GETTING THE DEAL THROUGH

Mergers & Acquisitions

in 66 jurisdictions worldwide

2014

Contributing editor: Alan M Klein

Published by
Getting the Deal Through
in association with:

Aabø-Evensen & Co Advokatfirma
ÆLEX
Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)
ASAR – Al Ruwayeh & Partners
AVM Advogados
Baker Botts LLP
Basham, Ringe y Correa, SC
Bersay & Associés
bizconsult law LLC
Bonn & Schmitt
Bowman Gilfillan
Boyanov & Co
Casahierro Abogados
Colibri Law Firm
Corpus Legal Practitioners
Costa, Waisberg e Tavares Paes Sociedade de Advogados
Debarliev, Dameski & Kelesoska Attorneys at Law
DLA Piper Ukraine
EDAS Law Bureau
ELİG Attorneys-at-Law
Estudio Trevisán Abogados
Ferrere Abogados
Freshfields Bruckhaus Deringer
Gilbert + Tobin
Gleiss Lutz
Goodmans LLP
GTG Advocates
HJM Asia Law & Co LLC
Hoet Peláez Castillo & Duque
Homburger
Icaza, González-Ruiz & Alemán
Kettani Law Firm
Khaitan & Co
Kimathi & Partners, Corporate Attorneys
Kim & Chang
Lloreda Camacho & Co
Magnusson
Mares / Danilescu / Mares
MJM Limited
Nagashima Ohno & Tsunematsu
Nielsen Nørager Law Firm LLP
Odvetniki Šelih & partnerji, o.p., d.o.o.
Paul, Weiss, Rifkind, Wharton & Garrison / David Norman & Co
Pellerano & Herrera
Rentsch Legal
RIAALAW
Roca Junyent, SLP
Schönherr
Simont Braun
Simpson Thacher & Bartlett LLP
Slaughter and May
Stankovic & Partners
Ughi e Nunziante – Studio Legale
Walker Kontos Advocates
Walkers
Weil, Gotshal & Manges
Wong Beh & Toh
WongPartnership LLP
Young Conaway Stargatt & Taylor, LLP
ZICOlaw (Thailand) Limited

Mergers & Acquisitions 2014

Contributing editor:
Alan M Klein
Simpson Thacher & Bartlett LLP

Getting the Deal Through is delighted to publish the fully revised and updated fifteenth edition of *Mergers & Acquisitions*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Mergers & Acquisitions 2014 examines the law and regulation of business combinations and addresses the most important issues for international deals.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 66 jurisdictions featured. New jurisdictions this year include Angola, Mozambique, Panama, Portugal and Spain. Global and EU overviews are also provided.

Many legal disciplines come into play in large M&A deals. In particular, advisers must take account of competition regulation. This volume contains an appendix covering merger control rules across the world. For a more detailed analysis please refer to another volume of the *Getting the Deal Through* series: *Merger Control*.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingtheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise in this field. We would like to thank Casey Cogut of Simpson Thacher & Bartlett LLP for his stewardship of the title over the last fifteen years. We would especially like to thank and acknowledge Alan M Klein as contributing editor of this and future editions.

Getting the Deal Through
London
May 2014

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers
George Ingledew
george.ingledew@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

First published 1999
Fifteenth edition
ISSN 1471-1230

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Japan

Ryuji Sakai, Kayo Takigawa and Yushi Hegawa

Nagashima Ohno & Tsunematsu

1 Types of transaction

How may businesses combine?

The following forms of business combinations are available under Japanese law:

- share acquisition;
- business transfer;
- merger;
- share exchange;
- share transfer; and
- corporate split.

A share acquisition and a business transfer are straightforward sales and purchases of shares or a business of a company between the seller and the purchaser.

A merger is a transaction between two or more companies whereby those companies merge with each other such that one surviving company remains (absorption type merger) or one new company is formed (incorporation type merger). In a merger, in general, shares of the merged company are exchanged for the shares of the surviving company or the newly formed company.

A share exchange is a transaction between two companies whereby one company becomes the 100 per cent shareholder of the other company. In a share exchange, in general, shares of the acquired company are exchanged for the shares of the acquiring company, namely the new parent company.

A share transfer is a transaction whereby an existing company newly forms a parent company and becomes its wholly owned subsidiary, that is, the shares of the existing company are exchanged for the shares of a to-be-formed parent company. This allows an operating company to create and shift to a holding company governance structure. In addition, because two or more companies may jointly implement a 'share transfer' to create a holding company owning all the shares of those companies, a share transfer is often used as a means of business combination.

