The Mergers & Acquisitions Review

Seventh Edition

Editors
Simon Robinson and Mark Zerdin

Law Business Research

The Mergers & Acquisitions Review

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The publisher would like to welcome Mark Zerdin, also a partner at Slaughter and May, as current and future editor of *The Mergers & Acquisitions Review*. We are delighted to have Mark on board, and we look forward to future editions in Mark's very capable editorial hands.

Gideon Roberton
Publisher, The Law Reviews
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CONTENTS

Editor's Preface xiii
Mark Zerdin

Chapter 1 EUROPEAN OVERVIEW 1
Mark Zerdin

Chapter 2 EUROPEAN COMPETITION 13
Götz Drauz and Michael Rosenthal

Chapter 3 EUROPEAN PRIVATE EQUITY 20
Thomas Sacher, Steffen Schniepp and Guido Ruegenberg

Chapter 4 US ANTITRUST 33
Scott A Sher, Christopher A Williams and Bradley T Tennis

Chapter 5 US ENERGY TRANSACTIONS 53
Sarah A W Fitts, Adam Hankiss and Christopher R Aung

Chapter 6 SHAREHOLDERS AND BOARDS OF DIRECTORS IN US MERGERS & ACQUISITIONS 69
George A Casey and Cody L Wright

Chapter 7 CROSS-BORDER EMPLOYMENT ASPECTS OF INTERNATIONAL M&A 83
Marjorie Culver

Chapter 8 AUSTRALIA 93
Nicola Wakefield Evans and Lee Horan

Chapter 9 AUSTRIA 107
Christian Herbst

Chapter 10 BAHRAIN ... 120
Haifa Khunji and Maryia Abdul Rahman

Chapter 11 BELGIUM ... 135
Olivier Clevenbergh, Gisèle Rosselle and Carl-Philip de Villegas

Chapter 12 BRAZIL ... 144
Marcus Fontes, Max Fontes, Paulo de Tarso Ribeiro and Juliana Huang

Chapter 13 BRITISH VIRGIN ISLANDS ... 155
Jacqueline Daley-Aspinall and Murray Roberts

Chapter 14 BULGARIA ... 169
Yordan Naydenov and Nikolay Kolev

Chapter 15 CANADA ... 179
Robert Yalden, Ward Sellers and Emmanuel Pressman

Chapter 16 CAYMAN ISLANDS ... 196
Wendy L Lee

Chapter 17 CHINA ... 219
Fred Chang and Wang Xiaoxiao

Chapter 18 COLOMBIA ... 232
Sergio Michelsen Jaramillo

Chapter 19 COSTA RICA ... 247
John Aguilar Jr and Alvaro Quesada

Chapter 20 CYPRUS ... 255
Nancy Ch Erotocritou

Chapter 21 CZECH REPUBLIC ... 261
Lukáš Ševčík, Jitka Logesová and Bohdana Pražská

Chapter 22 ECUADOR 269
Diego Pérez-Ordóñez

Chapter 23 EGYPT 279
Omar S Bassiouny and Mohamed Oweis

Chapter 24 ESTONIA 287
Sven Papp and Karl-Erich Trisberg

Chapter 25 FINLAND 300
Jan Ollila, Anders Carlberg and Wilhelm Eklund

Chapter 26 FRANCE 311
Didier Martin

Chapter 27 GERMANY 326
Heinrich Knepper

Chapter 28 GIBRALTAR 338
Steven Caetano

Chapter 29 GREECE 348
Cleomenis G Yannikas, Vassilis-Thomas G Karantounias and Sophia K Grigoriadou

