IN-DEPTH

# Private Equity

## JAPAN

LEXOLOGY

# Private Equity

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In-Depth: Private Equity (formerly The Private Equity Review) provides an overview of the market climate and regulatory regime for private equity transactions in key jurisdictions worldwide. With a focus on recent trends and developments, it offers practical and informed guidance from local practitioners about how to raise money and close deals.



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# Japan

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## Summary

# I Introduction

## i Deal activity

More than 20 years have passed since the emergence of the Japanese private equity (PE) market. In recent years, we have seen many large buyout deals led by global-based sponsors. There have been three main trends in Japanese PE transactions.

The first trend is carve-out deals. The Practical Guidelines for Business Restructuring issued by the government in June 2020 strongly encourage listed companies to review their business portfolios. This is one of the factors encouraging large Japanese companies to sell their businesses. Many of the recent large-scale buyouts were carve-outs in which global-based PE funds were the buyers.

The second trend is buyouts from the founders' families, which serves as a form of business succession. Many founders of Japanese blue-chip companies are approaching retirement age and they do not always have suitable successors. Selling to PE funds lets them cash out their assets while allowing them to pass on the business to a professional management team. Business succession has become an important source of PE transactions in Japan.

The third trend is the increase in growth equity investments. Since the mid-2010s, Japanese start-ups have been inclined to raise several rounds of additional financing before going public to increase their valuations at initial public offering. Domestic PE funds and strategic buyers are leading growth equity investments.

According to RECOF DATA, which is one of the most reliable statistical data sources for merger and acquisition (M&A) transactions in Japan, the number of acquisitions by PE firms involving Japanese targets from January to December 2023 was 918, 151 of which were inbound transactions, whereas the number of management buyouts (MBOs) involving PE firms during the same period was 22.

RECOF DATA also shows that there were 104 divestitures by PE firms from January to December 2023.

Major sponsors active in Japan include global-based firms such as KKR, Bain Capital, CVC, Carlyle, MBK and Apollo Global Management, and domestic independent firms such as Japan Industrial Partners (JIP), Japan Investment Corporation (JIC), Advantage Partners, Aspirant Group, Integral, Japan Growth Investments Alliance (J-GIA), New Horizon Capital and others. There are other domestic PE firms that are affiliated with financial institutions (banks and securities firms) and trading companies.

## ii Operation of the market

It is common for sponsors acting in Japan to enter into a management services agreement with top management prior to the closing of the acquisition, which sets forth numerical performance targets, compensation packages and other matters.

In addition to the annual base compensation and performance-based bonuses paid in cash to top management, a compensation package may be agreed that is triggered by the sponsor's exit. The most typical arrangement under such compensation packages is to have the target company issue stock options to top management for no consideration, which allows top management to exercise the options for shares in the target company upon the sponsor's exit, and then sell the shares for cash.

If the owner of the target company continues to manage the company after the buyout, top management is often allowed to acquire a minority stake in the target company and enter into a shareholders' agreement with the sponsor. If this is the case, upon the sponsor's exit, top management can sell their shares jointly with the sponsor for cash by exercising their tag-along right.

When a PE fund acquires all of or a controlling interest in a Japanese target company, the major exit arrangement is a trade sale. However, secondary buyouts have been increasing in recent years. There has been an increase in the number of cases whereby an additional portfolio company acquired through post-investment roll-up (in many cases, the first portfolio company in a certain industry acquires several other companies in the same industry) is sold to other PE funds. The main reason for this trend is that when PE funds attempt to exit, they generally retain financial advisers to conduct a bidding process and maximise the sale proceeds, and they often approach not only strategic buyers but also other PE funds as potential bidders.

When a PE fund conducts a bidding process, it generally shortlists potential buyers to a few companies in the first round of bidding. It then further limits the number of potential buyers to one or two companies in the second round of bidding after conducting due diligence, followed by negotiations for definitive agreements. For small and medium-scale projects, it generally takes one to two months to conduct the first round of bidding; two to three months for the second round of bidding, including the due diligence process; and several more months to reach a definitive agreement with the selected buyer. For large projects, the bidding process itself is often longer.

