Jurisdiction: **Japan**

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The most fundamental law in Japan governing mergers and acquisitions is the Companies Act. Mergers and acquisitions in Japan include (i) transfers of shares (including the acquisition of listed shares by tender offer), (ii) business transfers, (iii) statutory corporate reorganizations including mergers (*gappei*), company splits (*kaisha bunkatsu*), share exchanges (*kabushiki kokan*) and share transfers (*kabushiki iten*), and (iv) issuances of new shares to acquirers by way of third party allotments, all of which are governed by the Companies Act. Definitive agreements for the transfer of shares and business transfers will be governed by the Civil Code of Japan if the governing law is Japanese law. The acquisition of listed shares is governed by the tender offer regulations and insider trading regulations of the Financial Instruments and Exchange Act (the "FIEA"). The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the "Anti-Monopoly Act") also applies as merger control regulations. As for an inbound acquisition by an offshore investor of a Japanese company ("Inbound Acquisition"), the Foreign Exchange and Foreign Trade Act (the "FEFTA") will apply. Depending on the industry in which the target company belongs, certain industry-specific regulations (e.g., the Banking Act, the Insurance Business Act) may also be applicable.

In addition to the statutory laws mentioned above, the rules of a stock exchange (including timely disclosure rules) apply to the acquisition of listed shares. As for governmental guidelines, the Financial Services Agency (the "FSA") issued guidelines for tender offers (the "Tender Offer Q&A"), which elaborate on the governmental interpretations of the tender offer regulations. Additionally, in 2007, the Ministry of Economy, Trade and Industry ("METI") issued guidelines for management buyouts (the "MBO Guidelines"), which set forth best practices for management buyouts. Since some of the provisions of the guidelines have been referred to in court rulings, the guidelines themselves have come to be regarded as soft laws by practitioners. The MBO Guidelines were recently updated (announced in June 2019), and its name was changed to the Fair M&A Guidelines, in order to clarify that the guidelines also cover acquisitions of minority shares by controlling shareholders.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In relation to certain acquisitions of listed companies (including an acquisition by tender offer and issuance of listed shares), there has been the practice that (a) the FSA and the relevant Local Finance Bureau examine the statutory disclosure documents, which are required to be produced under the FIEA for the transaction, and (b) the stock exchange, on which the target company's shares are listed, reviews the timely disclosure of the disclosure documents relating to the transaction.

As for mergers and acquisitions which may

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The types of transactions which he has been involved in cover public takeovers, private acquisitions, mergers, stock-for-stock deals, asset acquisitions, joint ventures and various types of private equity investments.

be subject to merger control, as set forth in the Anti-Monopoly Act, the Japan Fair Trade Commission (the "JFTC") will examine the documents filed by an acquirer in accordance with the Anti-Monopoly Act (the first phase review), and, if necessary, will further consider whether the acquisition will have an anticompetitive effect on the relevant market (the second phase review). If the JFTC finds any anticompetitive problems in the second phase review, it may issue an order to have such problem resolved (see Question 4).

With respect to Inbound Acquisitions, the Ministry of Finance supervises such Inbound Acquisitions via the Bank of Japan, which is the central bank of Japan (see also Question 4). Further, mergers in certain industries (e.g., finance related businesses including banking, certain businesses relating to electricity and railways, etc.) require official permits from the relevant Ministers.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Although hostile bids are not prohibited in Japan, they also have not been common. Until the year 2000, there were very few hostile bids. However, from the early to mid-2000s, some activists tried to make hostile bids and even went to court. Almost all of those bids did not succeed. This was mainly because Japan had a cultural environment in which shareholders in general refused to accept hostile bids, rather than decide based on economic rationality. In terms of legal technics, the so called "prior warning-type rights plan" was invented and installed in a majority of Japanese listed companies in the middle of 2000s. Then hostile bids in Japan almost disappeared after 2008. There were two major reasons – first, in 2007, the Supreme Court of Japan issued a ruling holding that a vested rights plan against a hostile bid by an offshore activist was legal and valid; and second, was the financial crisis in 2008.

