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# Mergers & Acquisitions

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# Japan

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### Overview

Since December 2012, under the leadership of Prime Minister Shinzo Abe, Japan has been in the process of implementing economic policies popularly known as "Abenomics", comprising three components (called the three arrows): massive monetary easing; expansionary fiscal policy; and long-term growth strategy. Prime Minister Abe has now become one of the longest-serving leaders in Japan's history. His tenure became the third longest in June 2019, and will become the longest in November 2019 if he survives the summer's election for the House of Councillors, the upper chamber of parliament. Due to this long-surviving government, economic policy has been consistent for the last several years. Although the full results of the policies are still unclear, the impact has been a surge in the Japanese stock market together with a significant depreciation of the Japanese yen against other major currencies: comparing the figure as of year-end 2018 and 2012, the Nikkei 225 was up 93% (to JPY 20,014 from JPY 10,395), and the yen was approximately 25% cheaper against the US dollar. The yen depreciation certainly helped the competitiveness of Japanese companies abroad.

Although Japan is still struggling to completely recover from the massive earthquake in Northern Japan which occurred back in 2011, business activities have mostly returned to normal, and Japanese M&A activity in the following years has been quite active. In particular, outbound M&A activity has been strong across a variety of industries, including retail, healthcare, financial services, industrials, energy and consumer products. Many Japanese companies that have no international presence or experience now list overseas strategies or expansion as one of their top priorities. Japan has also seen a number of domestic deals, particularly consolidations within the same industry. There is also an increasing number of start-up investments, especially for fintech companies. Due partly to the increase in the number of such start-up investments, 2018 recorded the largest number of domestic M&A deals in history.

### Active cross-border M&A

The volume of outbound M&A in 2018 was about JPY 19 trillion, which was a record high and almost 2.5 times the volume of 2017. The total number of outbound M&A transactions was 777, which was also a record number. The acquisition of **Shire PLC** ("Shire") by **Takeda Pharmaceutical Co.** ("Takeda") was approximately JPY 7 trillion, which accounted for about 27% of the total volume of outbound M&A in 2018. Also, the series of M&A transactions by **SoftBank Group Corp.** ("SoftBank"), including M&A through its investment fund called Softbank Vision Fund, increased the volume of outbound M&A. The volume of outbound M&A by SoftBank was approximately JPY 2.25 trillion, which accounted for about 12% of the entire amount of the outbound M&A for 2018.

In terms of the region where cross-border M&A was directed, we have seen a significant increase of investments into the U.S. The volume of investment into the U.S. in 2018 was almost 200% of the volume in 2017, and both the volume and the number of M&A transactions into the U.S. was at a record high.

For Japanese companies, Southeast Asian countries have been the target for the last several years, especially after the increase of the labour cost in China due to the growth of the Chinese economy and also because of certain political tension over small islands in the East China Sea. This strategy has been called a "China plus" strategy and a number of Japanese companies have invested into Southeast Asian countries such as Thailand (especially for the automotive industry), Vietnam, Indonesia, Myanmar and the Philippines. In addition, because of the trade war between the U.S. and China, Japanese companies are now being forced to reconsider their supply and sales chain throughout the region, which may increase again the volume of M&A in the Southeast Asian region.

## Significant deals

Largest outbound M&A deals – Takeda

Outbound M&A deals have been quite active for the last several years in Japan, and the largest M&A deal in 2018 was also an outbound deal. It was not only the largest in 2018, but was also the largest ever M&A deal by a Japanese company. On May 8, 2018, Takeda announced that it had agreed with Shire to purchase all that was issued and to be issued ordinary share capital of Shire. The deal was completed on January 7, 2019. Under the terms of the acquisition, each Shire shareholder was entitled to received USD30.33 in cash for each Shire share and either 0.839 new Takeda shares or 1.678 Takeda ADS (American Depositary Shares). Upon the completion of the transaction, Takeda shareholders owned approximately 50% of the combined group. The total amount of consideration was approximately JPY 7 trillion (at the time of announcement).

