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Contents

Private M&A

EMPLOYEES, PENSIONS AND BENEFITS

UPDATE AND TRENDS

Contributors

Japan

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

The most common structure for acquisitions and disposals of privately owned companies is a simple share sale, where the seller sells shares of a target company, and the buyer purchases such shares pursuant to a sale and purchase agreement. Although less frequent, alternative structures are available for acquisitions and disposals. An acquirer can acquire all outstanding shares of a target company by way of a share exchange (***kabushiki koukan***) – a share exchange is a corporate reorganisation under the Companies Act whereby a company acquires 100 per cent of the shares of another company in exchange for shares, cash or other property. An acquirer can also acquire more than 50 per cent of the shares of a target company by way of a share delivery (***kabushiki koufu***) – a share delivery is a corporate reorganisation under the Companies Act whereby a company acquires more than 50 per cent of the shares of another company in exchange for shares, cash or other property.

Acquisitions and disposals of businesses or assets are conducted by way of a business transfer or a company split (***kaisha bunkatsu***). A business transfer is a simple sale and purchase of the business of a target company. To transfer contracts in a business transfer, the consent of the counterparties is required. Alternatively, the transaction parties can use a company split (***kaisha bunkatsu***) – a company split is a corporate reorganisation under the Companies Act whereby the parties can transfer the business of a target by operation of law. In a company split, contracts are also, in principle, transferred to the acquirer by operation of law. In light of this advantage, a company split is often the preferred structure in acquisitions and disposals of businesses or assets.

A typical transaction process will involve:

- the parties entering into a confidentiality agreement;
- the buyer conducting due diligence on the target company, the target business or the target assets;
- occasionally, the parties entering into a memorandum of understanding (MoU) or a buyer providing an offer letter, neither of which is definitive; and
- the parties negotiating and entering into a definitive agreement, followed by a closing.

The timeline to negotiate and close a transaction varies, depending on factors such as the transaction structure, the deal size, the nature and extent of due diligence, and the obtaining of any necessary clearance from authorities (if required). However, generally speaking, it takes two to six months for share purchases and two to eight months for business transfers, share exchanges, share deliveries and company splits. The latter four transaction structures tend to take longer, as the parties need to follow the procedures prescribed under the Companies Act.

Law stated - 17 7 2024

Legal regulation

Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

The Companies Act principally regulates private acquisitions and disposals. Notably, corporate reorganisations such as share exchanges, share deliveries and company splits must comply with the requirements and procedures under the Companies Act. Transaction parties should also be mindful of other Japanese laws that may be applicable to the transaction, including:

- the Civil Code;
- the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the Antimonopoly Act); and
- the Foreign Exchange and Foreign Trade Act (the FEFTA).

While transaction parties may generally choose the governing law of the transaction, in most cases involving Japanese private companies, the parties agree that the laws of Japan will govern such transactions.

Law stated - 17 7 2024

Legal title

What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

A buyer usually acquires full legal title to shares in a target, a business or assets, unless the shares, business or assets are encumbered, and the encumbrances are not terminated before the acquisition. There is no concept of 'level of assurance' under Japanese law.

In a share purchase, legal title to the shares in a company is transferred based on the agreement between the seller and the buyer; provided, however, that if the target company issues share certificates, those certificates must be delivered to the buyer to transfer legal title to the buyer. In a share exchange, legal title to the shares of a company is transferred on an effective date as agreed between the parties, and in a share delivery, legal title to the shares is transferred on an effective date as determined by the buyer.

In a business transfer, a buyer acquires each asset based on an agreement with the seller, although if the seller is transferring contracts (and any liabilities thereunder), the consent of the counterparties to such contracts is required to duly transfer such contracts. In a company split, as opposed to a business transfer, legal title to the business or assets is, in principle, transferred by operation of law. Contracts are also, in principle, transferred to the acquirer by operation of law in a company split.

There is a difference between legal and beneficial title in Japan. Legal title is ownership of shares or assets, while beneficial title is the right to enjoy financial or other benefits of the property.

