

market intelligence

Volume 1 • Issue 2

GETTING THE
DEAL THROUGH

M & A

Alan M Klein leads the global interview panel covering 20 key economies

Is CEO confidence returning?

North America • Asia-Pacific • Europe • Latin America
Activity levels • Keynote deals • Inside track • 2014 trends

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GETTING THE
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market intelligence

Welcome to *GTDT: Market Intelligence*.

This second issue focuses on the global M&A markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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Ryuji Sakai and
Kayo Takigawa

M&A IN JAPAN

Ryuji Sakai and Kayo Takigawa are partners at Nagashima Ohno & Tsunematsu, primarily handling corporate M&A matters. They represent various clients in and outside Japan, including both business and finance companies.

GTDT: What trends are you seeing in overall activity levels for mergers and acquisitions in your country during the last year or so?

RS & KT: Since the global financial crisis in 2008, and the Great East Japan Earthquake in 2011, as it is known, the economy in Japan has been slow. Overall, mergers and acquisitions have been somewhat sluggish. Despite this general trend, we have seen an increase in outbound transactions (ie, Japanese companies making investments in target companies in foreign jurisdictions). In particular, acquisitions by Japanese companies in China and South East Asia have become increasingly active recently.

Further, in December 2012, the Liberal Democratic Party of Japan (LDP) regained control of the government and started advocating its commitment to turning around the Japanese economy, which includes increased government spending and monetary easing measures. Thereafter, in response to this policy change, stock prices in the Japanese market have recovered, and the value of the Japanese yen against the US dollar and other foreign currencies has significantly depreciated. Although it remains uncertain whether this present trend will lead to the full



“The electronics industry, food and beverage industry, and pharmaceutical and health-care industry are currently the focus of M&A activity.”

Image: Sean Pavone/Photo / iStock / thinkstock

recovery of the Japanese economy, the volume of inbound transactions, as well as purely domestic transactions, has also started to pick up (obviously, the recent downward trend of the yen should favourably affect inbound transactions). However, we do not think that the level of activity for mergers and acquisitions, as a whole, has returned to the level before the global financial crisis.

It may also be worth noting that private equity fund activity was almost entirely suspended after the global financial crisis, but has been increasingly more active recently.

GTDT: Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?

RS & KT: The electronics industry, food and beverage industry, and pharmaceutical and health-care industry are currently the focus of M&A activity, and we predict that this trend will continue.

The underlying reason for the activity levels in each industry varies. In the electronics industry, many major Japanese electronics companies have faced hurdles for further growth or, in some cases, financial difficulties for various reasons, including the emergence of strong competitors in China and Korea, the high yen value (until recent monetary easing measures implemented by the Abe government), and pressure from their customers. In addition, there are arguably too many players in this industry in Japan. Accordingly,

such electronics companies have been urged to undertake significant business restructuring efforts, including divestiture of non-core businesses, business alliances, and re-deployment of manufacturing functions to overseas locations that offer better opportunities for cost efficiency. Micron Technology’s acquisition of Elpida Memory through a corporate reorganisation completed in July of last year and the acquisition of a health-care subsidiary of Panasonic by KKR completed in August 2014 are typical examples. However, the most notable transaction in this industry was the merger of Tokyo Electron Limited and Applied Material, Inc announced in September last year.

In the food and beverage industry, it appears that companies are in strong need of developing outbound transactions because of the saturation of the domestic market coupled with a widely expected sharp decrease in the Japanese population in the future. As a result, key players in the food and beverage industry are actively seeking to expand their business outside Japan through outbound transactions. The acquisition of Beam Inc by Suntory Holdings Limited is an example in this industry.

We understand that it is a global trend, not a trend particular to Japan, that pharmaceutical companies have recently been very active in mergers and acquisitions. Because of the large R&D costs for sustaining and expanding their businesses, pharmaceutical companies need to seek economies of scale, which may be a strong motivation for M&A deal activity. In addition, in Japan, the expected increase in the aged population and the increasing

sensitivity to health and medication problems seem to offer an attractive platform for pharmaceutical and health-care businesses, while there are many small and medium-sized companies remaining in Japan in this business sector. These factors could bolster both inbound and domestic transactions in the pharmaceutical and health-care industry in Japan. The above-noted KKR acquisition could be also cited as an example that shows this trend.

