18, 1999. Effective as of Aug. 15, 2000 (From the "Three Acts Against Organized Crime"— the two other pieces of legislation were ① The Act for the Punishment of Organized Crime, Control of Criminal Proceeds and Other Matters, (Law No. 136) and ② The Act for Partial Amendment to the Code of Criminal Procedure (Law No. 138)).

Background:

In recent years, the number of criminal activities performed inside and outside Japan by criminal organizations has increased dramatically. The importation and distribution of drugs or firearms, organized battles between violent groups, violent crimes committed by cult groups, smuggling crimes led by foreign crime organizations have all given rise to a movement to enact statutes against organized crime. Since the increase in the number of organized crimes has not only been caused by Japanese Violent Groups called "*Bōryoku-dan*" or the local cult groups (which sometimes have branches abroad), but also by other criminal organizations, including foreign organizations such as the notorious "Snakeheads" from China, the need for such legislation has become a concern in the international community as well.

The aim of the legislation was to detect and prosecute organized crimes as thoroughly as possible, to punish core persons in criminal organizations, to deprive such organizations of any criminal proceeds, and to send them the message that "crime does not pay". In order to

achieve this goal, the Diet enacted legislation providing for ① the severer punishment of organized crimes, and the control of criminal proceeds (providing punishment for money-laundering activities, widening the range of property to be forfeited, rendering it a legal duty of banks and other financial agencies to report any property suspected to be the proceeds of criminal activity, etc.), ② the use of wiretapping as an investigatory method, and ③ the protection of witnesses or informants that provide information concerning organized crime or the organization itself.

The second of these pieces of legislation will be discussed below in more detail.

Main Provisions:

"The Act for Wiretapping in Criminal Investigation" provides for a legally authorized investigatory method of wiretapping. This investigatory method is necessary since organized crime is hard to detect by using other ordinary methods of investigation. It is also necessary because the orders for the preparation, carrying out and covering up of organized crimes are likely to be sent through telephones and other communication devices, at least part of which is wired (Art. 2).

In this statute, the crimes subject to wiretapping are limited to crimes related to drugs or firearms, organized smuggling, and organized murder (Art. 3). Wiretapping concerning future crimes will be permitted as well, under strictly limited conditions (Art. 3).

The wiretapping will be performed based on a warrant issued by a judge of the district court (Art. 3), which contains the written order of the judge designating the type of communications subject to the wiretapping, the duration of the wiretapping, the name of the suspect etc. (Art. 6).

Wiretapping must be performed in the presence of a person in control of the communication being wiretapped (Art. 12), after the warrant has been presented to that person (Art. 9).

The prosecutors and other authorized investigators are entitled to perform wiretapping in order to make sure that the communication is the one they are permitted to wiretap, that is the one described on the warrant (Art. 13). When investigators detect conversations concerning

the commission of a crime that is not mentioned on the warrant while performing this type of wiretapping, they are permitted to continue listening and recording the conversation under certain circumstances (Art. 14).

What has been wiretapped must be kept on record (Art. 19), and when the wiretapping has been completed, it is necessary that the suspects be notified of the fact that the conversation has been wiretapped (Art. 23). The wiretapped parties have a right to *kōkoku* appeal the judicial order giving permission to wiretap, or to the wiretapping itself (Art. 26).

When public officials perform a wiretapping that is not authorized in this statute, he or she will be punished (Art. 30).

Editorial Note:

Before this enactment, the investigatory use of wiretapping was strongly criticized. The reason was that, in Japan, there has been the principle in criminal procedure that the explicit authorization of the legislature when performing coercive methods of investigation is required (Code of Criminal Procedure, art. 197). Since this new statute mentions wiretapping as a "coercive method" and, at the same time, clearly gives authorization to the use of wiretapping in investigation, the issue seems to have been resolved by this statute. Moreover, as a consequence of this enactment, the method of wiretapping characterized as "Inspection" (Code of Criminal Procedure, art. 218, para. 1) formerly in use, can not be taken.

