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This issue covers the following topics:

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Amendment Bill of the Act on the Protection of Personal Information
■ General Corporate
Amendment to the Japanese Civil Code
■ Acquisition Finance
Limited Conditionality in Acquisition Finance in Japan

■ Data Protection and Privacy

Amendment Bill of the Act on the Protection of Personal Information

I. Introduction

On March 10, 2020, a Bill to Amend Part of the Act on the Protection of Personal Information (the "Amendment Bill") was submitted to the Japanese Diet. The main provisions of Amendment Bill shall come into force within two years from the date of promulgation of the amendment.

The following is the outline of contents of the Amendment Bill which are expected to have a significant impact on ongoing business practices.

II. Reinforcing the Obligations of Business Operators

(i) Obligation to Report to the Personal Information Protection Committee of Japan and Notify Individuals with regard to Data Breaches

(a) Obligation to Report to the PPC

Under the Act on the Protection of Personal Information (the "Act"), business operators are not legally obliged to report to the Personal Information Protection Committee of Japan (the "PPC") or to notify an affected data subject in the event of a data breach, such as the leakage of Personal Data. The PPC's pronouncement specifies that business operators ought to make efforts to report any data breach to the PPC or other supervising authorities. This is, however, not legally binding.

The Amendment Bill prescribes that business operators will be legally obligated to report to the PPC in certain events related to the breach of security of Personal Data handled by a business operator, such as the leakage, loss, or damage, and which are highly likely to harm the rights and interests of data subjects (Article 22-2(1) of the Amendment Bill). Unlike the obligations under the GDPR to report to supervisory authorities, the Amendment Bill does not include any time restriction for reporting to the PPC.

As a side note, in the event of a data breach by a trustee to whom a business operator has entrusted the handling of Personal Data (a concept similar to "processor" under the GDPR), the trustee shall not be obliged to report the data breach to the PPC

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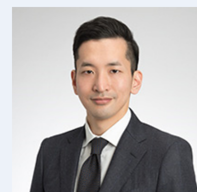

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provided that the trustee notifies the trustor (a concept similar to "controller" under the GDPR) of the data breach (Article 22-2(1) of the Amendment Bill).

Further details of this reporting obligation, including the contents and timing of the report, will be provided under the PPC rules.

(b) Obligation of Notification to Data Subjects

According to the Amendment Bill, when a business operator is obliged to report to the PPC as mentioned above, the business operator shall also notify the data subject of such data breach (Article 22-2(1) of the Amendment Bill). However, in cases where it is difficult to notify the data subject, the business operator may be exempted from doing so provided that necessary alternative action is taken to protect the data subject's rights and interests (Article 22-2(2) of the Amendment Bill). While further details will be provided under the PPC rules, the PPC explains that such alternative measures may include making a public announcement and inviting inquiries from potentially affected data subjects.

(ii) Introduction of the Obligation of Proper Use

Article 16-2 of the Amendment Bill prescribes that business operators are prohibited from using Personal Information in a manner that encourages or is likely to encourage illegal or improper conduct. Although the language here is vague, it is expected that PPC will issue guidance to clarify the interpretation of this article so that it does not have a chilling effect on business operators.

(iii) Reinforcing Opt-Out Regulations

(a) Addition of Matters to be Disclosed for Opt-Out

In principle, a business operator must obtain the consent of the data subject when the business operator provides Personal Data to a third party under the Act (Article 23(1) of the Act). However, there are some exceptions including the 'Opt-Out' method where a business operator must meet certain requirements, such as notifying the PPC of certain matters prescribed in the Act and in the PPC rules (Article 23(2) to (4) of the Act). The Amendment Bill adds the following information to the matters that are required to be disclosed to the PPC and announced to the public (or notified to the data subject) when seeking to utilize the opt-out method.