A corporate split is a transaction whereby one company splits out a segment of its business. The split-out business can be transferred to a company to be newly formed as a result of a corporate split (incorporation type split) or to an existing company (absorption type split). In general, shares of the company to which the split business is transferred are issued to the transferring company that splits out the business, or to the shareholders of such company.

Under the Company Law, not only stock companies, but other types of companies (for example, limited liability companies) may become parties to the above types of business combinations. However, because most M&A transactions in Japan occur between stock companies either as parties or as vehicles, the answers to the questions below also assume that only stock companies are involved, unless otherwise indicated.

In addition, the consideration that may be used for absorption-type mergers, share exchanges, or absorption-type splits has been expanded so that, in addition to shares of the acquiring or successor company noted above (for example, the surviving company in a merger, an acquiring company in a share exchange and a succeeding company in a corporate split), cash, bonds, stock options and other assets may be used as consideration in these business combination transactions.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The most important law governing business combinations is the Company Law (Law No. 86 of 2005, as amended).

In addition, the following laws and regulations are important:

- the Commercial Registration Law (Law No. 125 of 1963, as amended);
- the Law Concerning Prohibition on Private Monopoly and Preservation of Fair Competition (Law No. 54 of 1947, as amended) (the Anti-monopoly Law);
- the Financial Instruments and Exchange Law (Law No. 25 of 1948, as amended) (the FIE Law); and
- the Foreign Exchange and Foreign Trade Law (Law No. 228 of 1949, as amended) (the FEFT Law).

3 Governing law

What law typically governs the transaction agreements?

Mergers, share exchanges, share transfers and corporate splits are statutory arrangements provided for by the Company Law, which is a part of Japanese law. Therefore, the agreements or other documents for those transactions must satisfy the relevant requirements under Japanese law, and will be governed by Japanese law. Agreements for share acquisitions and business transfers may be governed by the laws of any jurisdiction selected by the parties; however, in the majority of cases, the agreements for those transactions are also governed by Japanese law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Anti-monopoly Law

Under the Anti-monopoly Law, subject to certain threshold requirements and exceptions, a company accepting a business transfer, a company implementing a merger or a corporate split, and companies jointly implementing share transfer must file a prior notification of such transaction with the Japan Fair Trade Commission, after which there is a 30-day waiting period.

Further, under the Anti-monopoly Law, subject to certain threshold requirements and exceptions, if a company increases its shareholding in another Japanese or foreign company with certain amount of sales in Japan, and the resulting shareholding ratio exceeds ownership thresholds of 20 per cent, or 50 per cent, such company must file a prior notification with the Japan Fair Trade Commission, after which there is a 30-day waiting period.

FEFT Law

Under the FEFT Law, a foreign investor may be required to file ex post facto reports with the competent ministers through the Bank of Japan when it acquires shares of a Japanese company (see question 15).

FIE Law

The FIE Law contains certain disclosure obligations relevant to business combinations and the tender offer regulations, as well as insider trading regulations (which are important in practice but are not covered by this chapter).

Under the FIE Law, if a party acquires 5 per cent or more of the shares of a publicly traded company (namely, a company listed on a stock exchange or registered for trading over the counter), such party is required to file a large shareholding report within five business days of the acquisition. An increase or decrease of 1 per cent or more in the shareholding ratio of the acquirer will trigger an obligation to file an amendment report (see question 6). Also, the FIE Law requires prior submission of a securities registration statement in the event of a merger, share exchange, share transfer or corporate split where, in addition to the other requirements, the acquired company (the dissolving company in a merger, the company becoming a subsidiary in a share exchange and a share transfer, or a splitting company in a corporate split) of such business combination is subject to continuous disclosure requirements under the FIE Law, and the securities to be distributed as consideration are not subject to disclosure requirements under the FIE Law.

More importantly in the context of M&A transactions, tender offers are governed by the FIE Law. Under the FIE Law, a tender offer is mandatory for a purchase or purchases of shares of publicly traded companies or other companies that are otherwise subject to continuous disclosure requirements under the FIE Law, if, inter alia: after such purchases from more than 10 sellers via 'off-market' transactions within a period of 61 days or less, the purchaser's shareholding is in excess of 5 per cent; after such purchases via off-market transactions or certain trade sale type market transactions, the purchaser's shareholding is in excess of one-third; or after a combination of off-market transactions or certain trade sale-type market transactions for shares in excess of 5 per cent in itself, and other acquisitions of shares (including subscription of newly issued shares), being implemented within a three-month period, the purchaser's shareholding increases by more than 10 per cent and is in excess of one-third in total. For the purpose of 'purchaser's' ownership percentage calculation, detailed rules are provided in the FIE Law, and shares owned by statutorily defined 'affiliates' are aggregated.