## II Year in review

### i Recent deal activity

As mentioned in Section I, most of the recent large-scale buyout deals have been carve-outs in which foreign PE sponsors were buyers. However, the largest buyout by a PE firm during 2023 was the acquisition of Toshiba led by JIP, which was announced in March 2023 and completed in September 2023 (total purchase price of approximately ¥2 trillion). The next largest buyouts led by PE firms were the acquisition of JSR by JIC, which was announced in June 2023 (total purchase price of approximately ¥900 billion), and the acquisition of Shinko Electric Industries led by JIC together with Dai Nippon Printing and Mitsui Chemicals, which was announced in December 2023 (total purchase price of approximately ¥680 billion). These buyouts, all led by Japan-based PE firms and Japanese strategic buyers, appear to be restructurings aimed at strengthening Japan's global competitiveness in the semiconductor industry. Forty-seven MBOs in 2023 did not involve PE funds (six more deals than in the previous year). Among them, Taisho Pharmaceutical Holdings' acquisition by its founding family, announced in November 2023, was notable because it did not rely on PE funds to raise over ¥700 billion.

## ii Financing

Purchase vehicles raise funds for acquisitions by issuing equity and through borrowings. Bonds are rarely used as acquisition financing in Japan. Lenders extend term loans for the purchase price and others, revolving loans for working capital and other types of loans, which include capex loans for target companies whose business operations require capital expenditures, and bridge loans for target companies that hold excess cash or other excess assets.

Mezzanine financing, such as subordinated loans and preferred stocks, is considered to fill the gap between the acquisition price and the sum of the sponsor's equity and senior loans. In addition, stock options may be issued as an equity kicker to mezzanine financiers.

Financers providing senior leveraged buyout (LBO) loans include major banks, regional banks, insurance companies and others. Mezzanine finance is provided by mezzanine funds managed by independent firms or other asset managers, lease companies, insurance companies and others. In rare cases, sellers take part in financing, which is called vendor financing. Financial institutions, which have become limited partners of sponsor PE funds, may also have a chance to participate in senior or mezzanine financing for buy-out transactions led by such PE funds. The financial terms provided in typical senior LBO loan agreements are 'debt service coverage ratio', 'leverage ratio', 'pricing grid' and 'cash sweep ratio', among others. In addition, the balance sheet test and profit-and-loss account test are commonly used in domestic LBO loan transactions.

Lenders commonly require an extensive range of conditions precedent, representations and warranties, covenants and events of default. The general notion on security packages is that, in addition to the shares in the purchase vehicles held by the sponsor PE funds, all the substantial assets owned by the target companies and purchase vehicles are subject to security for the lenders, and that the target companies guarantee to the lenders the payment by the borrowers. The actual range of assets subject to security varies for each transaction. Last, although certain funds clauses and clean-up periods may have been seen in senior loan agreements for buy-out transactions led by global-based PE funds, these provisions are rarely found in purely domestic LBO loan agreements.

In light of the recent growth in investors' awareness of sustainability, PE funds now tend to consider sustainable initiatives in target companies. In aiming to promote and support sustainable economic growth, Japanese banks have begun utilising sustainability linked loans in M&A finance transactions. LBO loans incorporating sustainability elements are expected to increase in the future.

## iii Key terms of recent control transactions

### Buyouts of private companies

A stock purchase agreement (SPA) is executed for an acquisition of a privately held company. It mainly covers price adjustments, representations and warranties (in respect of the seller and the target company), conditions precedent, pre-closing covenants, post-closing covenants, indemnification and termination.

In conventional Japanese M&A practice, in respect of price adjustments, it has been common to adopt a locked-box mechanism whereby the reference date is the last day of the target company's most recent fiscal year prior to the signing. However, it has become more common recently to agree on a post-closing price adjustment based on a comparison of the balance sheet at the time of the closing with the balance sheet used as the basis for the pricing at the time of the signing.

In PE deals, it is common for the buyer to request certain finance-out clauses as closing conditions. In contrast, the seller may require the buyer to provide certain pre-closing covenants, such as the obligation to exert efforts to secure acquisition financing or to provide a copy of the commitment letter from the potential lender.

**Buyouts of public companies**

In buyouts of public companies, a tender offer agreement would be entered into between the tender offeror and the major shareholder or between the tender offeror and the target company.