- Name and address of the business operator, and name of the representative of the business operator providing the Personal Data to a third party (Article 23(2)(i) of the Amendment Bill)
- A method of acquiring the Personal Data which is to be provided to a third party (Article 23(2)(iv) of the Amendment Bill)
- Other necessary matters prescribed by the PPC rules for protecting the rights and interests of data subjects (Article 23(2) and (8) of the Amendment Bill)

(b) Limitation of Personal Data Subject to Opt-Out

The Amendment Bill limits the categories of Personal Data that can be provided to third parties when utilizing the opt-out method. Specifically, the following data cannot be provided to a third party (Article 23(2) of the Amendment Bill).

- Special Care-Required Personal Information (similar to the generally understood concept of sensitive data under the GDPR)
- Personal Data acquired in violation of Article 17(1) (Proper Acquisition) of the Act
- Personal Data provided by other business operators through the opt-out method

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III. Addition of Matters to be Disclosed by Business Operators

(i) Addition of Matters to be Disclosed concerning Retained Personal Data

A business operator is obliged under the Act to disclose certain matters concerning Retained Personal Data to the public. The Amendment Bill adds certain items, including the address of the business operator and the name of the representative for the business operator, as matters to be disclosed (Article 27(1)(i) and (iii) of the Amendment Bill). At the same time, the relevant cabinet order is expected to be revised, and the PPC has indicated that, under the amended cabinet order, additional matters will also be added, such as the system for handling Personal Information, the measures taken concerning Personal Information and the method of processing Retained Personal Data. As a practical matter, the contents of the cabinet order with regard to the matters required to be disclosed will likely have a greater impact on business operators than the content of the Amendment Bill itself and many business operators will subsequently need to revise their privacy policies to comply.

(ii) Addition of Matters to be Disclosed concerning Joint Use

Under the Act, by utilizing the "joint use" exception, it is possible to provide Personal Data to a third party without the prior consent of the data subject. When seeking to take advantage of the "joint use" exception, it is necessary for a business operator to notify the data subjects of the name of the person responsible for controlling the Personal Data or to disclose the name of that person in a readily accessible location, such as posting it on the Internet (Article 23(5)(iii) of the Act). The Amendment Bill adds the address of the business operator and the name of the representative for the business operator as matters to be notified in advance to data subjects or disclosed publicly (Article 23(5)(iii) of the Amendment Bill). Many business operators using the "joint use" exception will have to revise their privacy policies to comply with these amendments.

IV. Expansion of the Range of Extraterritorial Application

Pursuant to an amendment to the Act in 2014, the major provisions of the Act became applicable to foreign business operators outside of Japan. However, foreign business operators remained outside of the scope of the provisions related to reporting and on-site inspections under the Act. The Amendment Bill allows for all provisions of the Act to be applied to foreign business operators outside of the territory of Japan without limitation (Article 75 of the Amendment Bill). According to the PPC, the purpose of this amendment is to remove the exception for foreign business operators and make clear that non-compliance may lead to penalties.

In addition, the Amendment Bill establishes provisions concerning Service (*sotatsu*) and Service by Publication (*koji-sotatsu*), either of which is required to be made prior to any administrative actions under the Act including requesting a report, requiring submission of materials, or the issuance of a recommendation or an order (Articles 58-2 to 58-5 of the Amendment Bill). While the Amendment Bill not only relates to foreign business operators, it is understood that the main purpose of the amendment is to avoid practical problems when implementing administrative measures against foreign business operators.

V. Reinforcing Regulations on Cross-Border Transfer

Under the Act, in principle, a business operator shall obtain the prior consent of a data subject when providing Personal Data to a third party in a foreign country. However, in cases where a third party in a foreign country has established a system that conforms to standards equivalent to those that a business operator under the Act is required to comply with concerning the handling of Personal Data (the "Equivalent Measures"), the business operator may provide Personal Data to such foreign third party without the prior consent of the data subject (Article 24 of the Act). The Amendment Bill reinforces such regulation on cross-border transfers.

