The Mergers & Acquisitions Review

Fourth Edition

Editor
Simon Robinson

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FOURTH EDITION

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For further information please email
Adam.Sargent@lbresearch.com

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Editor
Simon Robinson

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING ASSISTANT
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EDITORIAL ASSISTANT
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EDITOR'S PREFACE

In response to the financial crisis, the past year has been spent cutting costs and restoring balance sheets while governments have set about overhauling the regulatory landscape. Whether as a result of this approach or in spite of it, we have seen the first signs of a recovery in the second half of 2009. During the financial meltdown, many strong businesses focused on assessing their strategy and restructuring. As the signs of recovery began to emerge, such businesses tentatively started to re-engage in M&A transactions as a means of achieving growth.

Currently, buyers are conscious of scrutiny from shareholders with regards to how much is being paid for assets and whether the deals that are going ahead represent value for money (particularly in light of Warren Buffett's publicly voiced concerns during the course of Kraft's bid for Cadbury and shareholder reaction to the proposed acquisition of part of AIG by Prudential). Consequently, most potential buyers are treading carefully. On the other hand, there were also a number of quick deals in 2009 where a speedy resolution was necessary to allow distressed sellers to obtain cash promptly but the number of these should decrease throughout 2010 if we continue through to recovery.

Many are still cautious about the outlook for M&A activity for the remainder of 2010 and beyond. A rise in M&A activity is hugely dependent on the willingness of banks to increase lending. Access to credit plays a vital role in supporting the economy by helping businesses to create jobs and growth, both of which are necessary if we are to find our way out of recession and towards recovery. In the short term, M&A activity will depend heavily on boardroom confidence and such confidence will only be achieved if boards perceive that the few new M&A deals around have proven profitable for shareholders. Such confidence and optimism is slow to build; therefore,

while pockets of activity suggest that the worst of the financial crisis is behind us, the signs of recovery are tentative with buyers urging caution. The journey to recovery will be slow and difficult, but as lending increases and confidence rises, economists expect the sluggish growth of 2010 to develop into greater stability into 2011. That said, the recent problems of the euro, European government finances and the European banking sector could yet bring a renewed lapse into recession or worse. Only time will tell which progression turns out to be correct.

I wish again to thank all the contributors for their continued support in producing this book – one would hope that in this uncertain time the following chapters should at least provide some food for thought.

Simon Robinson
Slaughter and May
London
July 2010

Chapter 30

JAPAN

Hiroki Kodate and Risa Fukuda[*]

I OVERVIEW OF RECENT M&A ACTIVITY

Due to the changing Japanese and global economy and the financial crisis triggered by the subprime loan problems in the US (particularly following the collapse of Lehman Brothers in September 2008), the level of M&A activity involving Japanese companies continued to be low in 2009 as compared to 2007, which witnessed a very high level of such activity. In particular, the presence of investment funds, both foreign and domestic, that have faced difficulty in raising funds, has been less outstanding. However, it is noteworthy that there have been a number of outbound large-scale M&A transactions where Japanese companies acquired companies and businesses outside Japan involving large capital amounts. In addition, there were more M&A transactions driven with a view to restructuring or bailing out companies or businesses.

The Japanese have commonly been said to be allergic to M&A transactions that involve the sale and purchase of companies or businesses. However, even at the time of the financial crisis and thereafter, we see a decent volume of M&A transactions transpiring. M&A continues to become an important management strategy option for Japanese companies.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

In Japan, the Companies Act and the Financial Instruments and Exchange Act ('the 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, *inter alia*, public

* Hiroki Kodate is a partner and Risa Fukuda is an associate at Anderson Mōri & Tomotsune.

offers of securities, takeover bids and 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 in which merger control rules of Japan are contained (for the amendments on the Antimonopoly Act, please refer to Section III, *infra*). 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.

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. One of the major stock exchanges in Japan, the Tokyo Stock Exchange ('the TSE'), has revised its listing regulations to improve the current corporate governance (please see Section III, *infra*).

Finally, a number of recent court cases have the potential to significantly affect the Japanese M&A framework. These are described in detail *infra*.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Release of the Financial Services Agency's interpretation of regulations on takeover bids

To facilitate the implementation of better regulations to improve the transparency and predictability of the regulator's actions, the Financial Services Agency of Japan ('the FSA') released its initial interpretation regarding regulations on takeover bids of shares, etc. as a 'Q&A' document in July 2009, with additional Q&As addressing frequently asked questions on the same topics being supplemented with the latest addition on 31 March, 2010 ('the additional Q&As').