At present, hostile bids are still not very common but they are becoming more common compared to the late 2000s. The turnaround in hostile bids in Japan was triggered by the establishment of the second Shinzo Abe cabinet in December 2012, which introduced the Japanese Stewardship Code (the "JSSC") and Corporate Governance Code (the "JCGC"). The JSSC, which almost all of the major institutional investors active in Japan observe,

is largely similar to the U.K. Stewardship Code, and requires institutional investors to disclose the reasons for their exercise of the voting rights in their portfolio. The JCGC, on the other hand, requires certain listed companies to engage in "constructive dialogues" with their shareholders. The two codes created an environment where shareholders in Japanese listed companies are compelled to accept preferable offers even though they are hostile bids. Once upon a time, the Japanese believed that only activist shareholders were engaged in hostile bids. Now, hostile bids by strategic buyers are getting more common. In March 2019, Itochu Corporation, one of the major trading companies, made a successful hostile bid against Descente Ltd., a major sportswear manufacturer, which attracted much public attention.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, antimonopoly or national security legislation).

(a) FIEA

The FIEA sets forth tender offer regulations, insider trading regulations and some requirements on the issuance of new shares.

The tender offer requirements are statutorily provided under the FIEA and subordinate regulations. There are various types of acquisitions that would trigger a mandatory tender offer, but the most important consideration is when an acquirer purchases shares in a listed company and, as a result of the purchase, the acquirer's voting rights in such target company will exceed one-third of the total voting rights through one or a series of off-market transactions. The offeror can set an upper limit and/or a lower limit on the number of shares to be acquired in the tender offer; however, the offer cannot be capped if the offeror's voting rights after the tender offer will reach two-thirds or more of the total voting rights. The tender offer period must be at least 20 business days and may last up to 60 business days. The offer price must be equal for all offerees. All of the tender offer conditions need to be provided at the time of the launch of the tender offer. As discussed in Question 1, the Tender Offer Q&A, as well as the Fair M&A Guidelines, will also come into play as soft laws.

As for insider trading, a person who possesses material, non-public information with respect to a listed company is prohibited from selling and purchasing shares in such target company (whether on or off-market) until such information becomes public.

Finally, the issuance of new shares to an acquirer may trigger the mandatory filing of a securities registration statement, and require a waiting period in accordance with the FIEA. These requirements may apply even if the issuer is a private company.

(b) Merger control

Certain mergers and acquisitions that may have an anti-competitive effect in the relevant market will be subject to the merger control provisions of the Anti-Monopoly Act. A transfer of shares (including an acquisition by tender offer), merger, joint incorporation-type company split, absorption-type company split, joint share transfer or the acquisition of a business, which exceed certain thresholds, must be filed with the JFTC in advance. Any transaction filed with the JFTC may not be closed for a period of 30 days after the filing is accepted. The JFTC will conduct the first phase review during that period and will issue a written clearance notice unless the JFTC finds anti-competitive issues in the transaction. If the JFTC finds that such issues exist, a second phase review will be commenced and the fact that the transaction is under second phase review will be disclosed on the JFTC's website. The second phase review will last up to the latest of: (i) 120 days after the filing, and (ii) 90 days after the JFTC has received all inputs from the relevant parties (in practice, (ii) is generally applicable).

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(c) FEFTA

Certain Inbound Acquisitions may be subject to the FEFTA due to national security concerns. In most cases, the relevant offshore investor has to file an ex post facto report with the Bank of Japan by the 15th day of the month following the month when the Inbound Acquisition is closed; however, in certain industries, the investor is required to submit an advance notification to the Bank of Japan 6 months prior to the expected closing date. The latter transaction may not be closed within the 30-day period after the Bank of Japan accepts the filing (in practice, the period may be shortened to 2 weeks). The coverage of such restricted industries has been expanded in August 2019 to include certain businesses relating to information technology.

