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Doing Business In... 2022

Japan: Trends & Developments

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Trends and Developments

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M&A

Key developments in M&A law and regulation

In recent years, the number of hostile takeovers in Japan has increased, and companies targeted by hostile buyers have been trying to respond to such takeovers by introducing poison pills. Under conventional M&A practice in Japan, the issuance of share options, without contribution, to all shareholders excluding the hostile tender offeror, has generally been used as a poison pill, and is usually called a "rights plan". The last leading case relating to such a rights plan before 2021 was the Supreme Court's decision in Bull-Dog Sauce v Steel Partners, issued in August 2007, which upheld the validity of Bull-Dog Sauce's rights plan. Since the spring of 2021, however, several important court decisions on poison pills have been issued.

In NIPPO v Freesia Macros, the courts held that the rights plan issued by NIPPO was valid by emphasising the fact that the introduction and renewal of NIPPO's poison pill were approved by the shareholders based on the specific risk of a hostile takeover by Freesia Macros, even though the stock options were granted only by a board resolution.

In Japan Asia Group v City Index Eleven (CI11), the rights plan issued by Japan Asia Group was held to be invalid. The poison pill in this case, as a general rule, required the approval of the shareholders before the countermeasure could be invoked. However, as an exception, the poison pill allowed the board of directors to invoke the countermeasure even without shareholders' approval in case of a large-scale purchase that violates the rules stipulated under the poison pill. As such, under such exceptional circumstances, the countermeasure can be invoked even with only a board resolution, and without it having to be reviewed or ratified at a shareholders' meeting. Such an exceptional mechanism of the poison pill was considered to be the major factor in the court decisions that invalidated the Japan Asia Group poison pill.

In Fuji Kosan v Aslead Capital, Fuji Kosan's rights plan was judged to be valid. Fuji Kosan's poison pill employed almost the same scheme as that of Japan Asia Group's, which was based only on a board resolution, and which invoked the countermeasure based solely on a separate board resolution. The difference was, even if the countermeasure was initially invoked by a board resolution, a shareholders' meeting was still required to be held before the gratis allotment of stock options was to become effective. If the invocation was not approved at the shareholders' meeting, then the gratis allotment would be suspended. In this case, the invocation of the countermeasure was actually approved by an extraordinary general meeting of the shareholders.

In Tokyo Kikai Seisakusho (TKS) v Asia Development Capital (ADC), the Supreme Court held TKS's rights plan to be legal. Under this poison pill, if the invocation of a countermeasure is approved by a majority of the votes of the attending shareholders with voting rights, excluding ADC and its related parties and TKS's directors and their related parties (ie, majority of the minority), at a shareholders' meeting (MOM Resolution), and the large-scale hostile purchase is not withdrawn, then the gratis allotment of stock options will not be suspended.

The MOM Resolution was actually obtained at the shareholders' meeting held after the filing in court of the petition for a provisional disposition of injunction, and this point was considered to be one of the major factors in the court's ruling that held that the poison pill was valid.

As far as the recent court decisions on poison pills are concerned, it appears important that the shareholders' approval to the introduction and invocation of a valid rights plan is obtained. Moreover, in designing rights plans, it is essential that, at the least, a shareholders' meeting is scheduled to be held if the countermeasure is to be invoked.

Recent trends in the M&A market

As mentioned above, the number of hostile takeovers in Japan has continued to increase since 2020, although almost all M&A transactions in Japan are still friendly. The number of going-private transactions, whether friendly or hostile, has also increased. The number of tender offers filed with the Japanese authorities in 2021 was 71 (14 more than in 2020). This trend may have resulted from the recent reforms of the Tokyo Stock Exchange, which restructured the classification of stock exchange markets and provided stricter criteria for listing and delisting. These reforms were announced in February 2020, and took effect in April 2022. The governance costs of listed companies may have also increased due to the strengthening of the level of corporate governance required for listed companies by the amendments to the Corporate Governance Code in June 2021.

The number of management buyouts has also increased. The remarkable trend in management buyouts in 2021 was that some shareholders expressed their objections against tender offer prices. In some cases, the market price of the target shares exceeded the tender offer price because the dissenting shareholders intensively purchased target shares on the market, subsequently causing the tender offer to fail.

