

market intelligence

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GETTING THE
DEAL THROUGH 

M&A

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economies led by Alan Klein

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“staggering growth”

Activity levels • Keynote deals • Shareholder activism • 2016 forecast
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Publisher: Gideon Robertson
Senior business development manager:
Adam Sargent
adam.sargent@gettingthedealthrough.com

Product marketing manager: Sophie Pallier
subscriptions@gettingthedealthrough.com

Head of production: Adam Myers
Editorial coordinator: Eve Ryle-Hodges
Subeditor: Tessa Brummitt
Designer: Nathan Clark

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authorised copy contact Adam Sargent,
tel: +44 20 3780 4104

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GETTING THE
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market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing on 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 both 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?

Ryuji Sakai & Kayo Takigawa: In short, the overall trends of M&A activities have not changed recently. That is, the number of transactions, especially those that are outbound, is increasing.

Since the global financial crisis in 2008, and the Great East Japan earthquake in 2011, as it is known, the economy has been slow. Overall, mergers and acquisitions have been somewhat sluggish, but 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. Also, it may be noteworthy that during the past one to two years, we saw several massive cases where Japanese companies acquired foreign companies, such as the acquisition of Beam by Suntory, the acquisition of HCC Holdings by Tokio Marine and the acquisition of the Financial Times Group by Nikkei.



“The food and beverage and pharma and health-care industries are continuously the focus of active M&A deals, and we predict that this trend will continue.”

Furthermore, in December 2012, the Liberal Democratic Party of Japan (LDP) regained control of the government and started advocating their 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 continue, 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). The level of activity for mergers and acquisitions, as a whole, has nearly returned to the level before the global financial crisis.

It may also be worth noting that there are movements of withdrawal by foreign companies from their business in Japan. For example, the acquisition of Citibank’s retail business in Japan by Sumitomo Mitsui Trust Bank or the acquisition by Idemitsu of shares in Showa-Shell Sekiyu held by Royal Dutch Shell.

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 food and beverage and pharma and health-care industries are continuously the focus

of active M&A deals, and we predict that this trend will continue. The financial industry also seems to have become active, especially in outbound transactions.

The underlying reason for the activity levels in each industry varies. In the food and beverage industry and the financial 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 both these industries are actively seeking to expand their business outside Japan through outbound transactions. Acquisition of Beam by Suntory and HCC Holdings by Tokio Marine are key examples.

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. The large amount of R&D costs for sustaining and expanding their businesses, means that pharma companies need to seek economies of scale, which may be a strong motivation for M&A deal activity. In addition to this, the expected increase of the ageing population in Japan, and the increasing sensitivity to health and medical problems, seem to offer an attractive platform for pharma and health-care businesses, while there are many small or medium-sized companies remaining in Japan in this business sector. These factors could bolster both inbound and domestic transactions in the pharma and health-care sector.

The size of M&A transactions in the industries mentioned 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 aforementioned acquisition of Beam by Suntory and acquisition of HCC Holding by Tokio Marine are 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?

RS & KT: 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 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 Act 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: (1) where the stake in the target company exceeds 20 per cent; and (2) where it exceeds 50 per cent.

In addition, there is increasing sensitivity to so-called ‘gun-jumping’ issues between the

parties to M&A deals. Exchange of information in the context of M&A transactions would not normally give rise to issues of non-compliance under the Japanese Antimonopoly Act. 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 prior 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 are 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. Recently, there have not been many inbound transactions compared with this high point in the 1990s, but generally there is no longer any discernable 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 activism, as well as some attempts at hostile takeovers, experienced something 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 security fraud. 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 the Tokyo Stock Exchange (TSE) indicate that approximately 14.6 per cent of the Japanese listed companies adopted such plans as of July 2014). This appears to be an after-effect of the shareholder activism of the early 2000s. It should be also noted that Japanese culture is somewhat biased against hostile takeover attempts. For example, it appears to be a general policy of Japanese banks not to provide financial support to hostile takeovers, which seems to have set a high hurdle to be cleared by acquirers in this type of transaction.

THE INSIDE TRACK

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

In Japan, aside from legal theory, it is often unclear as to 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 difference but there frequently seems to be more substance to it.

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

They should certainly consider the availability of resources and in-depth experience for dealing with complicated Japanese law issues; the skill and experience for communication in English, both oral and written; and the 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 once 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 for the following Monday. We thought that the document would be an NDA or, albeit unlikely, a simple MOU. It turned out, however, that the client meant the 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 is likely never to be repeated.

Ryuji Sakai & Kayo Takigawa
Nagashima Ohno & Tsunematsu
 Tokyo
www.noandt.com

Incidentally, although this may only be distantly related to shareholder activism, in June 2015 the TSE publicly announced the 'Corporate Governance Code' that is expected to be honoured by all listed companies. The Code sets out various principles for accomplishing better and more advanced corporate governance, and may have a substantial impact on the management of Japanese listed companies in relation to M&A strategies, possibly including reactions to hostile takeover attempts.

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 advisors to the parties. However, occasionally, initial contact is made at the top 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 due diligence starts. In many cases, a non-binding or binding memorandum of understanding (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, the parties enter into a definitive agreement. Generally, owing to fiduciary duty concerns, a due diligence exercise is viewed in Japan as '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 last several years, and accordingly, we do not see any further substantial changes to come in the near future. However, in May 2015, an amendment to the corporate law of Japan became effective, 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 a 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 the 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 shareholders' resolution in the case of a share acquisition. 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 by 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. However, we may need to carefully watch how the economy in China fares. Unlike the crisis in Europe, the downturn of the Chinese economy would impact Japan.

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 are not likely to change significantly either. However, it seems that the retail industry may become more active in M&A deals, the reason for which, similar to the food and beverage industry, is that the shrinking Japanese population will require retail companies to be more consolidated in the domestic market and expand their business outside Japan.



“There is no longer any discernable bias against buyers from outside Japan in friendly, negotiated deals.”

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