In cases where a business operator is required to obtain the consent of a data subject, the business operator is obliged to, prior to the data transfer, provide the data subject with information on the protection of personal information in the foreign country where the third party is located, as well as the measures implemented to protect personal information taken by the third party and certain other similar information (Article 24(2) of the Amendment Bill).

In addition, in cases where Personal Data is provided to a third party in a foreign country pursuant to the Equivalent Measures exception mentioned above, the business operator is obliged to take necessary measures to ensure the continuous implementation of the Equivalent Measures by the third party and to provide the data subject with information on such necessary measures upon request (Article 24(3) of the Amendment Bill). Further details of each amendment will be provided in the PPC rules.

In practice, it is not foreign business operators who receive Personal Data that will be subject to these new regulations but, rather, Japanese business operators who transfer Personal Data outside of Japan. The strict enforcement of these

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regulations will likely result in the reduced transfer of Personal Data by Japanese business operators internationally. If business operators are obliged to investigate systems for protecting personal information in foreign countries and then provide such information to data subjects, it could be an onerous burden for most business operators. If the Amendment Bill intends to strictly enforce this provision of the regulation without imposing a prohibitive burden on business operators, the PPC, not each business operator, should conduct an exhaustive survey on such foreign systems and provide business operators with the necessary information.

VI. Introduction of New Rules concerning the Utilization of Data

(i) Introduction of "Pseudonymized Information"

(a) Purpose and Definition

The Amendment Bill introduces the concept of "Pseudonymized Information (*kamei-kako-jouho*)" in order to encourage analysis of data by business operators and to promote innovation by exempting data that has been processed to reduce the personal identifiability from requests for provision or cessation of use. The Amendment Bill provides that "Pseudonymized Information" means information relating to an individual obtained by processing Personal Information (which includes deleting or replacing information such as names and Individual Identification Codes) so that it is impossible to identify a specific individual by such data unless it is collated with other information (Article 2(9) of the Amendment Bill).

(b) Regulations on Pseudonymized Information

The Amendment Bill does not deal with Pseudonymized Information which does not constitute a database, and regulates Pseudonymized Information under two categories: (i) Pseudonymized Information which falls under Personal Information; and (ii) Pseudonymized Information which does not fall under Personal Information.

While the majority of the regulations pertaining to Personal Information, Personal Data and Retained Personal Data still apply to Pseudonymized Information that falls under Personal Information, the Amendment Bill exempts such Pseudonymized Information from some of these regulations (Article 35-2(3) to (9) of the Amendment Bill).

On the other hand, the regulations pertaining Personal Information, Personal Data and Retained Personal Data does not apply to Pseudonymized Information which does not fall under Personal Information. Such information is subject to separate regulation under the Amendment Bill that takes into account the balance between the need to protect such information and its utilization.

The table below outlines the specific regulations under the Act applicable to Pseudonymized Information as compared to the regulations under the Act concerning Personal Information.

Personal Information	**Pseudonymized Information which falls under Personal Information**	**Pseudonymized Information which does not fall under Personal Information**
Restriction due to Purposes of Use (Article 16)	Restricted to prescribed Purpose of Use under Article 15(1) except where permitted by law	N/A
Notification of the Purpose of Use upon Acquisition (Article 18(1), (3) and (4))	Notification of the Purpose of Use upon acquisition by publication (Article 35-2(4))	N/A
Ensuring the Accuracy of Data Content (Article 19)	In the event that it is no longer necessary to use Pseudonymized Information which falls under Personal Information, such data must be deleted without delay (Article 35-2(5))	N/A
Restrictions on Provision to Third Parties (Article 23(1) and (2)) and Third Parties in a Foreign Country (Article 24)	Pseudonymized Information which falls under Personal Information must not be provided to a third party (Article 35-2(6)) unless permitted by law (Article 35-2(6)), or in specific cases set forth in Article 23(5) (i.e., assignment, business succession, and joint use)	Pseudonymized Information which does not fall under Personal Information must not be provided to a third party (Article 35-3(1)) unless permitted by law (Article 35-3(1)) or in specific cases set forth in Article 23(5) (i.e., assignment, business succession and (iii) joint use)
Change in the Purpose of Use	N/A (Article 35-2(9))	N/A