Where a tender offer is required, the purchaser must, at the time of commencing the tender offer, file a tender offer registration statement with the local financial bureau and make a public announcement, both in accordance with the applicable disclosure requirements under the FIE Law. The information to be disclosed includes the purchase price, the tender offer period (from 20 to 60 business days), the conditions to the tender offer, the outline of the business plan after the completion of the tender offer, the outline of purchaser, etc. Further, it should be noted that, if the purchaser intends to purchase two-thirds or more of the shares of the target company, such a purchaser is required to offer to purchase all the shares tendered.

Stamp duty and other governmental fees

No stamp duty or other governmental fee is imposed on a share acquisition agreement, share exchange agreement, or share transfer plan. A stamp duty of ¥40,000 is imposed on a merger agreement and a corporate split agreement (or corporate split plan). Stamp duty on a business transfer agreement varies depending on the price of the business being transferred; with the maximum amount being ¥600,000. A business combination often involves amendments to the company's commercial registration, which are subject to various registration taxes in amounts depending on the matters affected. There are no governmental fees charged for a tender offer.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There are four categories of major disclosure requirements. The first is a public announcement required by the rules of the relevant stock exchange. The second, third and fourth are the filing of an extraordinary report, the filing of a large shareholding report, and the filing of a securities registration statement under the FIE Law. Regarding the details of such 'large shareholding report', see question 6. All information disclosed by these three means will become public information. The items required to be disclosed include an outline of parties, the outline of transactions, the reason for the transaction and the future prospects, etc. The details of such required disclosures differ according to the type of business combination.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the FIE Law, a party that becomes a 5 per cent or more shareholder of a publicly traded company is required to file a large shareholding report. In the report, such party must disclose its identity, as well as the number of shares it owns, the share acquisition and disposition history over the past 60 days, the purpose of acquisition, any material agreement relating to the shares (such as a security agreement), any financing source for acquisition funding and the identities of other cooperating shareholders. An increase or decrease of 1 per cent or more in the shareholding ratio will trigger an obligation to file an amendment report. The requirements are not affected even if the company is a party to a business combination.

In addition, the FIE Law requires a direct or indirect parent company of publicly traded companies to submit a report on its status within three months after the end of its fiscal year, except where such parent company itself is subject to the continuous disclosure obligations under the FIE Law. The report must contain information concerning its major shareholders, officers, and financial results, and shall be made public.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under the Company Law, the directors of a company owe a fiduciary duty to the company. This duty must be distinguished from a duty to the shareholders as a matter of legal theory. The Company Law provides that the directors of a company must be liable to third parties (including shareholders and creditors) who suffer any damage due to wilful misconduct or gross negligence of such directors in the course of performance of their duties as directors.

Under Japanese law, duties of controlling shareholders are not recognised. However, the Company Law provides that if a materially unfair resolution is adopted at a general meeting of shareholders as a result of affirmative votes cast by one or more interested shareholders, such resolution may be cancelled by legal action, which can be initiated by any shareholder, director or corporate auditor, etc.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In share acquisitions, no such shareholder approval rights exist except that approval at a general meeting of shareholders is necessary for share acquisitions for some closed companies, if the articles of incorporation of such companies so provide. However, as a matter of course, each shareholder has a choice not to sell such shareholder's shares. Mergers, share exchanges, share transfers, corporate splits and business transfers (however, as for transferor, only in the case of transfer of all or a substantial part of its business to another company, or, as for transferee, acceptance of all the business of another company) must be approved by a super majority resolution with an affirmative vote of at least two-thirds of the votes at a general meeting of shareholders, where the shareholders present at such meeting hold at least a majority (which resolution requirements and quorum requirements can be modified by the articles of incorporation to the extent permitted under the Company Law) of the relevant voting rights. In small mergers, share exchanges and corporate splits below certain threshold requirements – as well as for shareholders' approval at a subsidiary in any of those business combinations, implemented with its 90 per cent or more parent company – this shareholders' approval is not required. Dissenting shareholders have appraisal rights (except for the shareholders of the acquired company in a small corporate split).