Not only the size of the transaction, but the deal structure of this M&A was epoch-making for Japanese deals from various perspectives, especially in that (a) the consideration was a combination of cash and Takeda's shares, and (b) the American Depository Shares of Takeda were listed on the New York Stock Exchange during the process of this M&A.

After completion of this deal, Takeda-Shire has become a global top 10 pharmaceutical company in terms of sales.

Activity by SoftBank

SoftBank is a global technology company with a portfolio of companies including those in advanced telecommunications, internet services, AI, smart robotics, IoT and clean energy providers. SoftBank has been quite active in M&A. SoftBank established SoftBank Vision Fund in 2017 and it has been quite active in investments, especially in the field of, among others, transportation and logistics, real estate, fintech, health tech, and frontier tech. The total number of SoftBank-related M&A transactions was 51 in 2018 and amounted to almost JPY 9 trillion in total. Described below are the large and well-known deals recently completed by SoftBank.

In January 2018, SoftBank completed an investment of approximately USD 7.7 billion into **Uber Technologies Inc.** ("Uber") for about a 16% stake in Uber. This was the second-largest outbound deal in Japan in 2018. Since Uber was listed in May 2019, SoftBank seems to have obtained a substantial gain on its investment.

SoftBank also invested into **WeWork Companies, Inc.** ("WeWork"), a platform for creators, providing members all around the world with space, community and services through both physical and virtual offerings. It has been publicly reported that SoftBank has invested a total of around USD10.4 billion in WeWork thus far – USD 4.4 billion in 2017 and USD 6 billion in 2018 and 2019. WeWork also announced that it was planning to go to public as well, and it filed paperwork confidentially with the U.S. Securities and Exchange Commission in April 2019.

<u>Investment fund deals</u>

The total number of M&A deals by investment funds was 750 in 2018, which was also a record high, representing a 25% increase over the 598 deals in 2017. In particular, corporate venture capital investments have been quite active for the last several years in Japan. There were 511 M&A investments by venture capital funds in 2018, representing 68% of the total number of transactions by investment funds.

On the other hand, the investment amount by PE funds decreased because the sizes of the deals completed by PE funds were relatively small in 2018. Having said that, we did see some large deals by PE funds, including for example the acquisition by **Baring Private Equity Asia**, a global private equity firm in Hong Kong, of **Pioneer Corporation**, a Japanese audio system maker, for approximately JPY 100 billion.

<u>M&A in the retail sector</u>

M&A in the retail sector was very active, especially for domestic consolidation transactions because of the current economic situation surrounding the retail sector.

For example, **ITOCHU Corporation** ("ITOCHU"), one of the large trading houses in Japan, acquired an additional 8.6% of the shares of **FamilyMart UNY Holdings, Co., Ltd.** ("FamilyMart UNY"), one of the largest retail chains in Japan, to increase its shareholding from 41.5% to 50.1% through a tender offer process in order to make FamilyMart UNY a consolidated subsidiary of ITOCHU. ITOCHU announced the completion of the tender offer in August 2018, and the total amount of consideration was approximately JPY 120 billion.

After that, ITOCHU also announced in October 2018 two subsequent M&A deals: (i) the sale of all of the shares of **UNY CO., LTD.** ("UNY"), a subsidiary of FamilyMart UNY, to **Don Quijote Holdings Co., Ltd.** ("Don Quijote"), a large discount store chain in Japan, for JPY 28.2 billion; and (ii) the acquisition of common shares of Don Quijote through a tender offer process to obtain up to 20.17% for approximately JPY 212 billion. As a result of this series of M&A transactions, FamilyMart UNY and Don Qujiote as a group has become the third largest retail group in Japan in terms of volume of sales, following AEON group and Seven & i group.

<u>Other significant M&A deals</u>

Other M&A highlights were (i) the successful hostile bid by ITOCHU of **Descente Ltd.** ("Descente") in March 2019, and (ii) completion of a long-planned consolidation of **Idemitsu Kosan Co., Ltd** ("Idemitsu") and **Showa Shell Sekiyu K.K.** ("Showa Shell").