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(Article 15(2)) Obligation to Notify Data Subjects on Data Breach (Article 22-2 of the Amendment Bill) Publication of Matters concerning Retained Personal Data (Article 27) Claim of the Data Subject (Articles 28 to 34)		
Security Management Measures (Article 20) Supervision of Employees (Article 21) Supervision of Trustees (Article 22) Handling Complaints (Article 35)	Applicable	Applied mutatis mutandis (Article 35-3(3))
N/A	Prohibition of collating Pseudonymized Information with other information for the purpose of identifying a person (Article 35-2(7) of the Amendment Bill) Prohibition of the use of Pseudonymized Information in order to contact the data subject by telephone, mail, e-mail, etc. (Article 35-2(8) of the Amendment Bill)	Prohibition of collating Pseudonymized Information with other information for the purpose of identifying a person (Article 35-3(3) and 35-2(7) of the Amendment Bill) Prohibition of the use of Pseudonymized Information in order to contact the data subject by telephone, mail, e-mail, etc. (Article 35-3(3) and 35-2(8) of the Amendment Bill)

(ii) Regulations regarding Personal Data from the Perspective of Transferee ("Individual Related Information")

Under the Act, the consent of the data subject is generally not considered to be required for the transfer of data when the transferred data does not fall under the category of Personal Data from the viewpoint of the provider – even if the transferee can identify the data subject by collating such transferred data with other information. A typical example of such data transfer is through advertising technology utilizing online identifiers such as Cookies. In addition, last year, the PPC issued "recommendations" (which is one of the administrative actions that the PPC is entitled to take under the Act) to an enterprise which offered a platform for employment applicants and recruiters. The recommendations were issued on the grounds that the enterprise had collated the information acquired via the platform with the information that was provided by the recruiters through Cookies which were allocated to the applicants' Web browsers. The collated information was then used to calculate the rate of rejection of offers by each applicant and the rate was subsequently provided to recruiters without obtaining the applicant's consent[1]. Cookies are not generally considered to be Personal Information under the Act and it was not necessarily clear in this case whether the conduct amounted to a breach of the Act. Nonetheless, in light of these circumstances, the Amendment Bill established the following provisions in order to ensure that the data subject consents to any such data transfer.

The Amendment Bill introduces the new concept of "Individual Related Information (*kojin-kanren-jouho*)." "Individual Related Information" refers to information concerning a living individual that does not fall under any of the categories of Personal Information, Pseudonymized Information, or Anonymously Processed Information (*tokumei-kako-jouho*) (Article 26-2(1) of the Amendment Bill). According to the Amendment Bill, businesses handling Individual Related Information generally have to confirm the items below when: (a) they provide Individual Related Information to a third party; and (b) they expect that the third party acquires the Individual Related Information as Personal Data (Article 26-2 of the Amendment Bill).

(A) The data subjects have consented to the third party receiving the Individual Related Information as Personal Data (Article 26-2(1)(i))

(B) In the case of provision to a third party in a foreign country, when acquiring the consent described above, the data subjects are provided with necessary information, including the system for the protection of personal information in place in the foreign country and the measures taken by the third party to ensure the protection of personal information (Article 26-2(1) and (2)).

Furthermore, a number of the provisions concerning data transfer to third parties in foreign countries and the related

1 For further details of this case, please see page 2-ii(a) of our separate newsletter http://www.noandt.com/en/publications/2019/documents/japan_no20.pdf

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obligations to prepare and retain records when providing data to third parties shall also apply or apply *mutatis mutandis* to the provision of Individual Related Information to third parties.

This new regulation has the potential to have a significant impact on current business practices including targeted advertising.

VII. Enhancement of the Rights of Data Subjects

(i) Relaxation of Requirements for Cessation of Use, Deletion, and Cessation of Provision to a Third Party

The Amendment Bill makes it easier for data subjects to claim their rights against the business operators that retain their Personal Information. The table below provides further details.