Business restructuring in Japan was also active in 2021. This trend may have been inspired by the recent governmental guidelines issued by the Ministry of Economy, Trade and Industry, namely the Practical Guidelines for Group Governance Systems, announced in June 2019, and the Practical Guidelines for Business Transformations, announced in July 2020. Major intra-group reorganisations in 2021 include the integration of the five subsidiaries of the domestic liquor business under Suntory Holdings, and the merger of nine subsidiaries under NTT Facilities. Notable carve-outs in 2021 include the asset sale of the diabetes drugs business by Takeda Pharmaceutical and the sale of the personal care business by Shiseido.

Green Finance

Overview of green finance in Japan

The Glasgow Climate Pact adopted in November 2021 reaffirmed the goal of the Paris Agreement and required parties to achieve carbon neutrality by the middle of this century, and implement ambitious climate change measures by 2030. Earlier, in October 2020, the Japanese government had also declared "carbon neutrality by 2050," and has been treating global warming as an urgent issue.

To achieve these goals and address climate change risks, huge amounts of funds will be required. However, it is not realistic to cover all these costs with public funds, so private funds are essential. The introduction of private funds will be made possible by green finance.

Revitalisation of green finance

In Japan, the following systems are being developed to stimulate green finance.

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Guidelines

The Ministry of the Environment has issued guidelines for green bonds and loans. Although not legally binding, the guidelines support the introduction of green finance by providing a basic framework on which reference can be made. In addition, disclosure requirements in accordance with the guidelines allow for proper assessment by investors and other market participants, and act as a market disincentive to greenwashing.

The guidelines issued by the Ministry of the Environment are consistent with those issued by the International Capital Market Association and Loan Market Association.

Green Growth Strategy

In December 2020, the "Green Growth Strategy Through Achieving Carbon Neutrality in 2050" was formulated. Under the Green Growth Strategy, it is stated that tackling climate change should not be deemed as restrictive or costly, but should instead be considered as an opportunity for further growth. The government has set ambitious goals for 14 industries with high growth potential, and will mobilise all available policy measures to achieve them. The policies include the establishment of a green innovation fund of approximately JPY2 trillion and the creation of a tax incentive to promote investments in carbon neutrality, which are expected to attract investments in environmental, social and governance (ESG) areas by using the government fund as a catalyst.

Focus areas of green finance

Offshore wind power project

One of the recent and attractive cases of green finance is the offshore wind power project. The number of offshore wind power projects is expected to increase since renewable energy power projects are needed for decarbonisation, and land suitable for solar power projects or onshore wind power projects is becoming scarce.

The Act on Promoting the Utilization of Sea Areas for the Development of Marine Renewable Energy Power Generation Facilities came into effect in April 2019, and legislatively resolved earlier issues: (i) the occupation of sea areas, and (ii) the co-ordination of the interests of prior users. Under this Act, the exclusive occupancy and use of sea areas within the promotion zones are permitted for 30 years, and the interests of prior users, such us groups established by the related fishery managers, are co-ordinated by the council.

The Feed-in Premium (FIP) system was introduced in Japan in April 2022. For wind power projects, both the FIP system and the earlier Feed-In Tariff (FIT) system currently apply, although the FIT system is expected to be replaced with the FIP system from 2023. Under the FIT system, operators sold electricity at a fixed price to electricity companies, while under the FIP system, the unit price of electricity is a variable price plus a premium, and the operators are required to find the purchasers themselves. Therefore, it is necessary to pay more attention to cash flow stability compared to before.

In December 2021, a consortium represented by Mitsubishi Corporation Energy Solutions Ltd was selected as an operator for the offshore wind power project off the coast of (i) Yurihonjo City, Akita Prefecture; (ii) Noshiro City, Mitane Town and Oga City, Akita Prefecture; and (iii) Choshi City, Chiba Prefecture. Even though the Japanese government set a cap price of JPY29/kwh, the consortium won the bid by proposing a far lower price (Yurihonjo City, JPY11.99/kwh; Noshiro City, Mitane Town and Oga City, JPY13.26/kwh; and Choshi City, JPY16.49/kwh). These three cases will be the leading cases for offshore wind power projects in Japan.