Acquisition of shares of holding companies

Among the topics in the additional Q&As, one important issue discussed in Q15 was whether acquiring shares of holding companies will need to be done through a takeover bid regulated by the FIEA.

Under the FIEA, a takeover bid will be necessary when acquiring more than one-third of the shares of a company required to submit annual securities reports (these include, among other companies, listed companies) ('the target company') in principle. However, there was no rule expressly dealing with whether the procedures required in relation to a takeover bid will be necessary when acquiring the shares of a holding company that holds a stake of more than one-third of a target company. In the additional Q&As, the FSA stated that, depending on the 'status' of the holding company, there may be cases in which such an 'acquisition of shares' is in reality a method of acquiring the shares of the target company. The answer given in Q15 states that in such cases the relevant acquisitions will be regulated under the takeover bid regulations, as it would be contrary to the purpose of takeover bid regulations if existing shareholders of the target company did not have an opportunity to sell their shares. The answer in Q15 lists factors such as the value of assets that the holding company holds other than the shares of the target company and whether the holding company is a mere shell company as relevant factors when determining its 'status'. When considering what will constitute an

'acquisition of shares' for these purposes, the answer to Q15 states this to be a share acquisition in which the holding company ultimately can take control, such as where the share acquisition will result in taking over control of the holding company by acquiring over 50 per cent of the shares when shares held by 'special related parties' (as defined under the FIEA) are taken into account. On the other hand, the additional Q&As also states that if the acquisition of shares of the holding company is conducted together with a takeover bid for the target company, as long as certain conditions are satisfied (for example, if there is no upper limit on the expected number of acquiring shares, if the nature of the entire transaction as a whole is disclosed in the relevant notifications for the takeover bid, and if the acquisition price for the holding company's shares is reasonable) such that there is a low possibility that investors will be harmed, the share acquisition of the holding company will not be separately regulated under the takeover bid regulations.

This further matter was inserted into the additional Q&As in response to issues raised in an actual case. For details of this case, please refer to Section V, *infra*.

Certification of the funds for the takeover bid

Another important topic in the additional Q&As that will affect the current practice of takeover bids is the stricter regulation regarding the content of the certification of the funds for the takeover bid.

Under the takeover bid regulations, a document which evidences that there are enough funds to conduct the takeover bid is required to be attached to the takeover bid notification. When the person conducting the takeover bid intends to use borrowed money as funds for the takeover bid, in practice a certification to provide loans addressed to the person conducting the takeover bid has been prepared.

Q32 of the additional Q&As states that such certification of loans will need to appropriately evidence that the loan will be conducted with a 'reasonable degree of possibility'. In this respect, the answer to Q32 states that it will not have a 'reasonable degree of possibility' if, among others, (1) it is obvious that there is a question as to the means of the lender, or (2) if there are conditions of the loan which are not specific or objective in material aspects.

While it remains to be seen how specific the certifications will need to be, this is expected to greatly impact current practices. In relation to (2) *supra*, in the past it was common practice not to disclose the specific contents of the conditions attached to the loan, and rather simply state in the certification that the loan was subject to certain conditions stipulated in an agreement separately executed. In addition, for (1) *supra*, it is said that in cases where the lender is not a bank, for example a business company or a newly incorporated fund, it may be considered as a lender with 'questions as to its means', and it may need to submit additional documents such as certifications of outstanding balances or financial statements.

ii Implementation of an independent directors/company auditors system by the TSE

In December 2009, the listing regulations and related rules of the TSE were amended to implement the requirement of 'independent director/company auditor' for listed companies on the TSE.

This amendment took place as part of the TSE's comprehensive revision of the listing regulations under their 'Listing System Improvement Action Plan 2009'. Under this policy, the TSE focused on two main themes: improving the conditions to enhance the corporate governance of listed companies and improving the system and practices pertaining to timely disclosure in light of changes in the environment. The implementation of the independent directors/company auditors system falls within the scope of the first of the aforementioned themes. One of the reasons for this amendment is the perception held by some that the requirement of 'outside directors' and 'outside company auditors' as defined in the Companies Act (for example, not being in a position to execute business of the relevant company or its subsidiary, or having not been in such position in the past) is not sufficient from the viewpoint of protecting general shareholders.