The size of M&A transactions in the above industries has varied greatly and we do not see any particular pattern in terms of deal size. However, given the underlying incentives for M&A transactions in these industries, it would not be surprising if many large-scale transactions come to light in the future.

GTDT: What were the recent keynote deals? What made them so significant?

RS & KT: The merger of Tokyo Electron Limited and Applied Material Inc is certainly noteworthy as one of the recent keynote transactions. Both companies have generally continued to accomplish good operational results for many years but nonetheless have decided to integrate their businesses across the border for further growth. This deal is a notable transaction from the viewpoint of its size, which is expected to be in the area of US\$9.3 billion, as well as its unprecedented scheme in Japan of a merger between parties in different jurisdictions. In addition, the above-noted acquisition of Beam by Suntory, as well as the acquisition of Sprint Corporation by Softbank Corp completed in July 2013 and Lixil Corporation's acquisition of Grohe Group Sarl announced in September 2013, are also keynote deals taking into consideration their size and the 'outbound' nature of the transactions.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your country primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

Generally speaking, Japanese shareholders seem to have a strong preference for cash deals, and consideration used in most of the acquisitions in Japan is cash. However, in the case of merger transactions, it is common to offer as consideration the shares of the acquiring company to the shareholders of the target company.

We rarely see any significant acquisition transactions where the shares of foreign acquirers are offered to the shareholders of a Japanese target company (with a possible exception of Citi Group Inc's acquisition of Nikko Cordial Group several years ago).

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your country?

RS & KT: The most significant change is the amendment to the antimonopoly law in 2010, which introduced a pre-notification system for share acquisition. Accordingly, for any share acquisition with a size exceeding the applicable threshold, a notification must be filed with the Japan Fair Trade Commission at least 30 days before the closing. Previously, pre-notification was required only for a merger, business transfer or demerger. The recent amendment is in line with the global trend. However, it should be noted that this pre-notification will be required in two instances: (i) where the stake in the target company exceeds 20 per cent; and (ii) where it exceeds 50 per cent.

In addition, in Japan, there is increasing sensitivity to so-called gun-jumping issues for the parties to M&A deals. Exchange of information in the context of M&A transactions would not



Kayo Takigawa



Ryuji Sakai

“The increase of inbound transactions is one of the most notable changes we have been seeing recently.”

normally give rise to issues of non-compliance under the Japanese antimonopoly law. However, it has now been recognised in practice in the case of M&A transactions between global businesses that gun-jumping issues under foreign competition law must be duly taken into account, unlike the situation in previous years where a party could plead ignorance. As a result, this issue has come to significantly affect the information exchange process in the due diligence phase for M&A transactions that have a global aspect.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your country common?

RS & KT: The increase of inbound transactions is one of the most notable changes we have been seeing recently. There were many buyers from outside Japan in the 1990s when many financially troubled Japanese businesses, including banks, were rescued by foreign buyers, some of which were not well received in Japan then. Recently, there have not been many inbound transactions compared with the high point in the 1990s, but generally there is no longer any discernible bias against buyers from outside Japan in friendly, negotiated deals, and, in this sense, it would be fair to say that foreign buyers are common in Japan.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

RS & KT: Shareholder activists, as well as some attempts at hostile takeovers, experienced somewhat of a boom in Japan in the early 2000s. However, we have not seen much of either since the global financial crisis. One of the reasons may be that some of the key players in shareholder activism and hostile takeovers were involved in scandals and convicted of securities fraud, etc. During the era when they were active, a large number of Japanese listed companies introduced a Japanese version of anti-takeover plans (ie, the announcement of possible dilutive issuances of stock acquisition rights), and many of those plans still remain in effect (the statistics of Tokyo Stock Exchange indicate that approximately 19.4 per cent of Japanese listed companies adopted such plans as of September 2012). This appears to be an after-effect of the shareholders activism of the early 2000s. It should be also noted that Japanese culture that is somewhat biased against hostile takeover attempts (eg, it appears to be a general policy of Japanese banks not to provide financing support to hostile takeovers) seems to have set a high hurdle to be cleared by acquirers in hostile takeover transactions.