Law stated - 17 7 2024

Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In principle, a buyer must agree with all sellers (shareholders) to acquire all shares of a target in a share purchase. However, in certain cases, a buyer can acquire all shares of a target without having an agreement with each shareholder. If the buyer can acquire 90 per cent or more of the voting rights of the target, they can exercise a statutory right to cash out the minority shareholders. When exercising this statutory right, the buyer must provide notice of the major terms and conditions of the purchase to the target company and the minority shareholders and obtain the resolution of the board of directors of the target company. This statutory squeeze-out process takes at least 20 days. Minority shareholders who do not agree to the purchase price can file a petition for a court to determine the fair value of the shares if they do not reach an agreement on the purchase price with the buyer.

Alternatively, if the buyer utilises a cash-consideration share exchange with two-thirds supporting voting rights in the target, the buyer can cash out the minority shareholders in the share exchange, even without the consent of the minority shareholders. A share exchange generally requires an agreement between the buyer and the seller, as well as, for both parties, the resolution of a shareholders' meeting with at least a two-thirds vote and the resolution of the board of directors. This can take, roughly speaking, two to eight months to accomplish, depending on various factors.

Law stated - 17 7 2024

Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

In a business transfer or a company split, generally, a business and its assets are transferred to a buyer based on an agreement between the parties. Thus, any assets and liabilities, including contingent liabilities, can be contractually excluded from the transaction if the buyer and the seller so agree. Also, in a business transfer, contracts (and any liabilities thereunder), including accounts payable arising from contracts, cannot be transferred to the buyer unless the consent of the counterparties is obtained.

In a company split, however, contracts (and any liabilities thereunder) will, in principle, be transferred to the buyer by operation of law. However, contracts may contain a change of control provision or an anti-assignment provision that will be triggered by a company split. In such a case, contracts (and any liabilities thereunder) can be transferred by operation of law, although such a transfer constitutes breach of the underlying contract. For the protection of creditors, both parties to a company split must make a public notice announcing the transaction in Japan's Official Gazette and a daily newspaper or its website, as prescribed under their articles of incorporation, or alternatively make a public notice in the Official Gazette and notify each individual creditor of the transaction. This is done so that creditors can raise an objection to the transaction. A buyer and seller can also agree on the employees to be transferred to the buyer, though objections can be raised by:

1. employees who are engaged primarily in the business to be transferred but who are not to be transferred to the buyer; and
2. employees who are not primarily engaged in the business to be transferred but who are to be transferred to the buyer.

If employees object, the employees corresponding to category (1) above are transferred, while those corresponding to category (2) are not.

Law stated - 17 7 2024

Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

The FEFTA restricts direct investments by foreign persons, including entities incorporated under the laws of foreign countries as well as Japanese companies of which 50 per cent or more of the voting rights are directly or indirectly owned by foreign persons (collectively, a 'foreign investor'). A foreign investor is generally required to make a prior notification if they seek to invest in a company engaged in certain business sectors specified under the FEFTA ('designated business sectors'), such as those involving products used by or in the military, aviation, artificial satellites and space exploration, nuclear power plants, semiconductor or software industry. The statutory waiting period for this prior notification is 30 calendar days, and this timing must be taken into consideration when planning a transaction.

The Antimonopoly Act generally prohibits a buyer whose sales (including their affiliates') in Japan exceeds ¥20 billion from acquiring more than 20 per cent or 50 per cent of the shares of a target company whose sales (also including its affiliates') exceeds ¥5 billion without the filing of a prior notice with the Japan Fair Trade Commission (FTC). The statutory waiting period for this filing is also 30 calendar days. This requirement applies not only to share purchases, but also to business transfers and other asset transfers, and a different filing requirement is applicable to such transactions.

In some industries, such as those relating to broadcasting and news media and the transportation industry, shareholdings by non-Japanese persons are restricted. In addition, acquisitions of shares, a business or assets in heavily regulated industries are sometimes subject to approval by the relevant authorities. A typical example is the acquisition by a bank of certain businesses, which requires the approval of the Financial Services Agency.

Law stated - 17 7 2024

Consents

Are any other third-party consents commonly required?

If a parent company sells shares of its subsidiary and if the book value of such shares to be sold is 20 per cent or more of the total assets of the parent, a resolution at a shareholders' meeting passed with a super-majority vote is required.

Similarly, in a share exchange, share delivery and company split, the parties need to obtain a resolution at a shareholders' meeting with a super-majority vote (in a share delivery, only the buyer needs to obtain this resolution). However, where the transaction value in these transactions does not exceed a certain statutory threshold, namely the consideration for such a transaction is less than 20 per cent of the buyer's net assets, a resolution of a shareholders' meeting of the buyer is not required. With respect to a share exchange and company split, if the buyer owns 90 per cent or more of the voting rights of the target, a resolution at a shareholders' meeting of the target is not required.

