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Corporate M&A 2024

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Japan: Trends and Developments

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Trends and Developments

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Overview of the Landscape

The number of M&A deals involving Japanese companies in 2023 was 4,015, which was a slight decrease from the past two years (4,304 deals in 2022 and 4,280 deals in 2021), whereas the number had been increasing year-by-year from 2012 to 2022 (with the exception of a decline in 2020). From November 2023 onwards, however, there have been announcements of several larger deals, which evidently shows the recovery trend of the M&A market in Japan.

In contrast, the total value of M&A deals involving Japanese companies in 2023 was JPY17.9643 trillion, a 52.2% increase from JPY11.8029 trillion in 2022. Breaking it down by category, the total value of domestic transactions and out-bound transactions were JPY7.7596 trillion and JPY8.1386 trillion respectively, showing significant increases from the previous year. A symbolic domestic transaction in 2023 was the acquisition of Toshiba by a consortium of Japan Industrial Partners and other companies (for approximately JPY2 trillion), and the largest out-bound transaction in 2023 was the acquisition of United States Steel Corporation by Nippon Steel Corporation (for approximately JPY2 trillion). It is

notable that, including these two transactions, there were six deals worth JPY500 billion or more in 2023, whereas there was only one deal worth JPY500 billion in the previous year.

In 2023, there were 96 exit transactions made by private equity funds, for a total value of JPY793 billion, and both the number and total value of this type of transaction reached record highs. The sale of Nichii Holdings, a holding company of Nichii-Gakkan, by Bain Capital to Nippon Life Insurance Company (for JPY210 billion) and the sale of Japan Wind Development Co, Ltd to Infroneer Holdings (for JPY203.1 billion) were representative examples of exit transactions by private equity funds in 2023.

M&A deals related to sustainable development goals (SDGs) and ESG have continued to increase in the past few years, with the purpose of strengthening and expanding renewable energy businesses, restructuring asset portfolios, and moving towards decarbonisation. In 2023, this type of transaction accounted for 8.5% of the total number of M&A deals involving Japanese companies. One of the representative deals was the acquisition of Green Power Investment,

a renewable power generation company, by a consortium of NTT Anode Energy and JERA.

Tender Offers and Unsolicited Takeovers

Overview of tender offers

The total of number of tender offers (based on the number of tender offers filed) in 2023 was 80, representing a 35.6% increase from 2022 and the second largest number since 2008. The acquisition of Toshiba (described above), the acquisition of JSR and Shinko Electric Industry by JIC Capital, and other larger transactions made by domestic private equity funds led to a total transaction value of JPY5.6806 trillion, which is 3.7 times larger than JPY1.5306 trillion in 2022.

There were 17 transactions in which listed companies would become delisted as a result of a management buyout (MBO), an increase from 12 transactions in 2022, corresponding with more than JPY1 trillion on a total value basis for the first time in history. Notable companies in relation to which management buyouts were announced in 2023 were Taisho Pharmaceutical Holdings (the largest MBO of a Japanese company in history – JPY708.6 billion), Outsourcing (JPY221.1 billion) and Benesse Holdings (JPY208 billion).

One of the background reasons for this trend of delisting (either by way of MBO or otherwise) is pressure on listed companies from the Tokyo Stock Exchange and shareholder activism. In March 2023, the Tokyo Stock Exchange made a general request to all companies that are listed on either the Prime or Standard Markets to take action to implement management that is conscious of capital cost and stock price (and, especially, to companies whose price-to-book (P/B) ratio is less than one, which are subject to a stronger request for improvement). In this

respect, it would appear that quite a few companies may not easily achieve the requested improvement, at least in the short term. On top of that, there have been a series of requests by activist shareholders to listed companies to the same effect. Against this backdrop, listed companies that want to undertake structural reforms without being constrained by short-term stock price fluctuations tend to seek to delist their shares.

Relatedly, to improve inefficient capital relationships and partnerships, companies have been accelerating the move to dissolve publicly listed parent/subsidiary pairs, which has frequently been said to be unique to Japan. Fuji Soft privatised Cybernet Systems and another three listed subsidiaries. Sumitomo Electric Industries also privatised its two listed subsidiaries, Nissin Electric and Techno Associe.

Publication of the Guidelines for Corporate Takeovers

The Ministry of Economy, Trade and Industry formulated and published the “Guidelines for Corporate Takeovers” in August 2023 (the “Guidelines”). The Guidelines set out three principles to be respected for transactions through which corporate control of a listed company is acquired:

- corporate value and shareholders’ common interests;
- shareholders’ intent; and
- transparency.