Chapter 30 GUATEMALA 361
Jorge Luis Arenales and Luis Pedro Del Valle

Chapter 31 GUERNSEY 369
Caroline Chan

Chapter 32 HONG KONG 379
Jason Webber

Chapter 33 HUNGARY 390
Levente Szabó and Réka Vízi-Magyarosi

Chapter 34 INDIA 405
Justin Bharucha

Chapter 35 INDONESIA 425
Yozua Makes

Chapter 36 IRELAND 439
Fergus Bolster

Chapter 37 ISRAEL 447
Clifford Davis and Keith Shaw

Chapter 38 ITALY 456
Maurizio Bernardi, Roberta Di Vieto and Luca Occhetta

Chapter 39 JAPAN 471
Hiroki Kodate and Kenichiro Tsuda

Chapter 40 KAZAKHSTAN 481
Aset Shyngyssov and Klara Nurgaziyeva

Chapter 41 KENYA 489
Joyce Karanja-Ng'ang'a and Wathingira Muthang'ato

Chapter 42 KOREA 499
Jong Koo Park, Bo Yong Ahn, Sung Uk Park and Sung Il Yoon

Chapter 43 LITHUANIA 513
Giedrius Kolesnikovas and Emil Radzihovsky

Chapter 44 LUXEMBOURG 523
Marie-Béatrice Noble and Stéphanie Antoine

Chapter 45 MALAYSIA 537
Janet Looi Lai Heng and Fariz Abdul Aziz

Chapter 46 MALTA 548
Jean C Farrugia and Bradley Gatt

Chapter 47 MEXICO 558
Aarón Levet V and Alberto Solís M

Chapter 48 MONTENEGRO 567
Slaven Moravčević and Nikola Babić

Chapter 49 NETHERLANDS 577
Onno Boerstra and Guus Kemperink

Chapter 50 NIGERIA 596
Lawrence Fubara Anga

Chapter 51 NORWAY 601
Ole K Aabø-Evensen

Chapter 52 PANAMA 639
Julianne Canavaggio

Chapter 53 PERU 649
Emil Ruppert and Sergio Amiel

Chapter 54 PHILIPPINES 659
Rafael A Morales, Philbert E Varona, Marie Corinne T Balbido and Hiyasmin H Lapitan

Chapter 55 POLAND 669
Paweł Grabowski, Rafał Celej and Agata Sokołowska

Chapter 56 PORTUGAL 680
Martim Morgado and João Galvão

Chapter 57 ROMANIA 692
Andreea Hulub, Alexandra Malea and Vlad Ambrozie

Chapter 58 RUSSIA 707
Hannes Lubitzsch and Ekaterina Ponka

Chapter 59 SERBIA 715
Matija Vojnović and Luka Lopičić

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Lee Suet-Fern and Elizabeth Kong Sau-Wai

Chapter 61 SOUTH AFRICA 739
Ezra Davids and Ashleigh Hale

Chapter 62 SPAIN 752
Christian Hoedl and Javier Ruiz-Cámara

Chapter 63 SWEDEN 769
Biörn Riese, Eva Hägg and Anna Brannemark

Chapter 64 SWITZERLAND 778
Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon, Harun Can and David Mamane

Chapter 65 THAILAND 790
Troy Schooneman and Jeffrey Sok

Chapter 66 TURKEY 799
Tunç Lokmanhekim and Nazlı Nil Yukaruç

Chapter 67 UKRAINE 808
Anna Babych and Artem Gryadushchyy

Chapter 68 UNITED KINGDOM 819
Mark Zerdin

Chapter 69 UNITED STATES 845
Richard Hall and Mark Greene

Chapter 70 VENEZUELA 882
Guillermo de la Rosa, Juan D Alfonzo, Nelson Borjas and Adriana Bello R

Appendix 1 ABOUT THE AUTHORS 895

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 941

EDITOR'S PREFACE

This past year has seen some surprising twists and turns, not only in the mergers and acquisitions markets but also in the economic and political environments. November saw the re-election of Barack Obama, although this had less of an impact on the markets than an announcement by Ben Bernanke in May that the US Federal Reserve would consider a slowdown in its programme of quantitative easing. On the other side of the Pacific, Xi Jinping has outlined a new communist doctrine – the 'Chinese dream'. The doctrine reflects the changing economic outlook in China where growth will be increasingly consumer rather than investment-led. A new political rhetoric has also emerged in Japan as Shinzo Abe, elected in a landslide December victory, seeks to reinvigorate the Japanese economy. Both rebrandings flirt with nationalist sentiment and the attitude of these two countries towards one another will continue to bear on the region's business environment.