Under the new independent directors/company auditors system, companies listed on the TSE will need to ensure that at least one of the outside directors/company auditors is an independent director/company auditor who does 'not have conflicting interests with general shareholders'. In addition to securing at least one independent director/company auditor, if the appointed director/company auditor falls under a certain category of person (for example, *inter alia*, a major shareholder of the listed company or a person who executes business of the parent company or fellow subsidiary) and is designated as independent director/company auditor, the company is required to disclose the name and reason for so designating such person in their 'corporate governance report' (a report listed companies are obliged to submit under the TSE regulations).

While the requirement for 'independent directors/company auditors' is already commonplace and implemented in other countries, it can now be said that this requirement has finally been implemented in Japan as well. However, it remains to be seen how the system will actually work in practice.

iii An amendment to the Antimonopoly Act

In June 2009, the amended Antimonopoly Act ('the New Act') was passed by the diet in Japan. It has introduced changes to the merger control regime and more likely than not will have an impact on M&A transactions in Japan.

Pre-notification for share acquisitions

Unlike other types of business combinations (such as mergers), prior to the New Act a share acquisition only required, at most, a *post facto* notification. However, the New Act has implemented a requirement of pre-notification for share acquisitions (with only a few exceptions). Under this requirement, the relevant share acquisition cannot be conducted for 30 days (i.e., the waiting period) in principle from the date of receipt of the notification by the Japan Fair Trade Commission ('the JFTC'). The new merger control regime applies to transactions that have closed on or after 31 January 2010. It can be said that the New Act will influence M&A transactions as share acquisitions can no longer be used to avoid pre-notification under the Antimonopoly Act.

Threshold for notification for share acquisition

In relation to pre-notification for share acquisitions, the pre-amendment Antimonopoly Act ('the Old Act') stipulated three levels of notification thresholds for share acquisitions: when the acquisition exceeds 10 per cent, 25 per cent and 50 per cent of the total voting rights. However, under the New Act, this has been simplified into two levels: 20 per cent and 50 per cent.

Change in the notification standard

Under the New Act, the notification standard for business combinations has changed. It uses the concept of aggregate 'domestic sales' and 'combined business group' as a measure. For example, for a share acquisition, if the acquiring company meets the condition of exceeding ¥20 billion for the aggregate 'domestic sales' of the 'combined business group' that they belong to and if the target company meets the condition of exceeding ¥5 billion in respect of the target company itself and its subsidiaries' aggregate 'domestic sales', then it will be subject to a notification requirement.

It should be noted for foreign companies that when calculating 'domestic sales', unlike the Old Act where it was calculated based on the sales amount booked on the profit and loss statement of any Japanese subsidiary or Japanese branch office, the New Act defines this as the total amount of the products and service supplied in Japan during the latest fiscal year. Therefore, foreign companies cannot avoid this notification requirement merely by not having any subsidiary or branch office in Japan and it is likely that more transactions will need to be notified under this new notification standard.

Share acquisition through partnerships

While under the Old Act only share acquisitions by companies were subject to the notification requirement, under the New Act, if a company is to acquire shares through a subsidiary it controls having the form of a partnership, it is deemed that the direct parent company of such partnership is acquiring the shares and therefore the parent company will be subject to the notification requirement for such share acquisition.

Increase of the range for notification exemption

Under the New Act, any merger, corporate split or business transfer that occurs among parties that belong to the same 'combined business group' (e.g., the subsidiaries of the ultimate parent company) will be exempt from the notification requirements.

iv Court decisions

Please refer to Section V, *infra* for further details of court decisions that can be considered significant cases affecting M&A transaction law in Japan.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

i Outbound transactions

Following on from last year there continues to be large-scale outbound M&A transactions where Japanese companies make high-value acquisitions of companies or businesses

outside of Japan. One example is where Kirin Holdings Company Limited, Japan's top beverage maker, obtained shares of Lion Nathan Limited, a large brewing business company in Australia and New Zealand, in October 2009. Kirin, which originally held 46.13 per cent of Lion Nathan's shares, obtained the remaining 53.87 per cent through a scheme of arrangement structure by approvals of shareholders and the court. Kirin intends to pursue its objective of strengthening its offshore earnings by further promoting its integrated beverages strategy in Oceania.

ii Inbound transactions

Further to the high number of outbound transactions, various inbound transactions took place in 2009–10 as well. One notable inbound transaction in the context of the automotive industry was the investment by Volkswagen Aktiengesellschaft of Germany in Suzuki Motors Corporation. Volkswagen acquired 19.90 per cent of Suzuki's shares through a third-party allotment, becoming the top shareholder of Suzuki in January 2010, following an entry into a comprehensive partnership. They intend to achieve synergies for globalised strength in emerging markets and developing innovative and environmental cars. Recently, Suzuki announced that they have decided to issue additional shares through a third-party allotment to Volkswagen.