Requirements	Claim	Article
When the Personal Information is handled in violation of the prohibition of improper use	Cessation of Use and Request for Deletion	Article 30(1)
When a business operator no longer needs to use Retained Personal Data	Cessation of Use, Request for Deletion, and Cessation of Provision to Third Parties	Article 30(5) and (6)
In the event of a situation requiring the reporting of a data breach		
Cases where the handling of Retained Personal Data is likely to harm the rights or legitimate interests of the data subject		

Provided, however, that if both of the following criteria are met, a business operator will not be required to respond to a claim made by a data subject (Article 30(2) and (6)).

- It is difficult to cease the use of, delete, or cease the provision to a third party of Retained Personal Data including where it requires a large expense.

- Alternative measures to protect the rights and interests of data subjects are implemented.

(ii) Designation of Disclosure Methods

The Amendment Bill permits data subjects to designate the method of disclosure when making a request to the business operators for the disclosure of Retained Personal Data (Article 28-1 of the Amendment Bill). That is, the data subject may request the business operators to disclose the Retained Personal Data in electronic form. However, when it is difficult to disclose by the method designated by the data subject, including when the method is prohibitively costly, the business operator may make such disclosure in physical hardcopy form (Article 28(2) of the Amendment Bill).

(iii) Mandatory Disclosure of Confirmation Records regarding Data Transfer to a Third Party

Under the Act, business operators are obliged to confirm certain matters and keep records when providing Personal Data to a third party or when Personal Data is received from a third party (Articles 25 and 26 of the Act). The Amendment Bill provides that data subjects are entitled to request the disclosure of such records (Article 28(5) of the Amendment Bill).

(iv) Expanding the Scope of Retained Personal Data Subject to Disclosure

While data to be deleted within six months is not subject to claims by a data subject under the Act, the Amendment Bill abolishes such safe harbor provision. As a result, unless exempted by the cabinet order, all Personal Data, regardless of the period of time that the relevant data is held, can be subject to the claims of a data subject, including requests for disclosure. This amendment is expected to result in a further partial amendment to the "complementary rules" for Personal Data transferred from the EU to Japan on the basis of the EU's adequacy certification.

VIII. Reinforcement of Criminal Penalties

Under the Act, in principle, the maximum criminal penalty for a breach of the provisions of the Act by business operators is either imprisonment of one year or a criminal fine of JPY 500,000. The Amendment Bill restates this penalty and, in particular, raises the penalty in situations where business operators violate either the prohibition of illegal theft of a database (Article 83 of the Act) or a PPC order (Article 84 of the Act). While the Act stipulates that such

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violation by business operators is subject to a criminal fine up to JPY 500,000, the violating company will be fined up to JPY 100 million under the Amendment Bill (Article 87(1)(i) of the Amendment Bill).

IX. Concluding Remarks

If the Amendment Bill is passed without any revisions, it will be necessary for many companies to revise their privacy policies. In addition, it will also be necessary for some companies to reconsider whether to utilize targeted advertising. As such, the Amendment Bill would have a considerable impact on a wide range of business practices. Companies would need to examine how the Amendment Bill may impact their own business and consider necessary measures while paying close attention not only to the content of the Amendment Bill itself but also to the expected revision of the relevant cabinet order and the PPC rules.

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■ General Corporate

Amendment to the Japanese Civil Code

I. Enactment of the Act Partially Amending the Civil Code

On April 1, 2020, the Act Partially Amending the Civil Code (the "Amendment") will enter into force and will wholly amend the provisions of the law of obligations, which are mainly compiled in Book III of the Civil Code (the "Amended Civil Code").

II. Objective of the Amendment

The Japanese Civil Code was enacted in 1896 and since then the contents of the law of obligations have remained essentially intact except for a partial amendment to the guarantee system in 2004. Unsurprisingly, it has been thought that the provisions of law of obligations in the Civil Code require amendment to reflect modern changes to Japanese society.