The Guidelines also present best practices regarding:

- the code of conduct of directors and board of directors regarding acquisition proposals;

- how to improve transparency through information disclosure by both acquirer and target company; and
- takeover response policies and countermeasures.

Cases have been highlighted in which the management did not promptly report to the board of directors when receiving a takeover proposal, or in which the board of directors did not consider such proposal adequately or appropriately. In part, this may be because the statutory law or judicial precedents do not provide clear standards on the general code of conduct of directors and board of directors upon receiving a takeover proposal, and, therefore, there was no shared awareness of the actions that should be taken in practice. Against this background, Chapter 3 of the Guidelines presents the code of conduct for directors and board of directors for each stage of the process for internal consideration, discussions or negotiations after receipt of the proposal. More specifically, the Guidelines set out the following:

- upon receipt of an acquisition proposal to acquire corporate control, management or directors should promptly submit or report such matter to the board of directors;
- in the case of a “bona fide offer” submitted to the board, the board shall give “sincere consideration” to such offer; and
- in the event that the board decides on a direction towards reaching an agreement for the acquisition, it shall make reasonable efforts to ensure that the acquisition be based on the terms that will secure shareholders’ interest, and to determine whether the acquisition is appropriate from the perspectives of enhancing the company’s corporate values.

Following the publication of the draft Guidelines, several unsolicited takeover proposals were made in public by listed strategic buyers to other listed companies, which historically had been fairly rare in Japan. For example, NIDEC made an unsolicited takeover proposal to Takisawa, in response to which Takisawa decided, after careful consideration, to accept the offer. Dai-ichi Life Insurance Holdings announced, without any prior contact with Benefit One, its intent to launch a tender offer to Benefit One subject to consent of the board of the target company. As another takeover bid had already been launched to Benefit One by M3, the board of Benefit One and its parent, Pasona Group, had to consider the proposal by Dai-ichi Life Insurance Holdings, comparing the content of the proposal with that of M3. After a two-month review, Benefit One finally consented to the counterproposal made by Dai-ichi Life Insurance Holdings. The Guidelines were explicitly and repeatedly referred to in the press release made by each of the above acquirers, which emphasised that the proposal was a “bona fide offer” in accordance with the Guidelines and that the acquirer was convinced that the board of the target company would approve the offer after a “sincere consideration” in light of enhancement of corporate value of the target and securing the target shareholders’ common interests. The above two cases show that the Guidelines would have a strong potential impact on public M&A practices in Japan.

Publication of the working group report on the tender offer and large shareholding reporting system

Although there has been no major amendment to the laws and regulations concerning tender offer and large shareholding reporting since 2006, various issues have been raised, and the need for amendments has been advocated, especially during the past few years. Against this back-

ground, from June to December 2023, a working group organised by the Financial System Council, an advisory body of the Commissioner of the Financial Services Agency, discussed tender offer and large shareholding reporting rules, as well as transparency of beneficial shareholders, and reflected the discussions in a report on the tender offer and large shareholding reporting system (the “Report”), which was published in December 2023. The Report proposed a variety of amendments, including the following points relating to tender offer rules.

- The threshold of one third in the so-called “one-third rule” (if the voting rights ratio exceeds one third after the acquisition, the acquirer is obligated to make a tender offer even if the purchase is made from an extremely small number of people) should be lowered to 30% in light of the standard in foreign countries.
- Market trades should be made subject to the tender offer rule (more specifically, the one-third rule). As a background to this, there have been cases in which more than one third of voting rights were acquired in a short period through market trades, and it has been pointed out that sufficient amounts of information and time required to make an investment decision need to be provided to general shareholders in such transactions that may have a material impact on corporate control.

Subsequently, a draft amendment to the Financial Instruments and Exchange Act was submitted to the Diet in March 2024. The draft amendment incorporates several major proposals from the Report, including the two proposals above. For an overall picture and details of the amendment, one needs to wait for upcoming amendments to relevant orders and regulations.

Tokyo District Court ruling on “fair price”

In the case of a cash-out of minority shareholders of a listed subsidiary (Family Mart) through a tender offer bid and a subsequent share consolidation implemented by a parent company (Itochu Corporation), which had held a 50.1% stake of Family Mart before the tender offer, the Tokyo District Court held that a particular price, which was above the tender offer price, was a “fair price” to be provided to minority shareholders of Family Mart in the squeeze-out process.