In a business transfer, if the seller is transferring all or a substantial part of its business, they need to obtain a resolution at a shareholders' meeting with a super-majority vote, and if a buyer is to receive all or a substantial part of the business of the seller, they also need to obtain a resolution at a shareholders' meeting. However, if one party owns 90 per cent or more of the voting rights of the other, the other party does not need to obtain a shareholders' meeting approval.

Law stated - 17 7 2024

Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

FEFTA

Under the FEFTA, a foreign investor may need to file a pre-closing notice or a post-closing report with the ministers that have oversight of the related business section, as well as with the Ministry of Finance when the investor seeks to take certain action, such as acquiring shares and appointing directors with respect to a target company engaged in a business within a designated business sector.

Antimonopoly Act

Under the Antimonopoly Act, a buyer in a share purchase whose sales (including their affiliates') in Japan exceed ¥20 billion is required to file a prior notice with the FTC when the buyer's shareholding ratio exceeds 20 per cent or its shareholdings exceed 50 per cent of the shares, of a target company whose sales (including its affiliates') exceed ¥5 billion. The statutory waiting period is 30 calendar days.

In addition, in the case of a company split or a business transfer, a buyer also needs to file a prior notice with the FTC, subject to certain criteria.

Stamp duty

Under the Stamp Duty Act, certain agreements or documents need to be stamped. Although a share purchase agreement does not need to be stamped, the agreement for a company split needs to be affixed with stamps equal to ¥40,000. In a business transfer, the stamps to be affixed will be up to ¥600,000, depending on the amount of the transaction consideration.

Other registrations

Patents, utility models, designs and trademarks can be registered with the Japan Patent Office. Copyright can be registered with the Agency for Cultural Affairs and the ownership of real estate must be registered with a Legal Affairs Bureau. A buyer can assert such rights against third parties by filing a change of registration.

Law stated - 17 7 2024

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Parties often retain financial advisers, accountants, tax advisers and business consultants. There appear to be no typical terms of appointment.

Law stated - 17 7 2024

Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Parties are subject to a general obligation under the Civil Code to act in good faith. Parties, generally, can freely stop or abandon negotiations at an early stage of contract negotiations. However, as the parties come close to reaching a definitive agreement, a party abandoning contract negotiations may be liable for unfaithful negotiation, depending on the reason for abandonment.

Under the Companies Act, directors may also be liable to a company and third parties for wilful misconduct or gross negligence in the performance of their duties.

Law stated - 17 7 2024

Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

Initially, parties typically enter into a confidentiality agreement pursuant to which each party must keep confidential any information regarding the other, the transaction and its negotiation. They then enter into a definitive agreement that sets out the detailed terms and conditions of the transaction.

In a share purchase or a business transfer, the parties enter into a share purchase agreement or a business transfer agreement as the definitive agreement.

However, in a share exchange or a company split, the documentation changes because the Companies Act requires shareholder approval and entitles creditors to make an objection, and as a result the arrangement is not strictly two-sided. While there is a share-exchange agreement (for a share exchange) or a company split agreement (for a company split) required under the Companies Act, the shareholders and creditors can see such an agreement. Consequently, typically, the transacting parties also separately enter into a definitive integration agreement, which sets out the detailed or sensitive terms and conditions that are not to be disclosed to third parties, including shareholders and creditors, as well as a simple share-exchange agreement or company split agreement required under the Companies Act.

Sometimes, a non-binding memorandum of understanding (MoU) is implemented prior to the execution of a definitive agreement. An MoU usually provides the envisaged structure, price range and other principal terms of the transaction.

In principle, whatever transaction has been agreed upon as a commercial matter is reflected substantially in a definitive agreement with respect to price, covenants, closing conditions, representations and warranties, and indemnification. However, in a business transfer or company split, the assets and liabilities to be transferred tend to be described in detail to precisely identify the subject and scope of the transaction.

Law stated - 17 7 2024

Documentation

Are there formalities for executing documents? Are digital signatures enforceable?

There are no formalities for executing documents unless otherwise agreed between parties. However, parties customarily affix their seals, registered with a Legal Affairs Bureau, to the

agreements. Furthermore, a Legal Affairs Bureau can issue a certificate that certifies the registrations of the representative seals, and sometimes such a certificate is requested by a party.