It has not been very common in Japan to see a hostile takeover bid, and most hostile bids have been unsuccessful. However, the hostile bid made by ITOCHU for Descente, a Japanese sportswear company, was successful. ITOCHU announced on January 31, 2019, the commencement of a tender offer for the shares of Descente to increase its shareholding of 30% up to 40% in order to have statutory veto rights under Japan corporate law. Thereafter, on February 7, 2019, Descente announced an opinion opposing the tender offer, stating a belief that the tender offer would damage the company's corporate value and infringe upon the common interests of its shareholders. In the end, ITOCHU announced the successful completion of the tender offer on March 15, 2019.

With respect to the consolidation of Idemitsu, the second-largest oil wholesaler, and number four Showa Shell, the merger plan was first announced in 2015, but the plan was delayed due to opposition by the founding Idemitsu family. The consolidation was finally achieved in April 2019, which resulted in a new era of an oil industry with two large players, JXTG Holding, which was formed through a merger of JX Holdings Inc. and TonenGeneral Sekiyu K.K. in 2017, and Idemitsu-Showa Shell group.

## Key developments

Amendment to the Companies Act

The Companies Act was completely overhauled in 2006, and is therefore a relatively new law compared to the other fundamental laws of Japan. Nonetheless, the rapidly changing business, financial and economic environment faced by Japanese companies has already highlighted the shortcomings of the rewritten Companies Act. As a result, an amendment of the Companies Act was passed by the Japanese Diet in June 2014 and came into effect in May 2015 (the "2015 Amendment"). Thereafter, the Ministry of Justice has continued discussions of a possible additional amendment of the Companies Act (the "Additional Amendment"), and a draft plan of the Additional Amendment was finalised in February 2019. The bill on the Additional Amendment is expected to be submitted to the extraordinary session of the Diet in fall 2019.

While the 2015 Amendment focused on certain corporate governance issues, including an option to introduce a new corporate governance system that includes an audit and supervisory committee (defined as "*kansa-tou iinkai secchi kaisha*" in the Amendment) and the introduction of double derivative actions in certain circumstances, there were some major reforms that have directly impacted M&A practice including, among others: (a) regulation on the issuance of shares that results in creating controlling shareholders; and (b) minority squeeze-out procedures. Regarding (a), while the Companies Act originally required only board approval for the issuance and allotment of new shares by a public company (unless it was deemed a discounted issuance), the 2015 Amendment obliges any public company planning an issuance of shares that results in creating controlling shareholders to disclose the details of the allotment, and if shareholders holding 10% or more of voting rights object to such issuance, obtain majority vote approval at a shareholders' meeting. Regarding (b) above, the 2015 Amendment introduced a new minority squeeze-out procedure which became frequently employed after the 2015 Amendment took effect. If a controlling shareholder directly or indirectly owns 90% or more of the total voting rights of the company, that shareholder is able to require the remaining shareholders to sell their shares without the need for shareholder approval or a court order, subject to the approval of the board of the target company only. Dissenting shareholders have the right to seek an injunction to prevent such a purchase if it is illegal or extremely unjust. Dissenting shareholders also have an appraisal right. Other reforms in the 2015 Amendments also had an impact on M&A practices in Japan (e.g., shareholder remedies which include the ability to seek an injunction of mergers and other reorganisations).