In Europe, despite an awkward Cypriot bailout, the sovereign debt crisis showed signs of stability and government bond yields are falling. Europe also improved its attractiveness in the eyes of investors and remains the largest destination for foreign direct investment. However, there has yet to be a return to growth. Investors seem split fairly evenly between those who believe Europe will emerge from the crisis in the next three years, and those who believe it will take five years or more. In any event, a return to the boom years is unlikely in the near future, particularly as the emerging markets see a relative slowdown. The IMF data for 2012 shows that the combined growth rate of India and China is at its lowest in over 20 years while global growth fell below 2.5 per cent in the second half of 2012. This global slowdown continues to pull M&A figures down making 2012 the fifth consecutive year in which deal values fell globally.

There are reasons for optimism though, particularly in the US market which has seen some substantial deals (the acquisitions of Heinz and Virgin Media being particular highlights). These deals have been made possible by the return of debt financing where the right deal can attract very favourable terms. Equities have also performed much more strongly over the past year. In May 2013 both the Dow Jones and the FTSE 100 hit record highs – validating to some extent the aggressive monetary policies pursued in

the US and the UK. Whether political will can start to lift the markets more broadly still remains to be seen.

I would like to thank the contributors for their support in producing the seventh edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2013

Chapter 39

JAPAN

Hiroki Kodate and Kenichiro Tsuda[1]

I OVERVIEW OF M&A ACTIVITY

Due to the changing Japanese and global economy, the level of M&A activity involving Japanese companies continued to be moderate throughout 2012. However, thanks to the 'Abenomics', a set of measures introduced by Japanese Prime Minister Shinzo Abe after his December 2012 re-election to the post and designed to revive the sluggish economy with 'three arrows': a massive fiscal stimulus, more aggressive monetary easing from the Bank of Japan, and structural reforms to boost Japan's competitiveness, Japanese stock has risen and the Japanese yen has weakened significantly.

It is yet to be seen how much this will have an effect on the overall M&A activity involving Japanese companies.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

In Japan, the Companies Act and the Financial Instruments and Exchange Act (FIEA) provide the fundamental statutory framework for M&A transactions. The Companies Act provides fundamental rules concerning companies and applies to both public and closed companies, whereas the FIEA makes provision for, among other things, public offers of securities, tender offers, insider trading, and is an important source of rules regulating M&A transactions involving public companies. There are also other important laws such as the Antimonopoly Act (AMA) in which Japanese merger control rules are contained. In relation to foreign investment in Japanese companies, the Foreign Trade and Foreign Exchange Act requires the approval of, or reporting to, relevant ministries in certain circumstances.

1 Hiroki Kodate is a partner and Kenichiro Tsuda is an associate at Anderson Mōri & Tomotsune.

The listing rules promulgated by the Japanese stock exchanges provide for, *inter alia*, timely disclosure obligations and delisting requirements, which are also important for deals involving public companies.

Last, a number of recent court cases have the potential to significantly affect the M&A framework of Japan. These are described in detail in the latter part of this chapter.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Outline of Amendments to the Companies Act

In September 2012, the Legislative Council of the Ministry of Justice of Japan published an Outline of Amendments to the Companies Act (the Outline of Amendments), which includes certain proposed amendments to the Companies Act that may have an impact on future M&A transactions. Since it is expected that a bill to amend the Companies Act, which would substantially incorporate the proposals in the Outline of Amendments, will be submitted to the Diet in the near future, it is worth analysing the possible impact of the proposed amendments on M&A transactions. The following briefly reviews three situations of note arising from the Outline of Amendments.

Third-party allocation involving a change in the controlling shareholder

Under the Companies Act, generally speaking, where a public company intends to make a third-party allocation of its shares, a board resolution will suffice and a resolution of a shareholders' meeting is not required unless the allocation price is 'particularly favourable' to the allottee. However, even if the terms of the allocation are not particularly favourable to the allottee, if such allocation involves a change in the controlling shareholder of that company (the shareholder who owns a majority of all voting rights in respect of that company), its impact on other shareholders should be taken into account.[2]

In this regard, the Outline of Amendments sets out that where a public company intends to make a third-party allocation of its shares that results in the allottee holding a majority of the voting rights of all shareholders of the company, such company is required (1) to give prior notice thereof to existing shareholders or make a public announcement of the same; and (2) to pass an ordinary resolution at a shareholders' meeting approving such allocation of shares if the shareholders holding one-tenth or more of the voting rights of all shareholders give notice of their opposition within a specified period.

