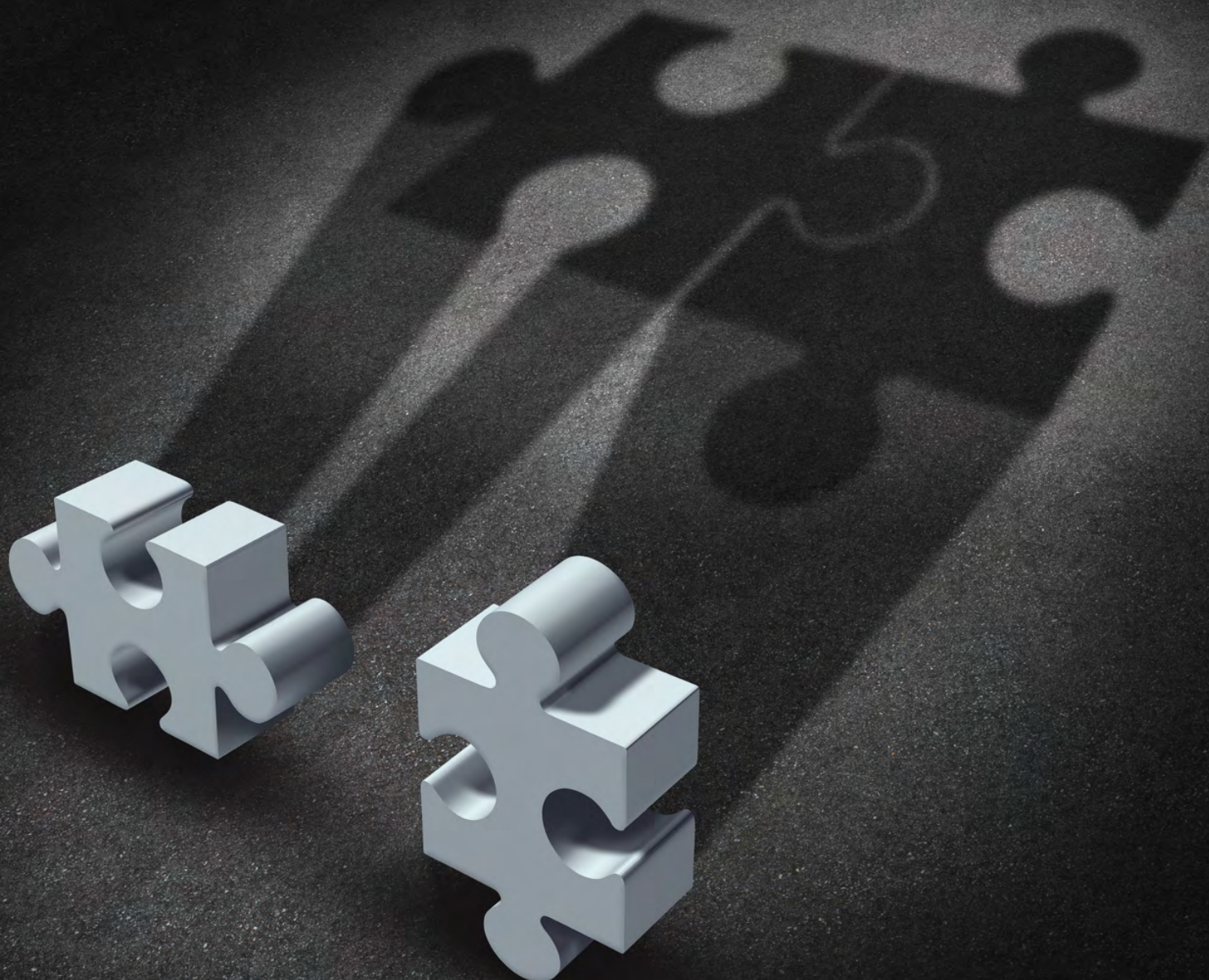


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## M&A Trends and Enhanced Employee Protection

By Seiya Kai & Shigeki Tatsuno

M&A activity in Japan has been experiencing an upward trajectory in recent years. This, in turn, has turned the spotlight on the rights of employees' in Japanese companies undergoing corporate restructuring. This article discusses the latest M&A trends in Japan and the recent enhancement of related employees' rights under Japanese law.

### Latest M&A trends in Japan

#### *Overall M&A Trends*

A total of 2,652 M&A transactions involving at least one Japanese party were reported in 2016. This is an increase of 224 (or 9.2%) over the number of transactions reported in 2015. The aggregate value of these transactions, amounting to approximately JPY16.6 trillion, also represents a 2.6% rise over that of 2015<sup>1</sup>. These numbers represent a post-Lehman peak in M&A activity in Japan both in terms of deal count and deal value.