A tender offer agreement with major shareholders generally includes the obligation to commence a tender offer and the conditions precedent for such commencement, the obligation of the major shareholder to tender its shares and not to withdraw the tender, representations and warranties, and covenants. A tender offer agreement with the target company would cover certain representations and warranties by each party, conditions to commence the tender offer and certain covenants of the target company including the obligation not to solicit or negotiate competing bids. For such obligation, fiduciary-out clauses would be provided as exceptions (e.g., if the counteroffer price exceeds the offer price of the tender offeror and other conditions are met, the target company may terminate the tender offer agreement), and break-up fees would also be provided in case the target company terminates the tender offer agreement due to the fiduciary-out. In the Toshiba case, a tender offer agreement was concluded between Toshiba and the tender offeror. It provided that the tender offeror would pay reverse break-up fees to Toshiba if the tender offeror does not commence the tender offer by the pre-determined commencement date because the relevant regulatory approvals are not obtained even though all other conditions to commence the tender offer are satisfied or waived.

In recent years, large buyout deals (especially those led by foreign PE funds) have been increasingly required to obtain clearances before closing under various regulations, such as merger control regulations, regulations relating to the Committee on Foreign Investment in the United States and other investment regulations in several jurisdictions. However, it may take several months to around a year to obtain such clearances after the parties have reached an agreement for the buyout and filings are made with the relevant authorities. In these cases, to protect the public shareholders of the target company, the Japanese financial authorities usually request the buyer to commence the tender offer only after the clearance is expected to be obtained. To address this concern, there is the practice of making a timely disclosure where the target company 'makes a pre-announcement' that the parties have already agreed on the buyout and that the tender offer will commence once the necessary clearances are expected to be obtained and other conditions are met. These pre-announcements were issued in the cases of Toshiba and JSR.

**Exits**

Among notable trade sales in 2023, Aspirant Group sold Japan Drilling, the sole offshore drilling company in Japan, to JX Nippon Oil & Gas Exploration, a subsidiary of ENEOS Holdings, which transaction was announced in March 2023. In addition, Advantage Partners' sale of Yaruki Switch Group, which runs a prominent chain of tutoring schools, to TBS Holdings, one of the major national broadcasters, was announced in June 2023.

As for secondary buyouts, the notable sales were of United Precision Technologies by Advantage Partners to Integral, announced in June 2023, and of NITTO and Heisei Biso by New Horizon Capital to J-GIA, announced in September 2023.

# III Legal framework

## i Acquisition of control and minority interests

### Buyouts of private companies

In an LBO scheme, a purchase vehicle established by a sponsor acquires all the shares of a target company after borrowing funds for the acquisition from a financial institution. In acquiring a private company, a simple SPA is concluded between the purchase vehicle and all the shareholders of the target company (see Section II.iii for the customary terms and conditions of an SPA), and there is no need for a tender offer process under the Financial Instruments and Exchange Act (FIEA), as described below. Although the articles of incorporation of a private company usually require the approval of the company's board of directors for the transfer of the company's shares, in practice, this is rarely an obstacle to a buyout.

### Buyouts of public companies

In buyouts of public companies, namely going-private transactions, it is common to conduct a two-step acquisition. A tender offer is made during the first phase, and the back-end squeeze-out of the remaining minority shareholders follows in the second phase.

In the preceding tender offer, a purchase vehicle established by a sponsor becomes the tender offeror and discloses information in accordance with the FIEA. The main disclosure documents are the public notice of the commencement of the tender offer, and the tender offer statement filed by the tender offeror and the position statement filed by the target company. If a tender offeror intends to acquire more than one-third of the total voting rights of a listed company, it is legally required to conduct a tender offer. However, in going-private transactions, it is customary to aim for two-thirds or more of the total voting rights without setting a cap on the number of shares to be purchased in the tender offer.

When conducting a going-private transaction, it is usual to take measures to ensure the fairness of the tender offer in respect of the public shareholders of the target company and eliminate the coercive nature of the tender offer. Specifically:

1.

in many cases, the tender offer statement sets out that the tender offeror intends to conduct a back-end squeeze-out at an amount equal to the tender offer price if the tender offer is completed successfully; and

2. a tender offer period of 30 business days or more is provided.