More specifically, in the notice or public announcement in (1) above, the Outline of Amendments provides that the name and address of the allottee that will hold a majority of the voting rights of all shareholders and the number of voting rights that

2 In this connection, the Tokyo Stock Exchange amended the listing rules in 2009 so that where a listed company intends to make a third party allotment of its shares which results in a dilution of 25 per cent or more or the change in a controlling shareholder, an opinion by a party independent from the company's management (such as an outside director or outside company auditor) shall be obtained. Similarly, the Financial Services Agency of Japan also amended the disclosure guidelines in 2010 to achieve enhanced disclosure.

the allottee will hold as a result of the allocation in question must be included, so that enhanced disclosure can be achieved.

Although the enhanced disclosure in (1) above would not be a greater duty for listed companies that have already disclosed relevant information pursuant to the listing rules or the FIEA, there may be cases where a third-party allocation is significantly delayed by the opposition of shareholders in the case of (2) above. To avoid such a situation, it may be advisable to set a flexible schedule that takes into account possible opposition from shareholders (and the shareholders' meeting to be held), or obtain prior approval at a shareholders' meeting.

Assignment by a parent company of shares in a subsidiary

Where a parent company loses control over a subsidiary through selling its shares in that subsidiary, this may affect the parent company in a similar way to that of an assignment of business of the parent company. Under the Companies Act, however, unlike a business assignment, there are no express provisions that state that the approval of a shareholders' meeting of the parent company is required where a parent company intends to assign its shares in its subsidiary.

The Outline of Amendments provides that if a company assigns all or a part of its shares in a subsidiary, the company must obtain prior approval for the assignment agreement by special resolution at a shareholders' meeting, unless: (1) the book value of the shares or units being assigned does not exceed 20 per cent (or, in cases where a lesser proportion is prescribed in the articles of incorporation, such proportion) of the value of the total assets of the parent company; or (2) on the effective date of the assignment, the parent company holds a majority of the voting rights of all shareholders of the subsidiary.

By necessitating the approval at the parent company's shareholders meeting, the sale process of the subsidiary may be delayed.

Buyout by a special controlling shareholder

The Outline of Amendments proposes a new provision whereby a special controlling shareholder (SCS) – a person who holds at least 90 per cent of the voting rights of all shareholders of a company – may make a demand that all other shareholders of the company sell their shares to the SCS.[3]

According to the Outline of Amendments, an SCS who intends to make such a demand is first required to give notice to the company about the conditions of the sale, including the amount of money to be paid to selling shareholders, and the date on which the SCS will acquire the shares. If the company gives its consent to the conditions of the sale, it must give notice to the selling shareholders no later than 20 days prior to the acquisition date, stating, *inter alia*, the details of the SCS and the conditions of the sale. By the company giving such notice, the SCS shall be deemed to have made the demand to the other shareholders for the sale of their shares, and the SCS will acquire all of the shares on the date of acquisition.

3 The Outline of Amendments provides that these new cash out rules also apply to share options.

For an SCS who intends to implement a cash-out of the remaining shareholders, this new rule will speed up the process as it does not require the shareholders' meeting that is currently needed under the most general cashout techniques under the Companies Act. If this new rule is implemented, it would likely be used in practice.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i Outbound transactions

Due to the longstanding favourable yen exchange rate and the increasing recognition of the importance of overseas operations among Japanese companies, last year showed that there continues to be large-scale outbound M&A transactions in which Japanese companies are acquiring high-value businesses outside Japan. A few notable examples of such transactions are as follows.

Mitsubishi Corporation/Encana Corporation

In February 2012, Mitsubushi Corporation (MC), one of the largest general trading companies based in Japan, agreed to acquire a partnership interest in the Cutbank Ridge Partnership (CRP) for approximately C$2.9 billion. CRP was originally formed by Encana Corporation, a North American energy producer, to develop natural gas assets in British Columbia, Canada. In accordance with the transaction agreements, MC paid C$1.45 billion in February 2012 as an upfront payment for acquiring its 40 per cent interest, and will pay an additional C$1.45 billion over the subsequent five years in order to fund a further 30 per cent of the Partnership's capital investments (in addition to its 40 per cent interest).