Green building

Green finance has also become an important method in the field of real estate finance. For example, Article 11 paragraph 1 of the Act on the Improvement of Energy Consumption Performance of Buildings requires that any new construction or expansion of a building of a certain size must comply with building energy consumption performance standards. If ESG is not considered sufficiently, the building will not be constructed or expanded because the building would not be able to attain the required standard, or would be too costly for it to reach that standard. As a result, the asset value of the property may decline and the property may become a stranded asset. On the other hand, if ESG is properly taken into account, the value of the property may increase, as more tenants are becoming environmentally conscious and rents can be set higher.

Since such ESG considerations are not always apparent from the external appearance of real estate properties, there has been an increase in the number of green building certifications in recent years. In Japan, CASBEE, BELS and DBJ Green Building are often used, but there are also cases where overseas certifications such as LEED in the United States and BREEAM in the United Kingdom are used. Green finance has also attracted attention in recent years as a way to finance the development or acquisition of such green buildings.

Labour and Employment

Power harassment

Power harassment has been considered a major problem in the Japanese workplace. Until June 2020, there was no law that defined or clearly regulated power harassment in the country. As such, it was previously treated as a kind of tort. In June 2020, the Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Worker's Vocational Lives was amended. The amendment provided a definition for power harassment, defining it as "bullying in the workplace which exceeds the scope necessary and reasonable in the course of business [and results] in damaging the work environment of the employer's workers."

In order to preclude any behaviour that constitutes power harassment, the Act required the employer to provide consultations to its employees and take necessary measures in terms of employment management, such as developing a necessary system for appropriately handling harassment behaviour. The guidelines issued by the Ministry of Health, Labor, and Welfare outline an appropriate system that each employer should establish. Initially, compliance with the obligations under the amended Act was limited only to big corporations; however, from 1 April 2022, all employers are required to take the foregoing measures.

Under the appropriate system described above, if there is a power harassment claim filed by an employee, the employer should investigate whether the claimed facts have indeed occurred and then take appropriate follow-up measures based on the results of the investigation, including but not limited to taking disciplinary action against the perpetrator-employee, while providing sufficient care to the victim-employee.

In connection with this, due to the revision of the CCL Act (described in the next paragraph), any statements and behaviours of bosses and colleagues in a company that make it difficult for an employee to take childcare leave are prohibited, and are deemed as maternity harassment, which is treated in the same way as power harassment.

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Amendment to the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members (the CCL Act)

Several amendments to the CCL Act have been made to encourage employees to take childcare leave. Currently, the rate of male employees taking childcare leave is less than 10%, but the government's goal is for this rate to reach 25% by 2025.

First, in order to encourage male employees in particular to take childcare leave, a flexible childcare leave system was introduced, which can be availed of immediately after the birth of the child. Specifically, this new system will allow an employee to obtain up to four weeks of leave, within eight weeks after the birth of the child; this leave may be divided into two periods. The employee may avail of such childcare leave if they request it at least two weeks before the commencement of the intended leave period. Also, the splitting of the childcare leave into two periods may be applied not only for the period immediately after the birth of the child, but also to childcare in general. This amendment will take effect on 1 October 2022.

Second, when an employee informs the employer that she or his spouse is pregnant or has given birth, the employer is obliged to inform the employee of the childcare leave system and confirm his/her intention to avail of it. This amendment took effect on 1 April 2022. Any superior informed of a child's birth and/or pregnancy by his or her subordinate is required to explain the childcare leave system himself/herself or introduce the employee to the HR department that will provide such explanation, and should not merely convey his or her congratulations.

Third, employers with more than 1,000 full-time employees are required to disclose the status of availments of childcare leave in their company. This amendment will take effect on 1 April 2023.

Amendment to the Act on Stabilization of Employment of Elderly Persons (the EEP Act)

Under the current law, if a retirement age is set, the retirement age shall be 60 years or older, and companies are obliged to continue the provision of employment until the age of 65. To implement the continued employment, companies may raise the retirement age to 65 years, abolish the retirement age, or have a re-employment system up to the age of 65.