5. What documentation is required to implement these transactions?

The necessary documentation will depend on the transaction scheme. The following shows the minimum documentation that is required in practice:

(a) Transfer of unlisted shares

A stock purchase agreement ("SPA") is generally executed as a definitive agreement. Since the organizational documents of a target company usually require board approval for the transfer of the shares, the seller will also have to prepare a written request for such board approval and the board minutes describing the board approval.

(b) Business transfer

A business transfer agreement is generally executed as a definitive agreement. The Companies Act requires the shareholders' approval (with the affirmative vote of two-thirds or more of all voting rights ("Supermajority Resolution")) of the seller for its sale of all or a substantial part of its business, and of the buyer for the purchase of the seller's entire business. Therefore, the minutes of the shareholders' meetings that describe such approvals are required. Some additional deeds or documents in addition to the business transfer agreement may be required to perfect the transfer of certain assets upon closing (e.g., filing of documents to register

the transfer of real estate, etc.).

(c) Corporate reorganization

Some statutory documents are required to be executed in order to proceed with certain corporate reorganizations including mergers, company splits, share exchanges and share transfers. As for a merger, a merger agreement, minutes of the shareholders' meetings of each party approving the merger agreement, a merger announcement to be published in the official gazette (to provide each party's creditors with an opportunity to object to the merger) and disclosure documents (both an advance disclosure and ex post facto disclosure, not to be filed with any authorities but to be maintained at each relevant party) are required.

Since the statutory requirements for the items that need to be stated in a merger agreement are quite limited, the merger agreement typically does not include the terms and conditions that are customarily provided in a SPA, such as representations and warranties, closing conditions or indemnity. Accordingly, the parties sometimes enter into a separate contract setting forth such terms and conditions, as necessary.

(d) Issuance of new shares

In the issuance of new shares, a share subscription agreement is generally executed as a definitive agreement. Since the issuance will require board approval and may also require shareholders' approval (mandatory for a private company and conditional for a public company), relevant minutes will have to be prepared. A securities registration statement may also be required under the FIEA.

(e) Tender offer

Certain types of acquisitions of listed shares are subject to tender offer regulations. In launching a tender offer, an offeror will need to (i) file with the relevant Local Finance Bureau certain statutory documents (e.g., tender offer notification and tender offer explanation), in accordance with the FIEA, and (ii) make a tender offer announcement via electronic public notice or through newspapers. The target company will also need to file a position statement with the Local Finance Bureau. If a major shareholder is negotiating with the offeror, they may execute a SPA. A summary of the SPA needs to be disclosed in the tender offer notification.

(f) Timely disclosure

If the party involved in a transaction is a listed company, then (i) certain statutory disclosure documents may have to be filed with the relevant Local Finance Bureau, in accordance with the FIEA, and (ii) a press release may have to be made pursuant to timely disclosure rules.

6. What government charges or fees apply to these transactions?

There are no charges or fees for a share purchase transaction. However, stamp tax duties are required to be paid for business transfer agreements, merger agreements, company split agreements and company split plans. Consumption tax is also required to be paid for business transfer transactions where a taxable asset is included in the assets to be transferred. If, pursuant to a transaction, a change is required in the company's registration information, which records the number of issued shares, history of statutory corporate reorganizations, etc., such as in the case of a statutory corporate reorganization and in the issuance of new shares, the company has to pay for the registration license tax.

No filing fees need to be paid to the JFTC for the JFTC's review, to the Finance Bureau for a tender offer notification, or to the Bank of Japan for a notification or report in accordance with the FEFTA.

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7. Do shareholders have consent or approval rights in connection with a deal?