If the transaction falls under an MBO (i.e., the current management invests all or part of the funds needed to acquire the target company's shares on the assumption of a going concern), the transaction is expected to comply with the Guidelines on Fair M&A published by the government in June 2019 (the 2019 Guidelines). In most cases, if a going-private transaction constitutes an MBO, in addition to performing the arrangements for points (a) and (b), above, the target company establishes a special committee that is independent from the board of directors, in accordance with the 2019 Guidelines. The special committee is expected to examine and determine the merits of the buyout, the appropriateness of the terms of the transaction and the fairness of the procedures from the perspective of the interests of the public shareholders in the target company.

If the target company has major shareholders, a tender offer agreement is often concluded between the tender offeror and the major shareholders whereby they agree that if the tender offeror conducts a tender offer for the target company's shares under certain conditions, the major shareholders will tender their shares and will not withdraw the tender. If there are no such major shareholders, a tender offer agreement would be entered into between the tender offeror and the target company, providing conditions to commence the tender offer. According to the Japanese Financial Services Agency's guidelines on tender offers, if a tender offer agreement is executed, the main terms and conditions of the agreement must be stated in the tender offer statement and the public notice of commencement (see Section II.iii for details of what is generally stipulated in a tender offer agreement).

The back-end squeeze-out generally employs either an exercise of the squeeze-out right or a consolidation of shares. The squeeze-out right was introduced in the 2016 amendment to the Companies Act and allows an acquirer to demand that all other shareholders of the target company sell all their shares in the target company when the acquirer holds 90 per cent or more of all the voting rights in the target company. The back-end squeeze-out by consolidation of shares is a method whereby the target company conducts the consolidation of shares using an extreme consolidation ratio and the shares of the target company held by the minority shareholders other than the acquirer are reduced to fractions of less than one share, and then, in accordance with the statutory procedures under the Companies Act, with court approval, the target company sells the integer portion of the shares that is the sum of such fractions and delivers the cash-out to the minority shareholders in exchange for their equity portion.

In contrast to the consolidation of shares, the exercise of the squeeze-out right does not require a resolution at a general shareholders' meeting of the target company. It can be handled by a resolution of the board of directors and does not require a statutory cash-out procedure for fractional shares. In practice, it takes several months for a listed company to hold a general meeting of shareholders, and the statutory cash-out procedures for fractional shares require court approval. Therefore, the exercise of the squeeze-out right allows for a quicker cash-out compared with the consolidation of shares.

Prior to the 2016 amendments to the Companies Act, the consolidation of shares was not used as a cash-out scheme because it did not provide the minority shareholders with legal protections such as the dissenting shareholders' right to demand the purchase of their shares and injunctive relief. However, after the amendment, these remedies were introduced; therefore, the consolidation of shares is now widely used as a back-end squeeze-out method. The greatest advantage of the consolidation of shares over the exercise of the squeeze-out right is that it does not require the acquisition of 90 per cent or more of the total voting rights of the target company in the first-phase tender offer. The consolidation of shares requires approval through a special resolution of the target company's shareholders, but such a special resolution can be obtained once the acquirer secures two-thirds, not 90 per cent, of the total voting rights of the target company.

Considering the above, in practice, although the minimum number of shares to be purchased in the first-phase tender offer is set at two-thirds of the total voting rights of the target company, if the tender offeror succeeds in acquiring 90 per cent or more of the total voting rights, it often chooses to exercise the squeeze-out right as the scheme for the back-end squeeze-out. On the other hand, if the number of shares purchased is less than 90 per cent, the consolidation of shares is often chosen.

### Where to form a purchase vehicle

A global-based sponsor usually sets up a joint-stock company under Japanese law as a purchase vehicle. In the financing context, the purchase vehicle would be the borrower, but the most efficient means of repaying the acquisition financing loan would be for the purchase vehicle to merge directly with the target company after the two-step acquisition is completed. In addition, Japanese law does not allow a Japanese company to merge directly with a foreign company, so this may be one of the reasons for structuring a purchase vehicle as a Japanese company.

### Foreign investment filing requirements

The Foreign Exchange and Foreign Trade Act (FEFTA) requires a foreign investor carrying out a foreign direct investment (FDI) in a Japanese target company to file a prior notification if the target company and its subsidiaries conduct certain restricted businesses that may have an impact on Japan's national security. Even when a non-Japanese sponsor uses a Japanese entity as a purchase vehicle, it is highly likely that the purchase vehicle will still be classified as a foreign investor under the FEFTA. An FDI for which prior notification is filed will be examined by the Ministry of Finance and other relevant ministries during a statutory waiting period of 30 days. This period may be extended for up to five months if the FDI raises strong national security concerns, but usually this is shortened to two weeks if the authorities do not find any such concerns.