With Japan's declining birthrate and aging population rapidly increasing, and with the continuing decline in population, the employment of elderly people in Japan has been further expanded in order to maintain the vitality of the economy and society. This amendment to the EEP Act became effective on 1 April 2021, and companies are now obliged to exert efforts to secure employment opportunities for their employees up to the age of 70, in addition to their current obligation to provide continued employment up to the age of 65.

Data Protection

The Amended Act on the Protection of Personal Information

The Act on the Protection of Personal Information (APPI) was amended in 2020 and 2021, with most of the amendments taking effect in April 2022. These amendments are the second major update since the law initially took effect in 2005. While some sections of the amendment promoted the use of personal information, many parts strengthened the protection of personal information.

Particularly, the important amendments relating to the strengthening of regulations are the following:

- the obligation to inform a data subject when obtaining consent for international transfers;
- the mandatory data breach notification; and

- the introduction of a new rule about personally related information.

Although the pre-amended APPI required a business to obtain the consent of a data subject when international data transfer occurs, the explanations required to be given when obtaining such consent remained unclear. The new rule clarifies this ambiguity. Notably, when a business knows which country the data will be transferred to, it must inform the data subject of the name of the country and provide a summary of the data protection rules of that country, including the risk of government access. This obligation may prove to be a significant burden on businesses.

Additionally, the law now has a mandatory breach notification rule. A business must notify the Personal Information Protection Commission of certain serious information breaches, generally, within three to five days, and inform the data subject concerned without delay. Therefore, each organisation must establish an internal system to allow it to be promptly informed of any breaches.

Lastly, a new regulation regarding personally related information has been introduced. The main targets of this regulation are web-based tracking technologies such as cookies. Personally related information is generally defined as information that relates to a specific individual but is not personal information. In Japan, information collected by cookies has been considered in many cases as non-personal information for a website operator, and thus constitutes personally related information. When such an operator provides personally related information to a third party for whom the provided information is deemed as personal information, the operator must ensure that the third party has obtained consent from the affected data subject. While this regulation covers a very limited situation, it affects many ad-tech companies, so its repercussions are still unclear.

Proposed amendments to the Telecommunications Business Act

A draft amendment to the Telecommunications Business Act was submitted to the Diet in March 2022. This amendment contains two critical revisions to the processing of personal information.

First, it introduces special regulations for large telecommunications businesses when processing specific user information. In particular, these businesses must establish information processing rules and submit these rules to the Minister of Internal Affairs and Communications. In addition, these businesses must conduct annual assessments of user information processing and appoint protection officers. These rules are stricter than the provisions in the APPI. In particular, the annual review and appointment of protection officers are similar to the Data Protection Impact Assessment and Data Protection Officer, respectively, under the GDPR.

Another significant change is the regulation of web-based tracking technologies. The proposed amendment stipulates that certain entities, including telecommunications businesses, must, in principle, notify users of certain items, or place the users in a position where they can readily learn about these items, whenever tracking technologies employed by the entities send information outside the users' device. Generally speaking, this regulation is not as stringent as the one in the EU e-Privacy Directive. First, while the percentage of organisations to which this regulation applies is unclear, it is not expected to have wide application. In addition, the rule is limited to external transmissions of information from a device and does not regulate simply storing data on a user's device. Furthermore, consent is not required and a notification alone is sufficient. Nevertheless, the combination of this regulation and the new rules on personally related information under the APPI will serve as the starting points for regulating web-tracking technology in Japan.

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Oh-Ebashi LPC & Partners is a full-service law firm with over 160 attorneys, and with its main offices in Tokyo and Osaka. It was originally established in Osaka in 1981, and now has an equivalent-sized operation in Tokyo. Oh-Ebashi was the first Japanese law firm to open an office in China; and together with its Nagoya office, the firm currently has offices in four locations. Oh-Ebashi has been providing its clients with the best legal advice and solutions for decades, and is committed to consistently exceeding clients' expectations and serving as their ideal legal partner. The legal practice at Oh-Ebashi covers a broad range of fields, including corporate/M&A, risk management and compliance, intellectual property law, life sciences, restructuring/insolvency, competition and antitrust/consumer protection, dispute resolution, finance and insurance, employment law, administration/regulatory law, tax law, international practice, China/Asian practice, private practice, and pro bono practice.

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