In order to effect the statutory corporate reorganization transactions described in Question 1, a Supermajority Resolution of the shareholders meeting is necessary, except for certain exceptional cases. In share transfers, shareholders do not have any consent rights except in the case where the company transfers its subsidiary's shares whose value exceeds 20% of the total assets of the company. In such a case, a Supermajority Resolution within the company will be required. Also, except for certain exceptional cases, a Supermajority Resolution is required when a company transfers its business with a value exceeding 20% of its total assets, or when a company purchases all of the business of another company.

In cases where there is an issuance of shares that does not entitle all the shareholders to receive an allotment of shares, if the company is a private company, a Supermajority Resolution of the shareholders meeting will be required. On the other hand, if the company is a public company, such Supermajority Resolution of the shareholders meeting will not be necessary to approve the issuance unless either (i) the amount to be paid for the share subscription is particularly favorable to the subscriber, or (ii) the number of votes that the subscriber will hold after the issuance of shares will exceed 50% of the total number of votes of all shareholders after the issuance, and a shareholder(s) holding 10% or more of the votes objects to such issuance.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Traditionally, it has been viewed that directors owed a fiduciary duty only to the company and that they did not owe any duty to the shareholders directly. However, recently, the view that directors have a duty to work for the shareholders' common interest in some circumstances has been spreading. For example, it is now a common view that directors approving a demand for cash-out by a controlling shareholder, which process was introduced by the revision of the Companies Act in 2015, and which enabled a controlling shareholder having 90% or more shares

to squeeze out the remaining minority shareholders subject to an approval by the board of directors of the target company (see Question 12), owe a duty to protect the interests of the minority shareholders. Also, in 2013, a court held that the directors involved in an MBO of a public company owed a duty to ensure that a fair price was paid to the shareholders and that a fair disclosure was made to the shareholders.

With respect to a controlling shareholder, there is no statutory law or court case which clearly mentions that a controlling shareholder owes any duty to the minority shareholder. However, in 2016, in a case regarding an appraisal right in which the controlling shareholders obtained 100% of a public company's shares through a two-step transaction (i.e. a tender offer and subsequent squeeze-out), the court held that the price determined by and between the directors and controlling shareholders would be respected if the price was determined through fair procedures, such as with the involvement of an independent third party committee and an expert. In other words, the court suggested in its decision that the minority shareholders may be awarded with more than the price determined by and between the directors and controlling shareholders if the target company did not take appropriate measures to secure fairness.

In addition, as mentioned in Question 1, the MBO Guidelines were revised and became the Fair M&A Guidelines in June 2019. The guidelines require (i) a public company whose entire shareholdings are acquired by an acquirer that had controlling shares in the company prior to the acquisition (i.e. parent company), or (ii) a target company of an MBO, not only to take measures securing the fairness of the offer price through fair procedures to avoid conflicts of interest, but also to provide sufficient information to the shareholders to help them make their own decision after gaining an understanding of the relevant information. As a result, it has become increasingly important to take the foregoing measures and provide sufficient information in acquisitions by a controlling shareholder and in MBOs.

9. In what circumstances are break-up fees payable by the target company?

There is no law or court case that prohibits the payment of break-up fees by a target company; nevertheless, it is uncommon for a target company in Japan to agree on break-up fees. Consequently, there has been no significant legal development on the requirements to set break-up fees by a target company.

10. Can conditions be attached to an offer in connection with a deal?

It is possible and common to attach conditions to an offer as conditions precedent in a private company's share purchase transaction, such as suspending the transaction until the waiting period after the filing with the JFTC has passed and the JFTC does not prohibit the transaction, or that there is no material adverse change in the business of the target company. Also, it is possible to attach such conditions as conditions precedent in a business transfer agreement, merger agreement and company split agreement even when the target company is a public company.

In the case of a tender offer, a withdrawal is only permitted if it falls under the cases specified in the FIEA, such as due to the bankruptcy of the target company or its implementation of anti-takeover defense measures. In such a case, the offeror has to disclose such conditions for withdrawal in the tender offer notice. Nevertheless, it is permissible to set a threshold for the minimum or maximum number of shares that the tender offeror will purchase from the target company. Thus, if the number of shares that are offered for sale do not meet the minimum threshold, the offeror is not obligated to purchase any of the shares. On the other hand, if the number of shares that are offered for sale exceeds the maximum threshold set, the offeror is obligated to purchase only such number of shares up to the maximum threshold, on a pro rata basis.