In addition, those provisions of the Civil Code governing contracts, which are deeply related to individuals' daily lives and economic activities, require amendment in order to make them more understandable to the public by codifying current case law principles.

III. Main Points

The main points of the Amendment are as follows:

(a) Amendments concerning prescription

Under the Amended Civil Code, prescription completes, in principle, at the earlier of either: (i) five years from the time when the obligee comes to know that he/she may pursue the claim; or (ii) ten years from the time when it becomes possible to exercise the right.

(b) Reduction of the statutory interest rate and implementation of the fluctuation system

The statutory interest rate will be reduced to three per cent per annum (the current statutory interest rate is five per cent per annum). In addition, the statutory interest rate will be automatically reviewed every three years in accordance with the provisions of the Amended Civil Code. The statutory interest rate will fluctuate in line with the average loan interest rate prevailing in the market as published by the Bank of Japan.

(c) Implementation of individual guarantor protections

Any guarantee, or revolving guarantee, made by individuals to secure business-purpose loans shall be null and void unless the guarantor prepares a certification by a notary public made within one month prior to the issuance of the guarantee which contains his/her intention to become the guarantor. This rule shall not apply to a guarantee made by related persons of the debtor (e.g., directors of a corporate debtor or a majority vote holders of a corporate debtor).

Further, the following rules of the disclosure obligation will be implemented:

(i) the disclosure obligation prior to the execution of the guarantee agreement: the debtor shall provide the guarantor with information regarding, among others, the financial condition of the debtor;

(ii) the disclosure obligation with respect to the performance of the principal: the creditor shall disclose the performance of the principal upon request from the guarantor; and

(iii) the disclosure obligation in case of the acceleration of the principal: the creditor shall disclose the acceleration of the principal to the guarantor within two months of becoming aware of such acceleration.

(d) Implementation of the provisions governing the general terms and conditions

The following provisions governing the general terms and conditions will be newly added to the Amended Civil Code:

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(i) an agreement in the form of the general terms and conditions shall be binding if (a) the parties have agreed to enter into a "Standardized Transaction" and have also agreed that their contractual relationship shall be governed by the general terms and conditions; or (b) it has been represented to the parties that their contractual relationship shall be governed by the general terms and conditions;

(ii) the right to request disclosure of the general terms and conditions; and

(iii) the right to amend agreements in the form of the general terms and conditions without the consent of the counterparties.

(e) Reform of the provisions of the warranty against "Defects"

The provisions of the warranty against "Defects" by the seller will be wholly amended such that the concept of "Defects" will be replaced by the concept of "non-conformity to the contract."

IV. Transitional Measures

In principle, the Amended Civil Code shall apply to the obligations arising, or contracts executed, on and after the date on which the Amended Civil Code becomes effective (i.e., April 1, 2020).

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■ Acquisition Finance

Limited Conditionality in Acquisition Finance in Japan

I. Background

Historically, Japanese banks have been reluctant to provide debt financing on a limited conditionality basis, such as is common with U.K.-style certain funds or U.S.-style limited conditionality in domestic transactions. The first public transaction conducted on such basis in the Japanese market was the debt financing for the acquisition of Macromill Inc, by Bain Capital which was announced in December 2013[2]. Since the Macromill transaction, the use of Japan-style limited conditionality in acquisition finance has been gradually increasing in domestic transactions but its use remains largely exclusive to top-tier private equity firms that have strong bargaining power against Japanese banks. Nonetheless, finance-out provisions are only rarely seen in acquisition agreements in similar transactions.

II. Japan-style Limited Conditionality

Japan-style limited conditionality is, in principle, defined by the following four characteristics:

(a) Limited representations, covenants and events of default as conditions precedent. Conventional credit agreements in acquisition finance in Japan typically require the accuracy of representations, no breach of covenants and no event of default, as conditions precedent to funding. In Japan-style limited conditionality, any representations, covenants, and events of default that are stipulated as conditions precedent for funding are limited to those that are specified as material therein and are only applicable to a borrower and a sponsor (i.e., representations, covenants and events of default with respect to a target and its subsidiaries are excluded).