Digital signatures are enforceable under Japanese law, although until recently the use of digital signatures was not common. However, one of the consequences of the covid-19 pandemic has been that many companies have begun to embrace the utilisation of digital signatures.

Law stated - 17 7 2024

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The typical scope of due diligence covers the following:

- basic information of the target company and M&A transactions;
- shares, stock options, other securities and the holders thereof;
- transactions with affiliated companies and any standalone issues;
- assets, including real properties, intellectual properties, systems and software;
- debts and mortgages;
- contracts;
- permits, licences and compliance matters;
- employee matters; and
- litigation and disputes.

It is not common in Japan for a seller to conduct due diligence on itself. However, the frequency of such cases is increasing. It is also not common for a buyer to rely on a due diligence report produced for the seller, and the buyer usually conducts their own due diligence even if the seller's due diligence report is provided.

Law stated - 17 7 2024

Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller could be liable for pre-contractual or misleading statements, but this liability can be excluded through an agreement between the parties, and the seller usually negotiates to include such an exception in the definitive agreement.

Law stated - 17 7 2024

Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

A company's fundamental information is registered in the commercial registry, which is publicly available. Items that are included in the commercial registry include:

- the corporate name and address;
- the date of establishment;
- the business purpose;
- the number of authorised shares and the number of issued shares;
- the class of shares and the contents of stock options;
- the amount of share capital;
- the necessity of the approval of a company for transfer of its shares;
- whether share certificates are issued; and
- the names of directors and statutory auditors.

In addition, information regarding the intellectual properties registered with the Japan Patent Office is publicly available. Information regarding real property owned by a company is also available on the real estate registry.

During the due diligence, the buyer typically conducts public searches on the commercial registry and intellectual properties of the target company. However, whether to confirm the real estate registry usually depends on the materiality of such properties.

Law stated - 17 7 2024

Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

A decision made by a lower court states that if a buyer has actual knowledge of a breach by the seller of representations and warranties, or if a buyer is not aware of a breach due to their gross negligence, the seller is not liable for such breach. However, practically, buyers attempt to include a sandbagging provision in the definitive agreement to preclude this.

Law stated - 17 7 2024

PRICING, CONSIDERATION AND FINANCING

Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

While it is customary to have a post-closing adjustment mechanism based on the closing accounts as of the closing date, there are many cases with no price adjustment mechanism having a fixed purchase price. A locked-box structure is not as common as the use of closing accounts.

Law stated - 17 7 2024

Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

While it is possible to have shares, vendor notes or other types of assets as consideration, it is customary to use cash as consideration.

There is no obligation to pay sellers the same consideration in the case of a share transfer. However, in the case of a share exchange or a share delivery, the buyer must pay the same consideration to each seller (the shareholders of the company).

Law stated - 17 7 2024

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

It is uncommon to use earn-outs, deposits and escrows, but it is possible to adopt these in Japan.

Law stated - 17 7 2024

Financing

How are acquisitions financed? How is assurance provided that financing will be available?

Usually, if a private equity fund is the acquirer or a transaction is a management buy-out transaction, the buyers obtain financing from banks via a non-recourse loan. However, if an operating company is the acquirer and cannot afford the purchase price with its funds in hand, it will arrange for a corporate loan based on its credibility and history with its main bank. In addition, in the case of a non-recourse loan, generally, the lenders will request security over the shares of the company held by the buyer and the assets of the company.

There are many cases where the buyer obtains a debt commitment letter or equity commitment letter and provides them to the seller prior to the execution of the definitive agreement, to demonstrate their creditability.

Law stated - 17 7 2024

Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

There are generally no limitations that impact financing structures under Japanese law. There is also no restriction on a seller providing financial assistance to a buyer, although a target company cannot provide its assets as collateral for the financing of an acquisition by the buyer until the buyer acquires all the outstanding shares of the target or obtains consents from all the other shareholders.

Law stated - 17 7 2024

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

It is customary to have the closing conditions stated in the definitive agreement if the signing date and the closing date are different. The following items are customarily closing conditions acceptable to a seller:

- no breach of representations and warranties with materiality or material adverse effect (MAE) qualification;
- no material breach of covenants;
- the company's approval on the share transfer;
- the submission of resignation letters; and
- the obtaining of necessary regulatory approvals and clearances.