There has been a series of amendments to the FEFTA, which may have an impact on PE transactions by a non-Japanese sponsor. The May 2020 amendments classified restricted businesses into core industries and other industries (i.e., non-core industries), and a more rigorous prior screening is required to be conducted for core industries. In addition, the appointment of directors in target companies and succession to restricted businesses through reorganisations, such as by business transfers, company splits and mergers, were added to the list of FDI subject to filing requirements.

When a global-based sponsor conducts a buyout in Japan, prior notification is required if it acquires 100 per cent of the shares of the target company (whether listed or unlisted) operating in a restricted business. This was the case whether the buyout was performed before or after the amendments. However, as a result of the amendments referred to above, after acquiring the company operating in a restricted business, its parent company, which is the purchase vehicle, is itself considered to be operating in the restricted business; thus, a prior notification is required each time a foreign sponsor appoints its members as directors of the purchase vehicle. In the case of an absorption-type merger of the target company to help repay the acquisition financing, resulting in the purchase vehicle becoming the surviving company, prior notification may also be required.

**Merger control**

For new acquisitions of a certain percentage of shares in a Japanese company, there are prior notification requirements based on the sales proceeds in Japan of both the acquirer and the target company. Specifically, if the total domestic sales of the acquirer and all its affiliates exceed ¥20 billion, the total domestic sales of the target company and its subsidiaries exceed ¥5 billion and the ratio of voting rights to be held by the acquirer in the target company will exceed 20 or 50 per cent as a result of the share acquisition, the acquirer (e.g., the purchase vehicle) must file a prior notification with the Fair Trade Commission. For PE sponsors, depending on the capital structure of the purchase vehicle, the sales proceeds in Japan earned by their existing portfolio companies may be included in the domestic sales of the acquirer's group. As a rule, a share acquisition cannot be closed for 30 days from the filing date of the prior notification, and this may affect the overall deal schedule.

## ii Fiduciary duties and liabilities

Under Japanese law, it is generally understood that controlling shareholders do not bear any fiduciary duties to minority shareholders.

Under the provisions of the Companies Act, a director of a target company who is appointed by the controlling shareholders has fiduciary duties to the company itself based on his or her capacity as such a director. This is understood to mean that such a director should act in the best interests of all the shareholders, including the minority shareholders.

With regard to the fiduciary duties of directors of a target company in an M&A transaction:

1. the Tokyo High Court, on 17 April 2013, ruled that in the case of an MBO going through a two-step acquisition, the directors have a duty to ensure the fair transfer of corporate value; and
2. the Osaka High Court, on 29 October 2015, ruled that if an MBO going through a two-step acquisition fails, the directors have a duty to negotiate with the acquirer's side through a fair process, taking the shareholders' interests into consideration.

These precedents were somewhat ambiguous as a code of conduct for directors of a target company when they are involved in corporate acquisitions. However, the government issued the Guidelines for Corporate Takeovers in August 2023 (the 2023 Guidelines), providing a clearer code of conduct for directors of a target company. When directors of a target company receive an acquisition proposal, the 2023 Guidelines suggest that the directors should promptly submit or report the matter to the board of directors so that the board will give 'sincere consideration' to a 'bona fide offer'. In determining whether the acquisition proposal is a bona fide offer, the board will consider whether the proposal is specific, its purpose is legitimate and the proposal is feasible. When the board of directors makes a decision towards reaching an agreement on the acquisition, the board should make reasonable efforts to aim at the best available transaction terms for the shareholders. If the board still makes an exceptional decision to endorse a proposal that is considered to be enhancing corporate value but is not sufficiently priced, the board should fully explain the reasonableness of its decision.