As regards inbound transactions, one of the leading countries conducting investment in Japanese companies is China. An example of this is the acquisition of shares of Laox Co, a Japanese electronics store, by Suning Appliance Co, a Chinese household electronics store and Nihon Kanko Menzei Co in the summer of 2009, based on a corporate alliance between Laox, Suning and Nihon Kanko Menzei. The trend of capital investment by China will likely continue.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i KDDI and J:COM case

As mentioned in Section III, *supra*, there was an actual case in which an issue arose as to whether obtaining a large stake of a holding company, which in turn had a large stake of a target company (refer to Section III for the definition), will be governed by the takeover bid regulation.

KDDI Corporation, a Japanese telecoms company, originally announced in January 2010 that it intended to acquire the entire ownership interests in Liberty Global Inc's ('LGI') three intermediary holding companies, which would result in it assuming LGI's ownership interest in Jupiter Telecommunications Co, Ltd ('J:COM'), Japan's largest multiple system operator, which includes a cable television business; this would have resulted in KDDI indirectly obtaining a 37.8 per cent stake in J:COM. However, the question arose whether it was legal or not for KDDI to obtain such a stake without conducting a takeover bid. It was not obvious on the face of the FIEA regulations as KDDI was not directly obtaining more than 33 per cent of shares of J:COM (J:COM is a listed company in Japan and therefore the takeover bid regulations apply if its shares are being acquired).

On 12 February 2010, KDDI announced that it decided to make an amendment to the sales and purchase agreement executed with the LGI group and that this would result in KDDI indirectly assuming a 31.1 per cent stake of J:COM's shares on a voting rights basis. KDDI specified in its news release that the amendment was made after considering the concerns raised by the FSA and after consulting with the FSA. It completed the acquisition on 19 February 2010.

It should also be noted that on 15 February 2010, to counter KDDI's move, Sumitomo Corporation, a shareholder of J:COM (but not the largest shareholder at that time) announced the commencement of a takeover bid to acquire further shares of J:COM. Sumitomo announced in April 2010 that it has completed the takeover bid and became a stakeholder of 40.1 per cent.

It is arguable that this is one of the cases that led to the FSA making a specific instruction in relation to the acquisition of shares of holding companies as previously explained in Section III.

ii Kirin and Suntory case

In February 2010, Kirin Holdings Company Limited and Suntory Holdings Limited declared that they would abandon their plan to merge despite their negotiations in relation to the merger. If the merger were to have taken place, it would have created a giant food and beverage company in Japan. One of the principal reasons for abandoning the plan was reportedly an inability to agree on the exchange ratio of the shares in the two companies.

iii Examples of domestic industry reorganisation

In September 2009, Mitsui Sumitomo Insurance Group Holding Inc, Aioi Insurance Co, Ltd and Nissay Dowa General Insurance Co, all major non-life insurance companies in Japan, announced that they had reached a final agreement in relation to an operational merger. They stated that their aim was to become one of the top-level insurance and finance companies operating globally. To implement such operational merger as of 1 April 2010, they created a holding company, MS&AD Insurance Group Holdings, Inc 'MS&AD' (the former Mitsui), which conducted a share swap with Aioi and Nissay Dowa, which is to be followed by the merger of Aioi and Nissay Dowa, expected to occur in October 2010.

Another example in the insurance industry is the operational merger of Sompo Japan Insurance Inc and NIPPONKOA Insurance Company, Limited, two non-life insurance companies in Japan. In March 2009, they announced the incorporation of a new joint holding company. Thereafter as of 1 April 2010 NKSJ Holdings, Inc was established as a new holding company under which both companies became wholly owned subsidiaries.

iv Significant court cases

In 2009–10, there were a number of notable court cases in Japan that may affect future M&A transactions. In this section, we discuss two major cases regarding the determination of the price of shares where the shares are under compulsory acquisition

by the company, and where shareholders are asserting their right to have the company buy back their shares, both of which are methods stipulated under the Companies Act.