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In Japan, the number of hostile transactions is gradually increasing, but the number of those that have been successful is still very small, partly owing to the negative image associated with hostile transactions in the market. Since 2005, a number of listed companies have adopted anti-hostile takeover plans ranging from 'poison pills' to simple declarations by management that it will take anti-hostile-takeover measures whenever a hostile takeover is launched that is not in accord with the best interests of the company and its shareholders, and in 2007, the Supreme Court rendered a decision upholding the validity of the anti-hostile takeover plans using poison pills. It should also be noted that while the purchaser is not able to conduct a due diligence investigation of the target in the case of a hostile takeover, the disclosure of publicly traded companies in Japan is sometimes not necessarily sufficient.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees and reverse break-up fees provided in the definitive agreements are generally enforceable in Japan, as long as the amount of the fee is reasonable in view of the costs and damage to the parties. If the amount of the break-up fee or the reverse break-up fee is unreasonably high, there is a possibility that a court might hold that the arrangement is against the public interest and declare it null and void.

To our knowledge, break-up fee arrangements have recently tended to be adopted more often than in the past, while reverse break-up fee arrangements have not yet been very popular in Japan. Break-up fee arrangements could also be viewed as a means to back away from the deal, should a more favourable opportunity be presented by a third-party bidder. In particular, these aspects of break-up fee arrangements may become important for publicly traded companies in the future.

Break-up fee arrangements for exclusive negotiation obligations contained in a letter of intent or memorandum of understanding are also generally enforceable but in practice are normally limited to the recovery of costs and expenses. It should be noted that the Japanese courts recently denied a request for injunctive relief based on a letter of intent with binding exclusive negotiation provisions by stating that monetary compensation should be sufficient.

In addition, the target company in an M&A transaction should generally avoid offering its assets as collateral to secure acquisition finance for the acquirer in view of the interests of minority shareholders unless and until the target company becomes 100 per cent owned by the acquirer as a result of the transaction.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than in the two cases mentioned in the question and possible intervention in cross-border transactions under the FEFT Law (which is based on national security as well as other concerns), there are no means for governmental agencies in Japan to influence or restrict the completion of business combinations. It should be noted, however, that in many cases business combinations require commercial registration with the competent legal affairs bureau. Parties wishing to implement atypical business combinations may encounter objections from the officials of the legal affairs bureau when registering such atypical business combinations and should therefore consult with the legal affairs bureau in advance.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Conditions to a tender offer are statutorily limited to the following: if the number of shares tendered is less than a specified minimum number, no purchase of shares will be made; if the number of shares tendered exceeds a specified maximum number (if such specified maximum number is set, it must be less than two-thirds), purchase of shares will be on a pro rata basis; and a tender offer can be withdrawn upon occurrence of 'material adverse change' – events that are statutorily defined.

Financing can be conditional upon successful completion of the tender offer. However, such financing must be on a firm commitment-basis and thus a tender offer cannot be conditioned upon the financing.

Business combinations other than in the form of a tender offer can generally be subject to agreed upon conditions. However, in practice, business combinations via merger, share exchange, share transfer, or corporate split, etc, between publicly traded companies, are rarely subject to many conditions other than necessary shareholder approval, regulatory approval or competition law clearance.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In the case of a tender offer for which the buyer needs to obtain financing, it is necessary to attach a document to the tender offer registration statement showing a firm commitment of the financing. It is requested by the authority that such a document should include substantial conditions precedent to the drawdown of the loan, as well as the representations and warranties if they are referred to in such conditions. Since the law does not allow a tender offer be conditional on the financing (as mentioned in question 12), and therefore, in theory, the buyer will be in default (unless the offerors withdraw their offer) if a condition precedent to the drawdown of the loan is not satisfied.

There is no specific rule on how to deal with the financing in the transaction documents for business combinations other than in the form of a tender offer, and it is up to the parties.