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11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

There are no specific regulations stipulating a minimum level of financing for transactions involving either private or public companies; however, a public tender offeror is required to disclose to the public that the offeror has sufficient financial resources to execute the offer and must provide the Finance Bureau with evidence of such resources, such as through a bank balance certificate or loan certificate. In an LBO transaction, a finance out clause (which permits the purchaser not to close the transaction if it cannot obtain necessary financing by the closing date) is usually stipulated as one of the conditions to the purchaser's obligation to the closing. However, it is important to note that a public tender offeror is not permitted to stipulate such a finance out clause in its offer.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Yes, an acquirer has several options to squeeze out minority shareholders in a target company. The basic rule for the squeeze-out of minority shareholders is if the acquirer holds 90% or more of the voting rights in the target company, obtaining a resolution of the board of directors only will be sufficient; on the other hand, if the acquirer holds less than 90% but at least two-thirds of the voting rights in the target company, a resolution of the shareholders' meeting will also be necessary. Obviously, a resolution of the board of directors is easier and quicker to obtain compared to a resolution of the shareholders' meeting. Therefore, the former is sought first in practice. In case the target company is a listed company, a tender offer is required as a first step until the 90% or two-thirds threshold is reached. In the case of a closed company, a share purchase arrived at through negotiations is the most common preparatory step.

(a) Share Cash-Out by Controlling Shareholders – 90% Threshold

When the board of directors of the target company approves the demand for share cash-out by the acquirer who holds 90% or more of the voting rights of the target company, the target company is required to provide notice thereof to its minority

shareholders. The minority shareholders are then cashed-out regardless of their preference, but they are entitled to exercise their appraisal right to seek a fair value for their shares in court. Note that while the appraisal right is guaranteed to minority shareholders in all types of squeeze-outs, this is the only proceeding where the lawful defendant is the acquirer instead of the target company.

(b) Consolidation of Shares – Two-Thirds Threshold

The consolidation of shares became the most common cash-out method after the provisions for the protection of minority shareholders were added to the Companies Act in 2015. In accordance with the resolution of the shareholders' meeting, the shares of the target company are consolidated so that all the shares held by shareholders, other than the acquirer, become fractional, thereby depriving them of voting rights. The fractional shares are then purchased by the target company or the acquirer in exchange for cash with the permission of the court.

(c) Share Exchange – Two-Thirds Threshold

The Share Exchange was practically the only scheme to squeeze out minority shareholders in exchange for shares in the acquirer until amendments to the Act on Strengthening Industrial Competitiveness ("AOSIC") opened the door for share-for-share M&A in 2018. In accordance with the resolution of the shareholders' meeting, the acquirer obtains all of the shares of the target company from the minority shareholders, and then issues its shares to them. The fractional shares are treated similarly as in the case of the consolidation of shares.

(d) Eased Share Cash-Out by Controlling Shareholders – Two-Thirds Threshold

If certain conditions under the AOSIC are met, including obtaining the approval of the corporate restructuring plan by METI, then the acquirer can cash-out the minority shareholders by a resolution of the board of directors of the target company at a lower ownership threshold requirement (two-thirds instead of 90% of the voting rights of the target company), as an exception to the scheme in (i) above.

13. What is the waiting or notification period that must be observed before completing a business combination?

The major regulations that need to be taken into account when scheduling an M&A are (a) merger control, (b) direct inward investment regulations, and (c) notification of creditors.