For the process of a two-step acquisition, on 1 July 2016, the Supreme Court ruled that if the major shareholders of a target company jointly set up a tender offer and conduct a two-step takeover with squeeze-out, even in such a transaction with a structural conflict of interest, if the tender offer was made through procedures generally recognised as fair to eliminate the conflict of interest and a subsequent back-end squeeze-out was made at the same amount as the tender offer price, the price determined between the parties shall generally be respected. However, in a decision by the Tokyo District Court on 23 March 2023, the Court recognised the dissenting shareholders' request to purchase their shares at an amount larger than the tender offer price, because the squeeze-out, which was made at an amount equal to the tender offer price under the above Supreme Court decision, was not determined through fair procedures (the *Family Mart* case). Family Mart, the target company, established a special committee in accordance with the 2019 Guidelines, which examined whether the tender offer price was appropriate. The special committee had been advised by an outside valuation adviser of a certain range that would constitute an appropriate share value. However, when the acquirer offered an amount lower than the suggested range, to which Family Mart's management agreed, the special committee accepted this offer without providing any particular reason. Considering this fact, the Court concluded that the special committee could not be considered to have sufficiently fulfilled its role as a body tasked with eliminating arbitrariness in the decision-making process of the target company from an independent standpoint.

When a PE sponsor conducts a going-private transaction constituting an MBO, a target company is expected to follow the 2023 Guidelines and implement the measures recommended by the 2019 Guidelines, including establishing a special committee in the target company. However, considering the *Family Mart* case, it is not sufficient to merely establish a special committee. The special committee must fulfil its role in a truly independent manner, without pandering to the acquiring party and the target company.

## IV Regulation

As mentioned above, in the case of acquisitions of listed companies, tender offer regulations under the FIEA must be observed. The Kanto Local Finance Bureau strictly supervises this aspect. Compliance with merger control regulations is supervised by the Fair Trade Commission, and compliance with foreign exchange regulations is supervised by the Ministry of Finance and related ministries. See Section III.i for recent amendments to the foreign exchange regulations, and Section II.iii for the impact of foreign regulations on recent large-scale buyout deals.

Further, in August 2023, the government issued the 2023 Guidelines, which were established as more general guidelines for all transactions to acquire control of a listed company, whether friendly or hostile, and not limited to transactions with an inherent conflict of interest structure, such as MBOs. However, the new Guidelines did not change the substance of the 2019 Guidelines and, therefore, the arguments above based on the 2019 Guidelines are not affected thereby.

In addition, in December 2023, the government announced its policy on the revision of tender offer regulations, and new bills are expected to come during 2024. The major items of the amendments are as follows:

1. Under the current regulations, if a purchaser intends to acquire more than one-third of the total voting rights of a listed company, it is legally required to conduct a tender offer. However, it is proposed that the threshold triggering a tender offer be decreased to 30 per cent from one-third.
2. A tender offer is not required if the voting rights of the target company held by the purchaser exceed the one-third threshold through intra-market transactions. However, it is proposed that such intra-market transactions be subject to a tender offer.
3. It is further proposed that, if the purchaser sets a cap on the number of shares to be purchased, the purchaser will need to explain in advance how to address any possible conflict of interests with minority shareholders that may arise after the tender offer.
4. The government will establish new regulations that allow for flexible handling of each case and strengthen the relevant regulatory authorities to make this practically possible.

## V Outlook and conclusions

The future outlook for large PE investments in Japan requires consideration of a variety of factors, and it is not always possible to draw a clear-cut conclusion. In 2023, the trend of domestic PE funds leading industry restructuring in Japan was evident, but the number of acquisitions by foreign funds was also strong. However, Japanese companies are making large outward investments despite the trend of a weak Japanese yen,[2] and examples have emerged of founding families of listed companies executing de-listings without relying on PE funds. On the other hand, the lack of successors for blue-chip companies is an intrinsic problem for Japanese industry, and the need to sell a business for the purpose of succession is expected to continue in the future. Furthermore, Japan's low interest rate policy is unlikely to have a significant impact on the availability of acquisition financing, even if there is a rate increase.

In light of the above, the opportunity and environment for large buyouts by global-based PE funds of Japanese-listed companies will continue to exist in the future.

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Endnotes

1 Norihiro Sekiguchi and Tomohiro Murakami are partners at Oh-Ebashi LPC & Partners. ^ Back to section

2 Apart from private equity deals and management buyouts, large outbound acquisitions by Japanese strategic buyers were notable in 2023, including the acquisition of US Steel by Nippon Steel (total purchase price of approximately ¥2 trillion) and the acquisition of Iveric Bio by Astellas Pharma (total purchase price of approximately ¥800 billion). ^ Back to section

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