Marubeni Corporation/Gavilon Holdings LLC

In May 2012, Marubeni Corporation (Marubeni), one of the largest general trading companies based in Japan, announced its entry into a share purchase agreement to acquire 100 per cent of the equity interests in Gavilon Holdings LLC (Gavilon), an American company headquartered in Nebraska that owns and operates distribution and storage networks for US-based grains, fertilisers and energy commodities, for approximately US$3.6 billion. Marubeni is one of the largest exporters of US grains to China, and the acquisition of Gavilon is expected to complement its current businesses.

The share purchase is subject to obtaining all necessary approvals from relevant competition authorities. While the US and EU regulators both cleared the transaction in 2012, the Chinese Ministry of Commerce (MOFCOM) only gave conditional approval to the merger in April 2013 – 11 months after an application for an antimonopoly review of the transaction was submitted by Marubeni. MOFCOM ruled that the acquisition could exclude or limit competition in the market of soybean imports to China, and thus made its approval conditional on Marubeni and Gavilon maintaining separate and independent trading units when selling soybeans to China, with firewalls set up between the two units to prevent exchanges of competitive information.

SoftBank Corp/Sprint Nextel Corporation

In October 2012, SoftBank Corp (SoftBank), a Japanese telecommunications giant, announced that it had concluded a series of definitive agreements to indirectly acquire a 70 per cent interest in Sprint Nextel Corporation (Sprint), one of the largest mobile carriers in the United States, for a total of US$20.1 billion. According to the announcement, the transaction would be financed by SoftBank through a combination of cash and a syndicated financing facility arranged and underwritten by Mizuho Corporate Bank, Ltd, Sumitomo Mitsui Banking Corporation, the Bank of Tokyo-Mitsubishi UFJ, Ltd. and Deutsche Bank AG, Tokyo Branch.

The acquisition firstly involves a US subsidiary of SoftBank purchasing newly issued convertible bonds from Sprint for US$3.1 billion. The purchase was completed in October 2012. The convertible bonds have a 1 per cent coupon rate with a seven-year maturity, but would be converted upon completion of the merger at US$5.25 per share. The convertible bonds represent 16.4 per cent of the outstanding common shares in Sprint post-issuance.

Secondly, if the requisite approvals from regulators and Sprint shareholders are received and other condition are satisfied, SoftBank's US subsidiary would be capitalised by SoftBank with US$17 billion. The subsidiary would then acquire shares in Sprint by providing shareholders, in aggregate, with around US$12.1 billion in cash and 30 per cent of its fully diluted equity (overall, US$7.3 per share), and by converting bonds. Consequently, SoftBank would have a 70 per cent interest in its US subsidiary, which would hold 100 per cent of the equity in Sprint.

In April 2013, Sprint received an unsolicited rival bid from DISH Network Corporation (DISH) valued at US$25.5 billion. As of May 2013, Sprint was in discussions and negotiations with DISH, but continued to recommend SoftBank's transaction to shareholders. Notably, the agreement between Sprint and SoftBank stipulates break fees of US$600 million payable by SoftBank if the merger does not close due to SoftBank being unable to secure financing, and payable by Sprint if it accepts a superior offer by a third party.

ii Inbound transactions

Sharp Corporation/Hon Hai Group

In March 2012, Sharp Corporation (Sharp), an electronics designer and manufacturer based in Japan, announced that it had entered into an agreement to issue shares by way of a third-party allotment to four companies in the Hon Hai group, a multinational electronics manufacturing group based in Taiwan. Under the agreement, Sharp would issue 121.649 million shares for a total of ¥66.9 billion, and resultantly, the Hon Hai group would acquire a 10.95 per cent interest in Sharp.

Further, the agreement stipulated that Sharp would enter into a capital and business alliance with the four companies in the Hon Hai group. The rationale for the transaction was that collaboration between Sharp's product development capabilities and the Hon Hai group's cost competitiveness in manufacturing electronics would improve the corporate value of all parties. As a part of the business alliance, Sharp and Hon Hai Precision Industry, the main company of the Hon Hai group, jointly operate Sharp's liquid crystal display plant in Sakai.