The Additional Amendment primarily focuses on corporate governance issues, such as making most of the shareholders meeting materials paperless and available only online, incorporating measures to prevent abusive use of shareholder proposals, requirements for a listed company to appoint at least one outside director (which topic is currently governed by the "comply-or-explain" requirement under the Code (as defined below) only), and streamlining and clarification of rules applicable to director compensation and D&O insurance and indemnification. However, there is one major amendment relating to M&A, which is the introduction of a new corporate reorganisation transaction called a Share Delivery (*kabushiki kofu*) – a form of stock-for-stock acquisition. There is currently a transaction called a Stock-for-stock Exchange (*kabushiki kokan*) that is available under the Companies Act, but it can only be adopted when the acquirer intends to acquire all issued shares of the target. However, an acquirer can use a Share Delivery to acquire only part of the issued shares of the target in exchange for its own shares (e.g., an exchange offer for a listed target), so long as the target is not a subsidiary of the acquirer prior to the acquisition, but will become one after the acquisition. Such transaction is actually permissible as of now by means of issuance of the acquirer's shares in exchange for an in-kind contribution of the target's shares. However, it is subject to a requirement that a court-appointed inspector investigate the value of the target's shares prior to the issuance of the acquirer's shares, and the target's shareholders receiving the acquirer's shares must indemnify the acquirer if it later turns out that the value of the target's shares significantly falls short of the value on which the issuance of the acquirer's shares was based. Such requirement tends to be prohibitively burdensome, but the introduction of the Share Delivery will lift such requirement and is expected to provide potential acquirers with broader options for stock-for-stock acquisitions. Pending the introduction of the Share Delivery, a similar arrangement is available under the Act on Strengthening Industrial Competitiveness, a special measures act administered by the Ministry of Economy, Trade and Industry of Japan ("METI"), but it requires that the acquisition plan be reviewed and approved by the ministry governing the relevant industry. In combination with the tax deferral treatment for a stock-for-stock acquisition as discussed below, we anticipate an increasing use of stock-for-stock acquisitions in Japan.

Amendment of M&A-related taxation

There were several M&A-related tax amendments in 2017 and 2018, which will potentially have a significant impact on M&A structuring. Among others, there were amendments to the taxation of: (a) a squeeze-out transaction; (b) a spin-off transaction; and (c) a stock-for-stock acquisition approved under the Act on Strengthening Industrial Competitiveness (as mentioned above). Due to these amendments, we will have broader structuring options for squeeze-out transactions, and we may also newly be able to conduct a tax-free spin-out transaction under certain conditions. Additionally, we will be able to enjoy a tax deferral in a stock-for-stock acquisition approved under the Act on Strengthening Industrial Competitiveness. In addition to the burdens under the Companies Act explained above, taxation on capital gains on the target's shares has been one of the main causes of the unpopularity of exchange offers and other partial stock-for-stock acquisitions in Japan, but this amendment to tax law is expected to promote the use of this type of transaction in the near future.

Developments in corporate governance

Corporate governance has continued to be a hot issue in Japan. The Japanese Financial Services Agency ("FSA") introduced a Japanese version of the Stewardship Code in February 2014 and subsequently revised it in May 2017. The FSA announced that, as of May 2019, 248 institutional investors have adopted the stewardship code as a result of such introduction by the FSA. This development is affecting the relationship of Japanese companies with their institutional shareholders, which is also affecting M&A practices in Japan.

Furthermore, in May 2015, the Tokyo Stock Exchange ("TSE") adopted the "Corporate Governance Code" (the "Code") and revised it in June 2018 following the revision of the Stewardship Code. Concurrently with the revision of the Code, the FSA published the Guidelines for Investor and Company Engagement (the "Engagement Guidelines"). The adoption of the Code had a significant impact on corporate governance and M&A practices in Japan. The Code is intended to establish fundamental principles for effective corporate governance for listed companies in Japan and takes the "comply-or-explain" approach with respect to its requirements. The Engagement Guidelines were adopted to show paths to effectively "comply-or-explain" with requirements under the Code and the Stewardship Code.

The Code includes not only important principles on corporate governance, such as a requirement for at least two independent directors, but also principles relating to M&A, such as principles relating to anti-takeover measures, capital policies that could result in a change of control or in significant dilution (e.g., management buyouts or share offerings), and cross-shareholdings. Since the Code is based on the notion that companies need proper corporate governance to achieve sustainable and mid- to long-term growth, it has become more important for companies to explain to their shareholders how a proposed M&A transaction would result in the sustainable and mid- to long-term growth of the company.