On the other hand, the limitation on representations, covenants, and events of default is typically determined on a materiality basis, rather than by reference to whether a certain representation is fundamental or not, as is often the case in U.S. style limited conditionality. Thus, representations that are material, but not fundamental, in nature, such as no financial indebtedness owed by a borrower SPV, are ordinarily included as conditions precedent in Japan-style limited conditionality.

(b) Target MAC. No material adverse effect on a target (and its subsidiaries), which is typically required in conventional credit agreements as a condition to funding, may also be excluded from the conditions in Japan-style limited conditionality.

(c) Broader inclusion of other conditions. Certain other conditions that are almost always a part of Japan-style limited conditionality are generally not as restrictive as in U.K.-style certain funds or U.S.-style limited conditionality. For example, the non-occurrence of bank exemption events, which may consist of, among others, natural disasters, war, system failure, or inter-bank market disruption that prevents lending, would almost always be a condition precedent for funding.

(d) Cleanup period. While certain representations, covenants and events of default are excluded from the conditions precedent of Japan-style limited conditionality, the breach of such representations or covenants, and events of defaults typically allow a lender to exercise any available remedies immediately after the closing. To avoid such a situation, a cleanup period of 30 days to 90 days is usually provided in the agreement for a borrower to cure any such breach or event of default.

Japan-style limited conditionality is used in both private acquisitions and public takeovers. It is not, however, mandatory for public takeovers as there is no legal requirements on the use of certain funds for public takeovers in Japan. In order to initiate a public takeover bid, Japanese TOB regulations require a suitor to submit and disclose evidence of sufficient funds to settle the takeover. A debt finance certificate provided by a lender, which contains detailed but not necessarily restrictive descriptions of the conditions to fund debt financing, is often used for this purpose. Consequently, whether or not such limited conditionality is required for debt financing for a private acquisition or a public takeover will be a commercial decision of the relevant parties (i.e. the seller and/or the sponsor).

III. Japan-style Limited Conditionality Remains Uncommon

As mentioned above, Japan-style limited conditionality is still uncommon in the Japanese acquisition finance market.

2 The limited conditionality seen in the Macromill transaction and subsequent similar transactions are often referred to as “certain funds” in Japan. For the purposes of this article, such limited conditionality will be referred to as Japan-style limited conditionality.

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Essentially, such conditionality is seen only in cases where a sponsor has sufficiently strong bargaining power against Japanese banks (and is willing to exercise such power) or in cases where the seller emphasizes the importance of the certainty of funds in its process letter.

One possible explanation for the limited use is the nature of Japanese banks which tend to behave like traditional commercial banks rather than investment banks and deeply value relationships with their clients. In Japan, the so called "main bank system", where the largest credit provider to a firm fulfils multiple roles for the firm's operation (i.e. not only providing a variety of financial services but also providing management support, such as the secondment of staff), is still very much alive. In that situation, it would not be as important whether a debt finance agreement provides for Japan-style limited conditionality or conventional full unrestricted conditionality, as the borrower has a credible expectation that the bank will provide funding in any case because of the strength of the relationship. In turn, this would make borrowers in the domestic market less eager to negotiate in favor of limited conditionality. Additionally, in the Japanese acquisition finance market, banks are still the dominant provider of a senior credit facilities as Japanese banks can take and hold term B loans, and no alternative private debt player has entered the market to date.

IV. Summary

Japan-style limited conditionality, which is less limited than U.K.-style certain funds or U.S.-style limited conditionality, are not often used in domestic acquisition financing, in part because of nature of Japanese banks. This trend is unlikely to change in the foreseeable future given the deep relationships between Japanese banks and domestic firms, and the lack of a viable private debt alternative in the Japanese acquisition finance market.

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