Further, there is no typical obligation on the seller to assist in the buyer's financing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Company Law authorises the use of straightforward squeeze-outs of minority shareholders, through cash-out mergers, cash-out share exchanges, etc. These squeeze-out transactions, including those with cash-out features, generally require both board approval and super-majority shareholders approval (two-thirds or more) of the companies concerned (the shareholders approval is not required at the target company, if the acquiring company already owns 90 per cent or more of the target company and at the acquiring company depending on the significance of the transaction). In the case of a publicly traded company, it normally takes at least several weeks to call a shareholders meeting. In addition, in certain cases, including mergers, creditor protection procedures require the observance of a one-month waiting period. In practice, the tender offer process often precedes a squeeze-out transaction in order to accomplish the share ownership of the target company required to implement the desired squeeze-out. One important caveat is that such squeeze-out transactions must be implemented on fair and commercially reasonable terms, otherwise the transactions may be challenged by minority shareholders through an attempt to cancel the required shareholders' approval, etc. In addition, the 'cash-out'-type mergers or share exchanges authorised by the Company Law cannot be used where a substantial premium is paid because of tax reasons, as discussed in the response to question 18. As an alternative, it is suggested in practice to use a recapitalisation-type transaction whereby the minority shareholders will effectively be squeezed out in cash. This alternative transaction also requires 'super majority' shareholder approval of the target company, but the 90 per cent ownership waiver for this shareholders approval is not available.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Business combinations resulting in a foreign investor holding 10 per cent or more of the shares of a Japanese publicly traded company or any shares of other Japanese companies will generally require a filing with the relevant ministries through the Bank of Japan under the FEFT Law. This filing is on an ex post facto basis in most cases. However, where the target company is engaged in a certain category of business that raises a concern for national security or other public interest (for example, military, aerospace, fishery, agriculture), prior notification must be filed, and with respect to protected business areas among such categories (for example, fishery, agriculture) the prior filing requirement functions as a de facto ban.

It should be noted that in order to implement a merger, corporate split, share exchange or share transfer, parties to these business transactions must be Japanese companies. However, triangular mergers are expected to allow foreign companies to effect a merger in Japan through a subsidiary, whereby the shares of the foreign parent company are offered to the shareholders of the target company upon the merger.

A business transfer requires the purchasing foreign company to have either a subsidiary or a branch in Japan. In contrast, in the case of a share acquisition, a foreign company may directly acquire the shares of a Japanese company. A foreign investor for purposes of the FEFT Law includes a subsidiary or a branch of a foreign company.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Parties to a merger and certain other types of business combination transactions that involve transfer of debts – including corporate splits – must undertake a creditor protection procedure, which generally involves public and individual notice requirements and observance of a one-month waiting period. The parties may not consummate these transactions until the expiration of such waiting period.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations involving target companies in regulated industries (for example, banks, securities firms, insurance companies and broadcasting companies) are subject to certain regulatory approval processes under the relevant industry-specific laws and regulations.

18 Tax issues

What are the basic tax issues involved in business combinations?

Straightforward share acquisitions (including by tender offer) and business transfers are taxable transactions and the seller will be subject to income taxation for any gains. In the case of business transfers, the seller must pay consumption taxes too (Japanese VAT). If the seller of shares of a Japanese company in share acquisitions is not a resident of Japan, it could be subject to Japanese income taxation for the capital gains; however an exemption may be available depending on the percentage of its ownership of the shares or the applicable tax treaty.

Statutory business combination transactions (namely, merger, corporate split, share exchange, and share transfer) can be implemented without income taxation at the time of the transaction (in substance, tax deferral) if such transactions satisfy the requirements for tax-qualified restructuring. Broadly speaking, such a transaction may satisfy the requirements for 'tax-qualified restructuring' if no consideration other than shares of the party taking over the business (including the shares of the parent company in the case of triangular mergers) is paid out (namely, cash-out for squeeze-out will disqualify the transaction), and:

- it is implemented between a parent and a wholly owned subsidiary or between wholly owned subsidiaries;
- it is implemented between a parent and a subsidiary or between subsidiaries, where 80 per cent or more of the employees continue to be engaged in the business concerned and the primary businesses are continued; or
- it is implemented to perform a 'joint operation', where:
  - the businesses of the parties are related to each other, 80 per cent or more of the employees continue to be engaged in the business concerned and the primary businesses are continued;
  - the ratio of the size of the businesses of the parties is within a range of 1:5 or the key management members remain the same; and
  - with certain exceptions, where the ownership structure resulting from the transaction is expected to continue within the applicable parameters.

In the case of a 'tax-qualified' business combination, neither the seller company nor the target company is subject to income taxation at the time of the transaction and their tax bases for the relevant shares or assets remain intact after the transaction (thus, tax deferral) and in general the shareholders of the parties are not subject to income taxation (also, tax deferral). However, a cash-out transaction is

Update and trends

During 2013, the trend from 2012, in principle, continued. That is, outbound acquisitions, which are acquisitions by Japanese companies targeting foreign companies, especially those in south-east Asia, were active when compared with the inbound acquisitions. However, the number of inbound acquisitions, as well as the number of domestic acquisitions, is increasing, as the economy of Japan is heading towards recovery, and the vaue of the Japanese yen is decreasing.