During 2012, Sharp's share value plunged due to high recorded losses being reported, and the Hon Hai group sought to review the terms of the proposed third-party allotment. In August 2012, the Taiwanese Ministry of Economic Affairs, which reviews outbound investments, requested further information while suggesting that the purchase price for the transaction seemed to be too high. In March 2013, the transaction officially fell through when the deadline passed without the transaction proceeding. The stated reason in Sharp's announcement of 26 March 2013 was non-receipt of approval from the relevant authorities. However, despite the failed third-party allotment, the business alliance between Sharp and the Hon Hai group continued.

Sharp announced that it would conduct a smaller third-party allotment by issuing 35.804 million new shares to Samsung Electronics Japan Co, Ltd (Samsung Electronics) for approximately ¥10.4 billion, resulting in Samsung Electronics acquiring 3.08 per cent of the voting rights in Sharp after the capital investment. Payment was completed on 28 March 2013.

Separately, in December 2012, Sharp announced its entry into a joint development agreement with a subsidiary of Qualcomm Incorporated (Qualcomm) to develop next generation Micro Electro Mechanical System displays. Sharp also entered into a capital alliance agreement with Qualcomm, whereby a third-party allotment of shares would be made to Qualcomm in two tranches. The first tranche was completed in December 2012 when 30.12 million shares were issued to Qualcomm for a total of ¥4.93968 billion. The second allotment of 11.868 million shares for a total of ¥5.957736 billion was made in June 2013 with the result that Qualcomm has aquired 3.53 per cent of the issued shares in Sharp.

Micron Technology, Inc/Elpida Memory, Inc

In July 2012, Micron Technology, Inc (Micron), a semiconductor manufacturer based in the United States, announced that it had signed a definitive sponsor agreement to acquire and support Elpida Memory, Inc (Elpida), a Japanese manufacturer of Dynamic Random Access Memory integrated circuits.

Elpida was undergoing corporate reorganisation proceedings at the Tokyo District Court, and its reorganisation plan called for Micron to sponsor Elpida's reorganisation by acquiring 100 per cent of the shares in Elpida for ¥60 billion, and contributing a further ¥140 billion through annual instalment payments until 2019. The payments would discharge all pre-petition debt obligations of Elpida under the corporate reorganisation proceedings.

The transaction was subject to a number of conditions, including the receipt of approval from Elpida creditors, the Tokyo District Court and antitrust regulators. All necessary antitrust regulator approvals were received by February 2013, with the Chinese MOFCOM being the last to give its approval. The Tokyo District Court also approved the reorganisation plan in February 2013 after Elpida creditors voted in favour of the plan. While two creditors immediately filed appeals to the District Court's decision, their claims were both dismissed by the Tokyo High Court in May 2013 for being groundless.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Court decision

In 2012–2013, there were a number of notable court cases in Japan that may affect future M&A transactions. In this section, we discuss one case concerning the determination of the price of shares in a company that were to be compulsorily acquired by that company.

Culture Convenience Club case

On 23 April 2012, the Osaka District Court made a decision regarding the 'fair price' for consideration to be paid to minority shareholders of Culture Convenience Club Co, Ltd, the company which runs Tsutaya stores (bookshops and video and CD rentals), in a squeeze-out following a takeover bid by way of a management buyout (MBO). In this case, the minority shareholders objected to the share price offered for the squeeze-out and filed a petition with the Osaka District Court to determine the 'fair price' for the shares. While the purchase price in the MBO was ¥600 per share (which was below the lower limit price calculated using the DCF method), the Osaka District Court ruled that the price per share should in fact have been ¥649 and adjusted the price accordingly.

The Osaka District Court held that the acquisition price for the shares should be decided based on a 'fair price'. When defining a 'fair price', the Osaka District Court followed the 2009 decision of the Supreme Court in *Rex Holdings Co Ltd*, in which the Supreme Court ruled for the first time what a 'fair price' is in the context of a compulsory acquisition, and thus stated that a 'fair price' is (1) the objective value of the shares as of the acquisition date, which is the price of the shares had the MBO not been effected (the Nakariseba Price); and (2) the expected increase in the value of the shares (premium) after the MBO.