The buyer needs to negotiate to have:

- financing out and MAE provisions;
- a provision that requires the seller to obtain consents for material contracts that contain change of control provisions; and
- other conditions.

Law stated - 17 7 2024

Closing conditions

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

It is not uncommon to have a general obligation, on a reasonable efforts basis, to satisfy the closing conditions in a definitive agreement. Typically, the obligations to obtain antitrust approval and other clearances are subject to more detailed provisions and the parties sometimes negotiate whether to include a hell or high water clause.

The obligations to satisfy the conditions that can be controlled by the party and easily performed, such as obtaining resignation letters from directors nominated by the seller, are usually definitive and express, while other obligations subject to the consent of third parties, such as obtaining consents in connection with contracts that contain change of control provisions, are usually provided as obligations on a reasonable efforts basis.

Law stated - 17 7 2024

Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Pre-closing covenants are normally agreed upon by parties. The usual scope of the seller's covenants includes:

- operating the target company's business in the ordinary course;
- allowing the buyer reasonable access to information about the target company;
- obtaining the necessary consents from third parties or sending notices to third parties if contracts with such third parties so require; and
- delivering resignation letters of directors and statutory auditors.

Generally, the remedy for breaching these covenants is seeking indemnification and, if certain criteria is met, the buyer is also entitled to exercise the option not to close or to terminate the definitive agreement.

Law stated - 17 7 2024

Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

The parties are usually entitled to exercise their termination rights, in the case of a material breach of covenants or representations and warranties, the lapse of a long-stop date, or the bankruptcy of the target company or the parties. It is common to only accept such termination before the closing of the transaction.

Law stated - 17 7 2024

Termination rights

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

The number of cases that adopt break-up fees and reverse break-up fees is increasing, but it is still not common practice in Japan to include such mechanisms.

Law stated - 17 7 2024

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

The seller typically provides representations, warranties and indemnities to the buyer. The scope of the customary representations and warranties are:

- due incorporation and authority to enter into and perform the definitive agreement and other fundamental representations and warranties;
- issuance and validity of shares;
- accuracy of financial statements, no undisclosed liabilities and no material changes after the balance sheet date;
- valid title to and no defects on the properties and assets;
- validity of contracts and related party transactions;
- compliance with laws and obtainment of necessary permits and licences;
- matters relating to employees;
- full payment of tax and tax returns;
- no legal proceedings and disputes; and
- no relationship with anti-social forces.

There is no clear difference between representations and warranties under the laws of Japan. A definitive agreement usually provides that if the representations and warranties are not accurate or true, the breaching party must indemnify the other party for damages incurred in connection with such breaches.

Law stated - 17 7 2024

Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

While the limitations on a seller's liability under the definitive agreement vary, it is customary to include limitations on the seller's ability, including de minimis deductibles or tipping baskets and caps, which are usually determined based on a percentage of the purchase price. However, there is no statistical data publicly available providing the market standard of the limitations.

Furthermore, it is also common to provide a survival period for the breach of representations and warranties or covenants. This period usually varies, but a customary claim period in connection with a breach of representations and warranties can be from six months to two years, and a claim period with respect to fundamental representations or warranties tends to be much longer or even unlimited.

Law stated - 17 7 2024

Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

The number of cases that adopt representation and warranty insurance is increasing, but these are still not widely used in Japan.

Law stated - 17 7 2024

Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

It is common for parties to agree to post-closing covenants. These generally include the seller's post-closing obligations not to solicit the target company's employees and not to compete with the target company's business for a certain period. It is also common for the buyers to agree to post-closing obligations to keep the employment of the target company's employees with their current employment terms and conditions for a certain period.

Law stated - 17 7 2024

TAX

Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

In the case of share transfers, transfer tax is not payable and no stamp duty is imposed.

With respect to company splits, however, stamp duty of ¥40,000 is imposed on each hard copy of the documentation, which is customarily equally borne by both parties. Furthermore, the registration fee for the company split is the higher amount out of ¥30,000 and 0.7 per cent of the increased capital amount of the buyer, which is customarily borne by that party. If real property is transferred through a company split, a real property acquisition tax is also imposed, which is equal to 3 per cent or 4 per cent of the official appraised value of such real property. This can be exempted if the company split qualifies for a tax exemption by satisfying certain criteria, including transfers of employees, principal assets and debts, and continuation of the business. A registration tax is additionally imposed on the real property registration of the transfer at the rate of 1.5 per cent or 2 per cent of the official appraised value of such real property. This is customarily borne by the buyer.