Sunstar case

On 1 September 2009, the Osaka High Court handed down a decision regarding the 'fair price' in relation to consideration to be paid to minority shareholders of Sunstar Inc, a global company in the mouth and body care field, in a squeeze out following a takeover bid by way of management buyout ('MBO'). In this case, the minority shareholders of Sunstar objected to the price for the squeeze out and filed a petition with the court to determine the 'fair price' of consideration for such compulsory acquisition, a right stipulated in the Companies Act. While the Osaka District Court held that the fair price per share was ¥650 (the same price as the price of the takeover bid), the Osaka High Court accepted the shareholders' claim that the price per share should in fact be ¥840 and adjusted the price accordingly. It should be noted that this case followed the famous Supreme Court decision in *Rex Holdings Co Ltd*, in which the Supreme Court ruled for the first time what a 'fair price' is in the context of compulsory acquisition of shares.

The Osaka High Court in the *Sunstar* case stated that the acquisition price of the shares should be decided based on the 'fair price' as of the acquisition date and that the 'fair price' should be based on the share price around that time. However, the Osaka High Court firstly stated that the price after the announcement of the takeover bid does not reflect an objective price and therefore should not be considered. Following that, the Osaka High Court further ruled that in an MBO case, it is obvious that the management of the company will try to devalue the share price for their own benefit and, therefore, unless there are special circumstances, the period from the commencement of preparation of the MBO until the announcement of the MBO should not be considered when determining the fair price of the shares. Specifically, in the *Sunstar* case the Osaka High Court determined that the period that was not being considered was one year before the announcement of the takeover bid up until the announcement date, taking into account the fact that there was no persuasive reason why the movement of the share price during recent periods should have a different trend from other similar companies of Sunstar and why the revenue sales for the business term in which the announcement took place was low compared to the previous year. As a conclusion, the Osaka High Court determined that the share price to be used as a basis to determine the 'fair price' is ¥700, a similar amount to the share price a year before the announcement of the MBO.

When deciding the 'fair price' the Osaka High Court added a 'premium' (a 20 per cent premium) on top of the ¥700 previously mentioned. In deeming the 'fair price' to consist of two components – the objective value of the shares acquired at the time of the squeeze-out, and a premium – the Osaka High Court's decision was consistent with that of the Osaka District Court and also the *Rex* case. In addition, it should be noted that while the company argued that ¥650 was reasonable value in the market as 87 per cent of the shareholders applied for the takeover bid, the court pointed out that the content of the notice to shareholders had a 'coercive effect' on the shareholders and therefore such allegation should not be considered (for example, a statement was made to the effect that it is the individual responsibility of shareholders who do not sell

their shares under the takeover bid to consult with their lawyers regarding the necessary procedure to be taken from thereon). Thus there should be deliberation when preparing these documents in takeover bids.

Sunstar appealed to the Supreme Court; however, the Supreme Court dismissed the case and the price of ¥840 per share was final.

Rakuten v. TBS case

In this case, Rakuten Inc, Japan's largest online shopping mall operator and the largest shareholder of Tokyo Broadcasting System Holdings Inc ('TBS'), voted against a corporate spilt (an absorption-type split stipulated under the Companies Act) whereby TBS was to transfer its television broadcasting business and Multi Visual Venture & Cultural Events business to TBS's wholly owned subsidiary at the general shareholders' meeting of TBS in 2008; accordingly, Rakuten demanded that TBS effect a share buyback pursuant to its rights under the Companies Act. As TBS and Rakuten could not reach agreement as to the price of such shares, they applied to the Tokyo District Court to rule on the issue. On 5 March 2010, the Tokyo District Court ruled that the price per share should be ¥1,294, which was significantly below the average acquisition price of Rakuten shares (approximately ¥3,100 per share).

In determining the 'fair value' of shares in a buyback context, the Tokyo District Court stated that such value should be calculated based on the objective value of the shares were the corporate spilt not to have occurred or the objective value reflecting the synergy effect of such corporate split as appropriate, with the effective date of the corporate split to be the relevant date. Further, it ruled that although in principle there is no such synergy occurring in a case like this one where the company will transfer its current business to its wholly owned subsidiary, if such corporate split has been carried out together with other corporate reorganisations or corporate organisational actions and there is a possibility that the value of the company's shares may change, such situation should be taken into account when determining the fair value.

By way of background to this corporate split, there had been an amendment in the Broadcast Law regarding a company becoming a holding company of a broadcasting company. Under such amendment, TBS conducted its corporate split in order to become a 'certified broadcast holding company' under the Broadcast Law. Under the amendment, shareholders who hold more than 33 per cent of such holding company on a voting rights basis were prohibited from exercising their voting rights for those portions that exceed 33 per cent. Therefore, the court analysed whether the value of the company's shares had changed as a result of the corporate organisational action, this action having led to the shareholders facing the restriction due to shifting TBS's broadcasting business to its wholly owned subsidiary.