#### *Key Feature of In-bound M&A*

A key feature of Japanese M&A activity in 2016 was the upsurge in deals of substantial size, such as Hon-hai's acquisition of Sharp and Toshiba's sale of its home appliance business to China's Midea group. Corporate carve-outs by way of corporate splits or business transfers for purposes of corporate consolidation also proved popular in 2016, with corporate splits being the preferred option in deals of more considerable size because they provide a more comprehensive detachment of the target business, and also obviate the need for the



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individual consents of employees to be obtained.

### Recent Amendments to Japanese Labour Laws

M&A activity in recent years also indicate a desire toward consolidation of assets and resources, as in Western Digital's acquisition of a stake in Toshiba's memory business, Canon's acquisition of Toshiba Medical Systems and Nippon Life's acquisition of Mitsui Life. Such corporate reorganisations, however, often require a closer examination of the relevant labour laws.

As a matter of fact, there have been some recent amendments to Japanese labour laws. Among them, the most significant relate to employees affected by a company split<sup>2</sup> or business transfer<sup>3</sup>. Foreign companies that wish to adopt such acquisition structures when investing in Japan may wish to note these amendments when considering the investment structure most suitable to them.

These amendments, which came into effect in September 2016, are briefly discussed in section B below.

#### **Amendments to Company Split-Related Regulation**

The Ordinance on the Act on Labor Contract Succession in a Company Split (the "Ordinance") and guidelines thereto (the "Guidelines") have been amended to reduce the impact of a company split on the affected employees in the split company.

These amendments (the "Amendments") aim at ob-



taining the understanding and cooperation of the affected employees and labour unions in a company split through holding informal and formal consultation with employees, providing sufficient advance notice to employees and labour unions, and allocating an adequate period within which certain categories of employees may object to the transfer of their contracts to the successor company. To this end, there have been three main amendments to the Ordinance and Guidelines.

First, the scope of affected employees has been broadened. Prior to the Amendments, only employees directly engaged in the business of the split company will be individually consulted on the company split. With the Amendments, however, employees who are not directly engaged in the business of the split company, but whose employment contracts will nevertheless be transferred to the successor company, will also be individually consulted.

Second, the scope of matters to be discussed in individual consultations with affected employees has been widened to include matters regarding the viability of both the split and successor companies. By way of background, the Companies Act permits company splits even where the split company or the successor company is expected to be unprofitable or go into debt. Since such situations could affect the job security of the affected employees, the ability of both the split and successor companies to remain going concerns is deemed a key matter to be discussed with the relevant employees.

Third, all employee-related procedures in a company split, such as prior notification requirements and those individual consultations mentioned above, will now have to be followed in respect of those employees whose employment contracts will be transferred to the successor company by way of a separate transfer agreement (as opposed to those whose employment contracts are transferred as part of the company split).



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*With Japanese companies being increasingly open to foreign investments, as evidenced by the continued uptrend in inbound M&A activity, foreign investors should also keep track of changes in Japanese labour laws, which could sometimes affect the feasibility of a deal.*  
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### Amendments to Business Transfer Guidelines

The guidelines concerning matters to be considered by companies in business transfers and mergers were amended to (i) ensure that companies obtain the genuine and informed (as opposed to the coerced or misguided) consent of their employees before such employees may be transferred as part of a business transfer and (ii) enhance the mutual understanding between the transferor and its employees so as to facilitate a smooth business transfer.

In summary, the amended guidelines require transferors to consult with employees and labour unions on a business transfer well before the business transfer is slated to take place, so as to secure enough time for the procurement of employees' consent to the business transfer. As with the case of a company split, the viability of both the transferring company and the transferee should be discussed in employee consultations. An employee will only be transferred under a business transfer if his or her individual consent to such transfers is obtained. (By contrast, no such individual employee consent is necessary in the case of a company split, although employees opposed to the company split may, subject to the terms of their employment contracts, terminate their employment.)

### Conclusion

With Japanese companies being increasingly open to foreign investments, as evidenced by the continued up-

trend in inbound M&A activity, foreign investors should also keep track of changes in Japanese labour laws, which could sometimes affect the feasibility of a deal.

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1. Mergers & Acquisitions Research Report February 2017. Japan: RECOF DATA Corporation, 10-13.

2. A company split involves the carve-out of the target business (typically known as the “split company”) from a company and the transfer of the carved-out business to a separate entity (typically known as the “successor company”).

3. A business transfer involves a contract between the buyer and the seller under which the seller transfers all or a material part of its business to the buyer.