On the other hand, we note that Japanese listed companies have become very sensitive to the voting policies from time to time adopted by

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

In Japan, aside from legal theory, it is often not very clear whose interest is represented by the management of the target company. Almost always, the welfare of the employees is a very important issue. In addition, the possible reaction of governmental authorities and other peers in the relevant industry, not to mention that of suppliers and customers, could be a concern. These factors tend to affect, and sometimes skew, the outcome of the transaction. This may be a matter of cultural differences but frequently seems to have more substance to it.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

It seems clear that they should consider availability of resources and in-depth experience for dealing with complicated Japanese law issues; skill and experience for communication in English, both orally and in writing; and capability of efficiently and carefully preparing necessary documentation.

What is the most interesting or unusual matter you have recently worked on, and why?

A client came to us after 5pm on Friday and requested us to work on a sizeable M&A transaction indicating that a certain document needed to be signed the following Monday. We certainly thought that the document would be an NDA or, in the unlikely event, a simple MOU. It turned out, however, that what was meant by the client was a definitive agreement for the deal. The next 48 hours was sheer chaos, but through a great deal of concerted effort, the document was signed as scheduled. This was unprecedented and will likely never be repeated.

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institutional investors, in particular, well-respected foreign institutional investors, and tend to try to ensure that the management proposals submitted to shareholders' meetings will receive their endorsement. This trend has led to the introduction by the Japanese government of Japan's so-called Stewardship Code, suggesting the principles that institutional investors should preferably comply with.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

RS & KT: The ways to start a transaction vary, but we understand that, in many cases, contact is initiated through the financial advisers to the parties. However, occasionally, initial contact is made at the senior management level.

There is nothing particularly unique to the transaction process in Japan. That is, if both parties are interested in moving forward, a non-disclosure agreement is typically executed first and the due-diligence process starts. In many cases, a non-binding or binding MOU is also executed before the start of the due-diligence or after the completion of the preliminary due diligence. In large-scale transactions, an MOU is often executed at an early stage so that full-scale due diligence may be conducted with participation of a large number of team members. With very few exceptions, only after the completion of the due diligence process, which may or may not be comprehensive depending on the particulars of the transaction in question, do the parties enter into a definitive agreement. Due to fiduciary duty concerns, generally, a due diligence exercise is viewed in Japan as a 'must' for significant transactions.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your country?

RS & KT: With respect to legal matters, generally speaking, there have been major changes in corporate law and other relevant laws that have been fundamental to mergers and acquisitions over the past several years, and accordingly, we do not see any further substantial changes to come in the near future. However, an amendment to the corporate law of Japan has recently been enacted, and is expected to become effective in April or May 2015, which includes one major change to the procedure for a share acquisition. That is, under the amended corporate law, when a seller company is to sell the shares of its material subsidiary, such sale should be approved by a supermajority shareholders' resolution (ie, at least two-thirds of the votes at a general meeting of shareholders). This requirement is applicable where the book value of shares to be sold exceeds one-fifth of total

assets of the seller company, and, as a result of such sale, the target company will not be a subsidiary of the seller company. The impact of this amendment could be significant, since there has been no such requirement for a shareholders' resolution in the case of a share acquisition.

In addition, this amendment to the corporate law will add new processes for certain issuance of new shares as a result of which the purchaser of such new shares will come to hold the majority of voting rights of the issuing company. While, under the current corporate law, a company may issue new shares only by a board resolution within the authorised capital (so long as the issuance price is not especially advantageous to the purchaser), the issuing company will, after the amendment, be required to notify the information concerning the purchaser to the existing shareholders, and, if such existing shareholders holding one-tenth or more voting rights of the issuing company raise objections to such issuance of new shares, the issuing company must obtain an approval at a general shareholders' meeting.