In a transfer of a business or assets, stamp duty is imposed on each hard copy of the definitive agreement, which is, depending on the price, up to ¥600,000; customarily, this is equally borne by each party. The transfer of a business does not need to be registered in the commercial registry of the parties, and consequently, related fees for a business transfer are not imposed. If real property is transferred through the transfer of a business, real property acquisition tax and a registration tax are imposed. The exemption described above does not apply to the transfer of a business. These taxes are customarily borne by the buyer.

Law stated - 17 7 2024

Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

In a share purchase, value added tax (VAT) is not imposed, although any capital gains from the transfer of shares are taxable. If a seller is a resident of Japan, capital gains are subject to tax at the rate of 20.315 per cent. Alternatively, if a seller is a Japanese company or foreign company with a permanent establishment in Japan, capital gains are included in income, and the effective tax rate is subject to the corporate income tax of approximately 30 per cent.

If the seller is a non-resident individual or a foreign corporation having no permanent establishment in Japan, capital gains arising from a transfer of a Japanese corporation (which is not a certain real property holding corporation, where special rules apply) are not, in general, subject to Japanese income tax. However, this is generally not the case if a foreign seller holding 25 per cent or more of the shares of the target company has transferred 5 per cent or more of such shares. If a seller is a non-resident individual, capital gains are subject to tax at the rate of 15.315 per cent and if a seller is a foreign corporation having no permanent establishment in Japan, capital gains are subject to tax at the rate of approximately 25 per cent. However, the exemption may apply depending on the capital gains article of the applicable tax treaty.

In the case of a transfer of a business or assets made by a Japanese corporation or by a foreign corporation doing business through a permanent establishment in Japan, capital gains are subject to corporate taxes at an effective rate of approximately 30 per cent. However, if such transfer is conducted through a tax-qualified company split satisfying

certain conditions, the tax on capital gains can be deferred; although in the case of a transaction involving a third party, such conditions are difficult to be met. Tax on capital gains is customarily borne by the seller.

Japanese consumption taxes, in the case of a sale of business or assets, are imposed at the rate of 10 per cent on transfers of assets. These consumption taxes are usually borne by the buyer.

Law stated - 17 7 2024

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

A change in shareholders does not legally affect the employees of the target company. Thus, the employees continue to be employed after closing.

In the case of a business transfer or an asset transfer, however, employees will be transferred to the buyer if agreed among the buyer, the seller and the employees. If an employee does not consent to the transfer, then the employee is not transferred to the buyer.

Furthermore, in the case of a company split, the seller and the buyer can agree on the scope of the employees to be transferred, although objections can be raised by:

1. employees who are engaged primarily in the business to be transferred but who are not to be transferred to the buyer; and
2. employees who are not primarily engaged in the business to be transferred but who are to be transferred to the buyer.

If employees object, the employees corresponding to category (1) above are transferred, while those corresponding to category (2) are not. In addition, the seller must take some procedures, such as providing advance notice or engaging in prior consultation with a union or each employee, as provided under the laws of Japan.

Law stated - 17 7 2024

Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

There are no obligations to notify or consult with employees or their representatives in the case of an acquisition of shares in a company or a business or assets unless a collective bargaining agreement with a labour union (if any) provides otherwise, or unless the transaction is a company split. In a company split, a target company must send notices

to employees and must engage in consultation with a labour union (if any), or with the representatives of employees (if there is no labour union).

Law stated - 17 7 2024

Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

In the case of a share transfer, pensions and other benefits generally remain unchanged. However, if the target company joins the pension and other benefit arrangements managed by its new parent company (ie, the buyer), the target company is required to leave its existing benefit plans.

In the case of a business transfer or a company split, the necessary procedures depend on the situation and can be complex. In many cases, the contributed assets may be able to be transferred to a pension plan managed or administered by an acquirer, although a permission or licence from an authority may be required and obtaining such a permission or licence may from six months to one year.

Law stated - 17 7 2024

UPDATE AND TRENDS

Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

No significant change in legal or market practice in private M&A transactions has been observed during the past 12 months.

Law stated - 17 7 2024