In analysing this, the court compared the price of the shares by utilising the effective date of the Broadcast Law amendment and the date of announcing that the company will become a certified broadcast holding company. As a result, the court came to the conclusion that there had been no devaluation of the shares or occurrence of synergy and therefore, the fair value should be determined based on the objective value of the shares were the corporate spilt not to have occurred with the effective date of the corporate split as the relevant date.

The court used the average share price of the term starting from one month before the effective date up until that date to eliminate the 'coincidental factors' of the share price fluctuation to come up with a price of ¥1,255, and by taking into account that TBS had been proposing a price per share of ¥1,249 during the negotiation stage the court reached the conclusion that the share price should be ¥1,249.

Rakuten has appealed to the Tokyo High Court and the decision is pending.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Leveraged buyouts 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 takeover bid over a Japanese listed target to acquire all of the issued shares in it (the first tier transaction) followed by a squeeze-out transaction 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 that involve a number of banks in the case of large-scale buyouts. In the context of the financial crisis, the trends are for banks to decide more carefully whether to make loans and the same is true of equity providers such as funds. Please see 'Certification of the funds for the takeover bid' in Section III for the FSA's recently announced Q&A regarding certification.

VII EMPLOYMENT LAW

The amendment to the Labour Standards Act came into effect on April 2010, and in one of the amendments, the overtime work compensation rate was increased from 25 per cent to 50 per cent when the employee works over a certain limit. Generally, when conducting legal due diligence for M&A transactions, the cost of unpaid overtime work compensation is one of the contingent liabilities that need to be considered. From this point of view, the amount of unpaid compensation in respect of overtime work may become a larger contingent liability in the future due to this amendment. However, in terms of proceeding with M&A transactions in Japan, it can be concluded that there were not any relevant major changes to employment law in 2009.

VIII TAX LAW

Among the changes made in the 2010 tax reform, the introduction of the new 'group taxation' regime is likely to affect M&A transactions in Japan. The aim of this regime is to tax companies effectively based on the reality that companies operate their businesses in 'groups'. It is stipulated that companies that have a 'total control relationship' (i.e., where all of the outstanding shares of a company are either directly or indirectly held by another company (including a foreign company) or an individual or two or more companies are under the same such control) shall be subject to this regime.

One of the most important changes under the regime deals with how to impose tax on the transfer of assets between Japanese companies belonging to the same 100 per cent shareholding group. Under the newly introduced regime, with respect to certain types of assets such as fixed assets, land, securities, money claims and deferred assets

(except for certain exceptions stipulated in the cabinet order) transferred between such companies, the capital gain or loss will be in principle deferred until, *inter alia*, the relevant asset is transferred again.

It can be said that this change will enable appropriate allocation of assets among group companies in Japan avoiding immediate taxation, and therefore enable flexible restructuring. This regime shall apply to transactions executed on or after 1 October 2010.

IX COMPETITION LAW

As mentioned in Section III, the enactment of the amended Antimonopoly Act and will mostly likely have an impact on future M&A transactions in Japan. For details, please refer to our explanation in Section III.

X OUTLOOK

The pace of M&A activity in Japan has continued to be relatively slow. Although we have witnessed some large-scale transactions, domestic and cross-border, it remains to be seen how long the relatively low level activity of M&A transactions will continue.

HIROKI KODATE

Anderson Mōri & Tomotsune

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.

Mr Kodate received his LLM from Harvard Law School (2000) and his LLB from the University of Tokyo (1994).

Mr Kodate is a member of both the Daini Tokyo Bar Association in Japan (since 1996) and the New York Bar (since 2001). He speaks Japanese and English.

RISA FUKUDA

Anderson Mōri & Tomotsune

Risa Fukuda is an associate at Anderson Mōri & Tomotsune, and her practice areas include corporate law, M&A and capital markets. She received her JD degree from Keio Law School (2006) and her LLB degree from the University of Tokyo (2004). She is a member of the Dai-ichi Tokyo Bar Association in Japan (since 2007). She speaks Japanese and English.

ANDERSON MŌRI & TOMOTSUNE

Izumi Garden Tower
6-1, Roppongi 1-chome, Minato-ku
Tokyo 106-6036
Japan
Tel: +81 3 6888 1000
inquiry@amt-law.com
www. amt-law.com/en/