With respect to (1) above, the Osaka District Court ruled that it was appropriate to use the average price of the shares for the one-month period preceding the takeover bid announcement (¥469). As for (2), the court ruled that the DCF method is one of the reasonable methods that can be used to calculate the expected share value, and such premium must be distributed equally (at a ratio of 1:1) between the acquirer and the dissenting shareholders. Applied to the facts, the expected premium calculated by the DCF method (¥830) less the Nakariseba Price (¥469) is ¥361, and the amount that the dissenting shareholders would receive is a half of such price, which is ¥180. Accordingly, the 'fair price' is ¥649 (¥469 plus ¥180).

Needless to say, the DCF method is one of the most popular methods used to calculate the value of shares in the context of MBOs (and squeeze-outs), and the court decision appears to place emphasis on the importance of making the purchase price in a takeover bid higher than the lower limit calculated by the DCF method. Nevertheless, valuations using the DCF method are generally based on various conditions and it is difficult to know how much emphasis should be placed on such method in relation to other valuation methods when determining a 'fair price'.

ii M&A transactions in Japan

Olympus Corporation/Sony Corporation

In September 2012, Olympus Corporation (Olympus) and Sony Corporation (Sony) announced that they had entered into a business and capital alliance agreement, which would involve a third-party allotment of Olympus' common shares to Sony for a purchase price of approximately ¥50 billion.

Under the capital alliance agreement, Olympus issued 34.3879 million common shares to Sony through a third-party allotment in two tranches and at a price of ¥1,454 per share. The third-party allotment was completed on 22 February 2013 and as a result Sony acquired 11.46 per cent of the voting rights in Olympus. Under the agreement, Olympus would also make all efforts to ensure that a candidate nominated by Sony is appointed on the Olympus board of directors.

Pursuant to the business alliance, a medical business joint venture company was established by Sony and Olympus in April 2013 for developing, designing, manufacturing and selling medical technologies such as surgical endoscopes and high-resolution technologies. The objective behind this was to align Sony's electronic technologies with Olympus' manufacturing and R&D expertise in medical products. The new company was founded with ¥50 million of stated capital (Sony 51 per cent, Olympus 49 per cent).

SoftBank Corp/eAccess Ltd

In October 2012, SoftBank announced its entry into an agreement to conduct a share exchange with eAccess Ltd (eAccess), which would result in eAccess becoming a wholly-owned subsidiary of SoftBank. eAccess is a Japanese telecommunications company. SoftBank delivered to each eAccess shareholder the number of SoftBank common shares equivalent to the value of eAccess shares held, with fractions of less than one share being exchanged for cash. The share exchange was completed and became effective on 1 January 2013.

However, on 17 January 2013, SoftBank reduced its interest in eAccess by selling around two-thirds of its shares with voting rights in eAccess, to 11 third parties. According to SoftBank's announcement on 17 January 2013, SoftBank decided to transfer those shares so that eAccess would maintain a certain degree of independence that it believed was necessary for future growth.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

LBOs have become more common in Japan in recent years. Banks operating in Japan extend loans to acquisition vehicles funded partly by equity so that these vehicles may make a tender offer over a Japanese-listed target to acquire all of the issued shares in it (the first-tier transaction) followed by a squeeze-out transaction for the remaining shareholders with the approval of shareholders of the target at a shareholders' meeting (the second-tier transaction). Extension of loans is often made in the form of syndicated loans, which involve a number of banks in the case of large-scale buyouts.

VII EMPLOYMENT LAW

In 2012, the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers was amended for the purpose of making fundamental reforms to the system of worker dispatch to ensure the protection of temporary workers (the amendment came into effect on 1 October 2012).

The amendments included (1) the prohibition of, in principle, *hiyatoi-haken* (hiring of temporary workers by the day or for a term of 30 days or less), (2) a limitation on the ratio of temporary workers who will be dispatched to other group companies, and (3) an improvement in working conditions for such workers, including the obligation for a receiving company to ensure new employment opportunities for temporary workers when the receiving company cancels the contract for the convenience of the receiving company. These regulations may become a source of contingent liabilities that need to be carefully considered when conducting legal due diligence for M&A transactions.

Other than the foregoing, there have been no major changes to employment law in 2012 relating to M&A transactions in Japan.

VIII TAX LAW

According to news coverage, in April 2011, Yahoo! Japan Corporation filed a lawsuit with the Tokyo District Court requesting the cancellation of a disposition by the Tokyo Regional Tax Bureau (TRTB) concerning an assessment by the TRTB in which it applied Article 132-2 of the Corporate Tax Act (CTA), a catch-all anti-avoidance rule concerning corporate reorganisations (the Catch-All Rule).