The Code also tries to address short-termism and recommends that remuneration to directors include incentives that reflect mid- to long-term performance or potential risks. As one of the reactions to this recommendation, Japanese listed companies now widely adopt restricted stock plans and other types of equity compensation as part of director remuneration. Although Japanese companies are active in cross-border M&A deals, they have not typically granted long-term incentives in M&A transactions. However, with the rapid movement toward introduction of long-term incentives, we may see more cases in the near future of Japanese companies giving long-term incentives to the management of overseas target companies in cross-border M&A.

The revision of the Code in 2018 requires listed companies to, among others, give weight to the cost of capital in determining business portfolio and resource allocation, ensure that their boards discharge their responsibility in CEO succession planning and monitoring of CEOs through their election or removal, and disclose their policy to decrease cross-shareholding. The emphasis on the cost of capital may encourage Japanese listed companies to dispose of their non-core businesses and focus on and expand their competitive edge, through both outbound and domestic M&A.

<u>Court decisions regarding the fairness of price in M&A</u>

In recent years, an increasing number of minority shareholders who are to be squeezed out have begun questioning the fairness of the squeeze-out price, especially in management buyouts or acquisitions of a controlled company by a controlling shareholder. The Companies Act allows shareholders who oppose the squeeze-out to request the courts to determine the "fair price" of their shares. However, it does not define the parameters in determining the fairness of the share price, and the courts are free to make that determination at their own discretion. This uncertainty in price determination poses a major risk when conducting a squeeze-out process, and has contributed to the rise in challenges of the squeeze-out price by minority shareholders.

Court challenges started in now famous cases such as the Rex Holding, the Sunster and the

Cybird cases. Each of the courts in these cases considered various factors in deciding the fair price but stressed the importance of the market price among other pricing measures. Since the determination of the fair price was made on a case-by-case basis, it is difficult to establish exactly what factors will be taken into account in addressing the issue.

In this context, the Supreme Court made an important decision in 2016 in the Jupiter Telecommunications Co., Ltd. case (J:COM case), reversing the lower court decisions that followed the previous framework in deciding the fair price in squeeze-out procedures after the tender offer. Under the previous framework, as described above, the court tried to determine the fair price itself, taking into account various factors and using certain calculation measures. On the other hand, in the J:COM case, the Supreme Court held that, even in a case where there is a conflict of interest between the majority shareholder (i.e., acquirer) and the minority shareholders, if the tender offer is conducted in accordance with "generally accepted fair procedures", the court should in principle approve the tender offer price as a fair squeeze-out price.

This Supreme Court decision is regarded as a paradigm change from the previous framework. Although there was a similar Supreme Court decision in the Tecmo, Ltd case in 2012 involving a corporate reorganisation transaction, the J:COM case is the first time the Supreme Court has made it clear in the context of a post-tender offer squeeze-out that the court will basically review the fairness of the procedures rather than the fairness of the price itself. In the J:COM case, the Supreme Court cited examples of the "generally accepted fair procedures" that were followed, including the fact that: (i) J:COM established an independent committee and obtained its opinion; and (ii) it was clearly announced in the tender offer procedure that the squeeze-out price would be the same as the tender offer price.

While the J:COM ruling should provide much more predictability in this type of transaction, there are still certain open issues, including: (i) any other factors that would be regarded as a "generally accepted fair process"; (ii) the scope of application of this Supreme Court decision; and (iii) how the court would determine the squeeze-out price in cases where it finds that "generally accepted fair procedures" were not followed.

In this regard, there was a court decision at the Osaka District Court in January 2017. This decision implemented the abovementioned framework as the Supreme Court proposed in the J:COM case, but the court determined that the procedures were not enough to determine the fairness of the price, and it actually reviewed the price itself. This J:COM ruling had a significant impact on Japanese M&A practices and there have been a series of lower court decisions based on the framework of the J:COM case, making it more important to consider carefully the factors that would be regarded as "generally accepted fair procedures" in each transaction.