The constitutionality of authorizing wiretapping as an investigatory method was strongly argued both inside and outside the Diet. For example, there was much debate as to whether the legislation violated the secrecy of communication (Constitution, art. 21), whether it deprived the suspect of due process (Constitution, art. 31), or whether it was against Article 35 of the Constitution, requiring "particular" warrant whenever coercive methods of investigation were used, etc. Taking these arguments into consideration, amendments to the original draft were made to limit (both substantively and procedurally) the use of wiretapping to cases that clearly necessitated its use.

Contemporary issues concerning this statute include ① the scope

of investigations concerning future offenses; ② permissibility of listening to or recording conversations inside the house (not using any wired device, *See* Art. 2); ③ listening to or recording crimes not authorized in the warrant (Art. 13), but detected in the process of performing legal wiretapping, etc.

The first issue concerns the concept of "investigation". Stated roughly, "investigation" means the activity of the police, the prosecutor, etc to find and preserve evidence, and to find the person that committed the crime. In this meaning, the crime is considered to have occurred before the investigation had begun. The new legislation partially authorizes wiretapping of future crimes in Articles 3 and 14. Scholars have attempted to resolve this issue by redefining the concept of investigation (using the ultimate goal of activities as the main element of the definition) or by reading the language of the statute narrowly, making wiretapping permissible only where the commission of the crime could be seen as an equivalent to quasi in-presence-crime (*Jun-Genkōhan*), or when there is enough proof of the previous commission of the same kind of crime.

The second issue concerns the scope of communication subject to wiretapping under this statute, and the relation of wiretapping to the original investigatory method of "inspection" (*Kenshō*). As the conversation between persons inside the same house does not use a wired device (except interphones, etc.), this statute will not be applied to the listening to or recording of this kind of conversation. Are there any limitations to the listening to or recording of this type of conversation? Some say that by omitting this kind of conversation from the statute, the legislature refused to authorize such listening or recording, rejecting the possibility of performing this type of investigation in the form of "inspection" as well. Others say that the legislature left the issue open so as to have it resolved inside the framework of the ordinary investigatory method of "inspection". According to this opinion, there is a possibility that listening to or recording of this type of conversation would be justified as a method of inspection.

The third issue concerns the doctrine somewhat similar to that of the "plain view". When investigators (in the process of performing authorized wiretapping) detect the future commission of the crimes not

mentioned in the warrant, is it permitted that they continue listening to or recording the conversation? The statute provides for these kinds of wiretapping in Article 14, but the theoretical grounds for permitting these kinds of wiretapping are very controversial. Some say that the doctrine of "plain view" (or the "warrantless search or seizure under exigent circumstances") is embedded in Article 35 of the Constitution. According to this theory, if wiretapping can be classified as a method similar to Constitutional seizure, and the circumstances of the actual case show a certain degree of exigency, the type of wiretapping in question has a chance to be permitted. The prevailing view in Japan, on the contrary, does not consider plain view, or "exigent search or seizure", as a doctrine embedded in the Constitution, and it seems more difficult to explain the permissibility of these kinds of wiretapping accordingly. Some scholars explain that since the Constitution does authorize (Constitution, art. 33, Code of Criminal Procedure, art. 212), or does not forbid (Code of Criminal Procedure, art. 210) the legislature from creating exceptions to the requirement of warrants under certain exigent circumstances, a type of exigent seizure (under similar circumstances) can be created by the legislature. However, some say that this explanation is still unsatisfactory.

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6. Commercial Law

Act to Partially Amend the Commercial Code etc.

Law No. 125. August 13, 1999. Effective on October 1, 1999 (Provisions about Share Exchange and Share Transfer and Groups of Companies) and April 1, 2000 (Provisions about Valuation of Assets).

Background:

The modern company tends to run a business not as a single com-