According to the news coverage and the voluntary disclosure made on 30 June 2010, in February 2009, Yahoo! Japan purchased SoftBank IDC Solutions Kabushiki Kaisha (IDC) from Yahoo! Japan's parent company for a purchase price of approximately ¥45 billion. At the time of the purchase, IDC had net operating losses (NOLs) of approximately ¥54 billion. This purchase was followed by a merger of IDC into Yahoo! Japan a month later, and Yahoo! Japan, in its 2009 tax return, deducted the NOLs that it had succeeded from IDC. The voluntary disclosure by Yahoo! Japan then says that the TRTB conducted an audit of Yahoo! Japan and asserted that: (1) the merger lacked a business purpose; (2) the purchase price of IDC was calculated based on unrealistic data; and (3) the transaction was solely aimed at exploiting the NOLs taken over by Yahoo! Japan from IDC. The TRTB alleged that the real reason behind the merger transaction was tax avoidance and disallowed the deduction of such NOLs by Yahoo! Japan in its 2009 tax return. It also determined that Yahoo! Japan owed a tax liability of an estimated ¥26.5 billion. It is considered to be the first time that the Catch-All Rule has been applied since it was added to the CTA in 2001 along with provisions that introduced tax-free corporate reorganisations. As of April 2013, Yahoo! Japan's case is still pending, and the court decision is awaited.

Under the Catch-All Rule, the district director of a regional tax office, regardless of the contract and accounting treatment of a corporation for tax purposes, may: (1) challenge the tax benefits sought in a tax return of a corporation that is a party to a merger, corporate divisive reorganisation, in-kind incorporation, in-kind distribution, share exchange, or transfer of shares (each a 'corporate reorganisation'); and (2) assess

the taxable income, losses and the amount of the tax liabilities of such corporation as the district director may see fit in certain circumstances. Specifically, the district director can make assessments where it is found that the burden of corporate tax is unjustifiably lightened by the implementation of a corporate reorganisation due to a decrease in profits or deemed dividends, increase in losses or tax credits, or for any other reason.

Under the Catch-All Rule, the phrase 'it is found that the burden of corporate tax is unjustifiably lightened' provides the district director with considerable liberty to apply this rule to various corporate reorganisations. As there are no objective standards by which to determine if a corporate tax burden has been 'unjustifiably' lightened, the language of this provision appears to allow application of this provision at the district director's sole discretion. As a general rule, however, to reduce the risk of the Catch-All Rule being applied, it is necessary to establish a non-tax business purpose for carrying out a corporate reorganisation (i.e., to choose an transaction that is commercially reasonable even without the tax benefit, rather than a solely tax-motivated transaction) to achieve the ultimately desired corporate structure.

IX COMPETITION LAW

A recent change to the merger review process of the JFTC was the abolition of the informal consultation procedure prior to the formal statutory filing of a proposed transaction under the AMA, which came into effect on 1 July 2011. It has been formally explained that an informal consultation will not be accepted by the JFTC, and that a formal review of a proposed transaction will start at the formal notification stage, lasting 30 calendar days, with a possible 90-calendar-day extension. Nevertheless, in actual filings made since July 2011, informal consultations prior to formal statutory filings have still been conducted, and it may take some time for the JFTC to completely abolish such practice.

X OUTLOOK

The pace of M&A activity in Japan has continued to be relatively slow. Due to the Abenomics, Japanese stock has risen sharply and the Japanese yen has weakened significantly. It has yet to be seen how long these trends will continue and how much they will affect the level of activity of M&A transactions involving Japanese companies.

Appendix 1

ABOUT THE AUTHORS

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Hiroki Kodate is a partner at Anderson Mōri & Tomotsune, and is principally involved in the fields of corporate and commercial law, with an emphasis on M&A and corporate governance. In addition to his experience at Anderson Mōri & Tomotsune, he served as an attorney at the Civil Affairs Bureau of the Ministry of Justice of Japan (2002 to 2005), where he was engaged in the modernisation of Japanese corporate law. He also worked at Slaughter and May in London from 2000 to 2001.

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