<u>Revision on guidelines on conflict of interest in M&A</u>

Back in September 2007, METI formulated the "Guidelines for Management Buyout (MBO) to Improve Corporate Value and Secure Fair Procedures" (the "MBO Guidelines"), aiming to present fair rules for management buyouts. In order to reflect developments in corporate governance reforms and court precedents discussed above as well as M&A practices for the past 10 years, and to more widely address conflicts of interest in M&A transactions, in June 2019, METI thoroughly revised the MBO Guidelines and formulated the "Fair M&A Guidelines; Enhancing Corporate Value and Protecting Shareholders' Interest" (the "Fair M&A Guidelines"), which proposes best practices to address conflicts of interest with a focus on management buyouts and acquisitions of a controlled company by a controlling shareholder.

The Fair M&A Guidelines proposes effective measures to ensure fairness of M&A transactions which include, among others, (a) formation of an independent special committee by the target which should comprise outside directors and other independent members, (b) obtaining advice from independent legal counsel and a third party valuation which should ideally be accompanied with a fairness opinion, and (c) conducting a market check.

While a special committee has been customarily formed for management buyouts, it has not always been the case with acquisitions of a controlled company by a controlling shareholder. The Fair M&A Guidelines also made clear its preference to have outside directors as members, rather than outside experts retained solely to serve the special committee. The Fair M&A Guidelines further suggests that the special committee should ideally get involved in negotiations with potential acquirers and receive advice from advisers retained by the special committee independently from the target, both of which have been relatively rare in practice.

While it is very customary to obtain a third party valuation, obtaining a fairness opinion has not been widely seen, but may change following the Fair M&A Guidelines.

Lastly, while it has been customary in a two-step acquisition for an acquirer to set the offer period in the first-step tender offer to be long enough to enable any potential acquirer to commence a competing bid, active shopping has been very rare. The Fair M&A Guidelines cite the effectiveness of an active market check in management buyouts (which may not be the case with acquisitions of a controlled company by a controlling shareholder), and we will need to see how the M&A market reacts to such suggestion.

Court decision regarding the issuance of new shares in case of dispute over control of company

In July 2017, there was a Tokyo High Court decision regarding the public offering of new shares in a situation involving a dispute over control of a company among existing shareholders.

In this case, Idemitsu, the second-largest petroleum company in Japan, conducted a public offering of its shares of common stock. Thereafter, the founding family of Idemitsu filed a petition to enjoin such issuance of shares. The founding family directly and indirectly owned more than one-third of Idemitsu's voting rights, which enabled the founding family to veto Idemitsu's material corporate actions such as mergers or other corporate re-organisations. Actually, the founding family was against the combination of Idemitsu and Showa Shell proposed by the incumbent management (which combination was subsequently completed in April 2019). The founding family filed the petition because issuance of the new shares would cause the shareholding ratio of the founding family to fall below one-third, and they would lose their veto right over material corporate actions.

Over the last few decades, courts have developed the "primary-purpose" (*shuyo mokuteki*) test for this type of situation. Under the primary-purpose test, the court will determine whether the primary purpose of the issuance of new shares is to dilute the shareholding of a specific shareholder and to maintain control of the incumbent management and shareholders. In the Idemitsu case, the court also used the primary-purpose test. The court ruled that the issuance of shares by Idemitsu was not for the primary purpose of diluting the shareholding of the founding family because, among others: (a) this was a public offering of the shares to general subscribers rather than an offering of shares to a specific third party, and therefore, it was less likely that the current management could control who would be the new shareholders and the opinions of such new shareholders; and (b) Idemitsu actually needed new money through this issuance of new shares in order to refinance the bridge loan which would be due within a few months.

There have been some arguments regarding the Idemitsu case, particularly since it seems the court easily concluded the necessity of financing without a thorough review. However, given the court's conclusion that a public offering of shares may be more acceptable from the perspectives of the "primary-purpose" rule, this case may have an impact on Japanese M&A practices going forward, especially in a situation involving a dispute over control of a company.