Concerning the regulatory framework, the bill on the amendment of Company Law is expected to be passed during spring 2014. Under this bill, a new system to squeeze out minority shareholders is planned to be introduced, under which a controlling shareholder (holding over 90 per cent of the shares in a company) is allowed to force minority shareholders to sell their shares to said controlling shareholder. In addition, by this amendment, some technical changes in the rules of business combinations will be made. If the bill for these amendments is passed as planned, it might come into effect in 2015.

We do not see any substantial impact of the credit crisis in Europe on the activities of mergers and acquisitions and the regulatory framework in Japan.

not tax qualified, meaning that even the target company must recognise taxable gains, if any, from the transaction because its assets (including goodwill associated with the business) must be either deemed to have been sold or revalued on a mark-to-market-value basis for tax purposes.

The onerous nature of the tax treatment of cash-out transactions can effectively deny the use of cash-out mergers or cash-out share exchanges, etc, where a substantial premium is involved because a premium normally represents the value of goodwill.

The 2010 Tax Reform adopted the 'group-based corporate taxation' regime, where business combination or other transactions taking place between a parent and a wholly-owned subsidiary or between wholly owned subsidiaries (both Japanese companies) can be implemented without income taxation at the time of the transaction (in substance, tax deferral), regardless of whether such transaction is a statutory business combination or is a tax-qualified restructuring as mentioned above.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In general, employment relationships and relevant employee benefits at Japanese companies are primarily regulated by the internal rules (Work Rules) established by the employer company and the applicable statutory provisions. It is rare that a detailed employment contract is signed.

In the case of share acquisitions, share exchanges and share transfers, since there is no change in the status of the employer company, employment relationships and employee benefits will remain unchanged after the transaction.

In the case of mergers and corporate splits, the employment relationships and employee benefits will automatically be transferred to the surviving or succeeding company. Therefore, the Work Rules and employment benefits of the merged or transferring company will continue to apply to the ex-employees of the merged or transferring company, even after the merger or corporate split, unless appropriate arrangements for integration are made. In connection with a corporate split, it should be noted that the employees primarily engaged in the transferred business are entitled to transfer to the succeeding company even if they are excluded from the scope of transfer in the relevant documents, and the employees not primarily engaged in the transferred business are entitled to remain with the transferring company even if they are included in the scope of transfer in the relevant documents.

In the case of business transfers, the transfer of employment relationships is not automatic and such transfer of employment relationships requires agreement between the parties to the business transfer and the consent of the relevant employees. The parties can agree that the purchaser will accept only those employees who consented to the application of the current Work Rules and employment benefits of the purchaser.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In the context of insolvency proceedings, acquirers should be careful in setting the timing of an acquisition (whether before the adoption of a restructuring plan or as a part of the plan) and identifying the party having authority to approve the acquisition (administrator, trustee, supervisor or court). It should also be noted that if the transaction is of the type in which an administrator or trustee is appointed in statutory insolvency proceedings, the transaction will have to be implemented on an 'as is' basis without any meaningful representations or warranties regarding the quality of the business. If the restructuring is under way as a private collective settlement

Nagashima Ohno & Tsunematsu

Ryuji Sakai — **ryuji_sakai@noandt.com**
Kayo Takigawa — **kayo_takigawa@noandt.com**
Yushi Hegawa — **yushi_hegawa@noandt.com**

Kioicho Building, 3–12
Kioicho, Chiyoda-ku
Tokyo 102-0094
Japan

Tel: +81 3 3288 7000
Fax: +81 3 5213 7800
www.noandt.com

outside the realm of statutory insolvency proceedings, the purchaser should possibly expect a difficult negotiation with the banks and other creditors.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Bribery of officials is generally prohibited under Japanese law, but such prohibition is not specific to bribery made in connection with business combinations. That is, bribery of foreign public officials with regard to an international commercial transaction for the purpose of gaining illicit profits is prohibited under the Unfair Competition Prevention Act and those who commit such bribery are subject to imprisonment of up to five years or criminal fines of up to ¥5 million or both. Further, bribery of domestic public officials with regard to such officials' duty is prohibited under the Criminal Code, and those who commit such bribery are subject to imprisonment of up to three years or criminal fines of up to ¥2.5 million or both.

 ISSN 1471-1230