The said Tokyo District Court decision followed the same framework in the Jupiter Telecommunications Supreme Court decision, which is the leading case on “fair price” in a transaction where there is a structural conflict of interest. The Tokyo District Court maintained the view that, in a controlling shareholder acquisition of a controlled company, the tender offer price determined by the parties shall be a fair price to be provided to minority shareholders in a squeeze-out process (unless there are special circumstances) on the condition that (i) certain measures have been taken to prevent the decision-making process from becoming arbitrary and (ii) a tender offer has been made in accordance with a procedure that is generally accepted as fair.

What should be noted in the said Tokyo District Court decision, though, is that it is a rare court decision during the past few years which denied the “fairness of the procedure” (ie, the fact that negotiations were conducted to the same extent as an arm’s length transaction that would have been sufficient to respect the tender offer price, under which situation, the court would not have to make its own judgment in the calculation of the fair price). It is also noteworthy that, in examining the above, the said Tokyo District Court decision made detailed fact-findings and analy-

ses concerning the process of consideration by the special committee of the subsidiary.

Shareholder Activism

At the ordinary general meeting of shareholders (GMS) held in June 2023, a variety of proposals were made by shareholders for 82 companies, the highest number ever.

At its ordinary GMS in June 2023, Cosmo Energy Holdings (“Cosmo”), 20% of whose shares were then held by entities controlled by the Murakami family, a well-known activist, passed a resolution to approve a poison-pill type of takeover defence, excluding the 20% stake from the count. This marked only the second so-called “majority-of-minority” vote on a poison pill type of takeover defence in Japan. Afterwards, as the activists conveyed to Cosmo their intent to increase their shareholding to 25% at the highest, Cosmo was planning to hold an extraordinary GMS in December 2023 to confirm the shareholders’ will by an ordinary resolution (ie, not a “majority-of-minority” vote). The extraordinary GMS was subsequently cancelled, however, because the Murakami family finally agreed to sell almost all of their shares to Iwatani Sangyo, a business partner of Cosmo, before the meeting.

Another case in point was Toyo Construction, which received an acquisition proposal from Yamauchi No 10 Family Office (YFO), an activist, in April 2022, but little progress had been made in negotiation after the proposal. At a GMS of Toyo Construction held in June 2023, seven of the nine candidates for directors proposed by YFO were approved. As a result, the majority of directors of Toyo Construction were those proposed by YFO. However, the board subsequently reviewed YFO’s proposal carefully in accordance with the Guidelines, and finally expressed unani-

mous opposition to the acquisition proposal in light of its corporate value, in response to which YFO withdrew its proposal.

Spin-Offs

Since a tax reform was introduced in 2017 that aimed to facilitate spin-offs (specifically, taxation of capital gains on a spun-out company and taxation of deemed dividends on shareholders were allowed to be deferred under certain conditions), only one spin-off had actually been implemented (by Koshidaka Holdings Co Ltd in 2019) utilising this tax reform. It has been observed that, when large enterprises spin off a division, there is also typically a need to maintain a capital relationship between the original enterprise and the spun-off entity. Given the situation, the tax reforms in 2023 positioned “partial spin-offs”, in which a part (less than 20%) of a wholly owned subsidiary’s shares remain held by a former parent company, as a qualifying reorganisation, to which the same tax benefits as 100% spin-offs could be applied subject to certain conditions.

It is remarkable that five companies have announced that they commenced study of implementation of spin-off just before or after the enforcement of the 2023 tax reforms, and two out of the above five announcements were on partial spin-offs. In May 2023, Sony Group announced that it will consider a partial spin-off of Sony Financial Group (SFGI), which became a wholly owned subsidiary of Sony Group in 2020. By owning less than 20% of SFGI’s shares, Sony Group would be able to secure certain business synergies, and SFGI would be able to retain the “Sony” brand in its company name and services, which would not have been possible if it were a 100% spin-off. Sony Group went on to announce in February 2024 that it obtained certification of a “Business Restructuring Plan” based on the Industrial Competitiveness Enhancement Act,

which is one of the main requirements for the application of the above-mentioned tax reforms, and that it decided to commence a concrete preparation for listing of SFGI shares. It has been announced that the spin-off will be officially decided by the board of Sony Group in May 2025 and implemented in October 2025.

Although the special tax treatment in the 2023 tax reform has only been approved with a time limit of one year commencing 1 April 2023, the government plans to extend the period by another four years.

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