(a) Merger Control

Parties to an M&A transaction are prohibited from closing the deal until 30 days have lapsed from the time the filing was received by the JFTC. This 30-day waiting period can be shortened upon request if the JFTC determines that the transaction would not raise any competition law concerns. Note, however, that the review by the JFTC can last for more than 30 days and the JFTC may even request for remedial actions after the waiting period. It is therefore standard practice to communicate with the JFTC prior to the formal filing, on a voluntary basis, in order to obtain a definitive clearance within the waiting period and avoid the situation where the parties have to change the terms and conditions of an already closed transaction.

(b) Direct Inward Investment Regulations

Until recently, the scope of direct foreign investments in Japan that were subject to prior filing has been very limited. However, on August 1, 2019, manufacturers of integrated circuits, and developers of certain types of software and other businesses were added to the list in order to address growing concerns on the leakage of technologies and damage to domestic defense-related production or technological infrastructures. It has also been reported that the ownership threshold for requiring prior filing will be reduced from 10% to 1%.

Although the basic waiting period is 30 days, it has been shortened to 2 weeks by a cabinet ordinance, and the regulator is currently required by a guideline to exert efforts to provide a clearance, generally, within 4 business days.

(c) Notification of Creditors

In case of a merger, company split or share exchange (or a share transfer, in very rare situations), a notification period of one month or more is required to allow the creditors to oppose the transaction or get paid.

Such notification of creditors is not necessary in case of a share purchase or business transfer.

14. Are there any industry-specific rules that apply to the company being acquired?

Yes, there are regulatory laws that are industry-specific. Most of them are neutral with respect to the nationality of the investors, but there are some rules and laws that directly regulate foreign investors, for instance:

Foreign investors cannot hold in aggregate more than the portion indicated below in the following companies:

Company	Limit
Nippon Telegraph and Telephone Corporation, which used to be a government-run company, and which is still responsible for nationwide communication infrastructures even after it was privatized.	1/3
A broadcaster that is publicly-listed or which the regulator deems is equivalent to a publicly-listed broadcaster	1/5
A domestic air carrier that is publicly-listed or which the regulator deems is equivalent to a publicly-listed domestic air carrier.	1/3

Also, a radio station license is generally not granted to a foreign investor. But radio stations established for the purpose of conducting telecommunications services are open to foreign investors as a result of a WTO agreement in 1997.

15. Are cross-border transactions subject to certain special legal requirements?

See the explanation about direct inward investment regulations in the answers to Question 13 (Direct Inward Investment Regulation) and Question 14.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

The general rules relating to the effect of M&A activities on employment agreements are as follows:

M&A Activity	Effect
Share purchase, share exchange and share transfer	The employment agreements will not be affected.
Merger	The employment agreements will be automatically assigned to the surviving company.
Corporate split	The employment agreements of those employees who are primarily engaged in the transferred business will be automatically assigned to the new company, while the employees who are not primarily engaged in the transferred business are guaranteed a right to remain in the original company.
Business transfer	The employment agreements will not be assigned to the transferee unless the consent of each employee is obtained.

In order to change the terms and conditions of the employee agreements, the consent of each employee or a collective bargaining agreement will generally be necessary.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Previously, a share-for-share M&A was rarely seen in the Japanese market principally because of the tax imposed on the capital gains that shareholders of the target company would realize through the M&A. In 2018, the AOSIC was amended so that the tax levy would be deferred until such time that the shareholder sold the shares of the acquiring company; however, it required that METI approved the corporate restructuring plan and that the other conditions set forth in the AOSIC were met.

Currently, it is expected that share-for-share M&As may become more popular when the amendments to the Companies Act passes the Diet in the autumn of 2019. Basically, the proposed amendments will provide that an acquiring company can make the target company its subsidiary by issuing its own shares to the shareholders of the target company in exchange for the shares of the target company. Unlike in the share-for-share M&A based on the AOSIC, which is a special Act under the control of METI, this share-for-share M&A will be based on the Companies Act, a general corporate law, so a METI approval is not necessary. The expansion of the deferred taxation to harmonize it with this corporate law reform is now under deliberation by the Tax Authority.

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