Amendment of the Foreign Exchange and Foreign Trade Act

The Foreign Exchange and Foreign Trade Act (the "Foreign Exchange Act") was amended in 2017 and took effect on October 1, 2017. The Foreign Exchange Act regulates foreign transactions, including inbound and outbound M&A transactions. The purpose of the amendment of the Foreign Exchange Act was, among others, to strengthen the regulation of cross-border transactions including M&A transactions.

Even before the amendment, certain cross-border M&A transactions were subject to a pre-transaction notification, but the sale and purchase of shares of a non-listed Japanese company between foreign shareholders had been excluded from such notification requirements. Under the amendment, such share transfers of non-listed Japanese companies in certain industries between the foreign shareholders have become subject to the pre-notification filing. The government may now review such transactions and, if necessary, the government may recommend or order discontinuation or change of such transactions.

Furthermore, in tune with the global trend to tighten scrutiny on foreign investments in critical technologies and infrastructures, the list of industries subject to a pre-notification has been expanded to address potential national security and cybersecurity concerns, which now covers manufacturing of semiconductors, mobile phones, personal computers, and software, as well as telecommunication services. The expanded list will be applicable to acquisitions to be completed on or after August 31, 2019.

M&A practices relating to anti-corruption regulations

As described above, we are still seeing a strong trend of outbound investments by Japanese companies into emerging markets including ASEAN countries. Expansion into these new markets has heightened concerns about potential corruption and other compliance risks, which have begun to have an impact on outbound M&A transactions. For example, Japanese companies have increased their focus on compliance issues in the conduct of M&A due diligence. The Japanese government has also begun looking more closely at corrupt practices involving Japanese companies and foreign officials. In 2014, the Tokyo District Public Prosecutor's Office indicted a Japanese railway consulting firm and its executives on charges of making illegal payments to officials in Vietnam, Indonesia and Uzbekistan. In September 2017, METI amended the "Guideline to Prevent Bribery of Foreign Public Officials", and also in January 2017, the Japan Federation of Bar Association revised the "Guidance on Prevention of Foreign Bribery". In this very active situation relating to anti-corruption practices in Japan, we expect to see further developments in M&A practice from the perspective of compliance with anti-corruption policies.

Representations and warranties insurance

Representations and warranties insurance is a relatively new topic on the Japanese M&A scene. This insurance is infrequently used in Japanese M&As, except for certain cross-border M&As. But recently, insurance companies have started to actively provide representations and warranties insurance in Japan. Also, in recent Japanese M&A practice, we have started to see transactions where the representations and warranties provided by the seller are limited compared to previous practice, and buyers are seeking alternative protection. As a result, this insurance is becoming much more common, and will become more widespread even in domestic M&As. Since this insurance is relatively new in Japan, practitioners face practical or legal issues in introducing it under the Japanese M&A legal framework and practice. But we believe that representations and warranties insurance will become an important tool to hasten negotiations between sellers and buyers.

## The year ahead

Overall M&A trends

Given the current Japanese economic conditions and intensified global competition, coupled with the abundant cash reserves of Japanese companies, we believe that outbound M&A activities will continue to grow strongly, with particularly strong growth in outbound deals into Asian countries. Outside Asia, North America and Europe are likely to continue to be favourite destinations but, increasingly, Latin American countries and African countries are also being added to the mix.

Change in law

As discussed above, the Additional Amendment of the Companies Act may cause some important changes in Japanese corporate culture as well as M&A practices, including possibly increased use of stock-for-stock acquisitions. The Fair M&A Guidelines will likely have a big impact on how management buyouts and acquisitions of a controlled company by a controlling shareholder will be carried out in Japan. The tightened scrutiny on foreign inward investments may affect the activities of foreign acquirers, in particular Chinese investors who have been active in Japanese M&A activities.

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