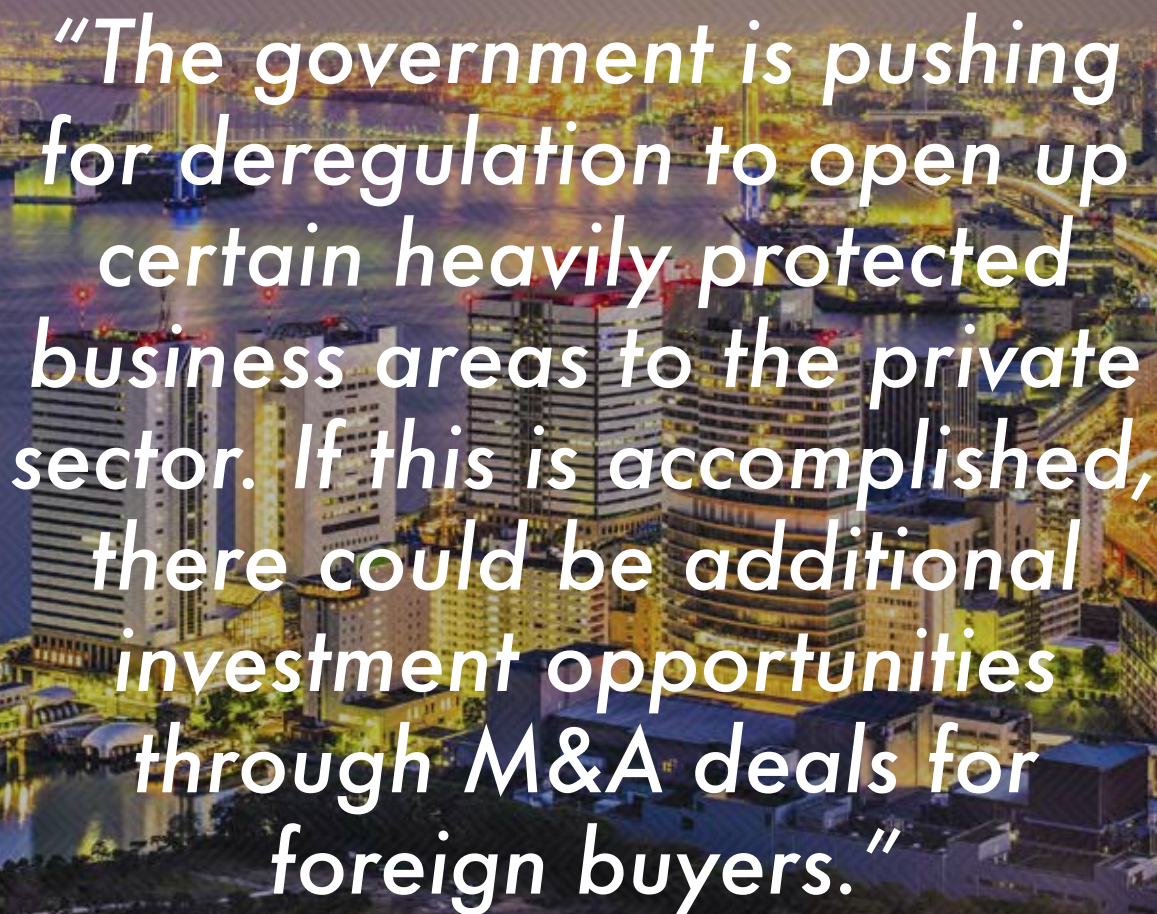
We might add that the government led by Prime Minister Abe is pushing for deregulation to open up

certain heavily protected business areas, such as medical and agriculture, to the private sector. If this is actually accomplished, there could be additional investment opportunities through M&A deals for foreign buyers.

As for commercial matters, unless there is any drastic improvement in the Japanese economy, we do not anticipate any significantly favourable changes taking place in the near future.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active?

RS & KT: We do not think there will be any drastic change in the next year or so; and the active sectors will not likely change swiftly either. However, it seems that the retail industry may also become more active in mergers and acquisitions, the reason for which is almost the same as that for the food and beverage industry. That is, the shrinking Japanese population will require retail companies to be more consolidated in the domestic market and expand their business outside Japan.



“The government is pushing for deregulation to open up certain heavily protected business areas to the private sector. If this is accomplished, there could be additional investment opportunities through M&A deals for foreign buyers.”

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