

Amendment Bill of the Industrial Revitalisation Law

On 14 February 2011, the Japanese government submitted an amendment bill in respect of the Law on Special Measures for Industrial Revitalisation and Innovation (the "**Law**") to the Diet. The Law was adopted in 1999 and aimed at revitalising the slow Japanese economy in an attempt to spur sustainable growth and development, and has previously been amended several times. The Law provides special (favourable) measures for Japanese companies with respect to the applicable corporate tax regime, financing options and Company Law requirements. In summary, the Law is structured to allow a business operator to benefit from such special (favourable) measures by preparing a specific business reorganisation plan which is authorised by a competent minister in charge of the operator's business and then those special measures are applied to the authorised business plan to aid the Company's growth and development. The amendment bill is mainly aimed at accelerating strategic industrial reorganisation to strengthen the global competitiveness of Japanese industries. The amendment bill contains certain new special measures which may influence M&A transactions.

Below is a summary of the main points of the amendment bill which may affect M&A transactions.

Cooperation between the Japan Fair Trade Commission and Competent Ministers for Antimonopoly Law Procedures

The amendment bill provides that, in the case where a competent minister authorises a business reorganisation plan, if the relevant plan falls under a case provided in the Cabinet Order where it is deemed likely that fair competition is not secured in the business field where the relevant business operates, the competent minister is required to have prior consultation with the Japan Fair Trade Commission ("**JFTC**"). No details of the Cabinet Order are currently released as the Order will be established in the future. It is therefore difficult to determine the scope and effect of such Order at this stage. However, it seems likely that the Order will apply to business reorganisation plans, including business combinations, which require prior notification to the JFTC in accordance with the Antimonopoly Law.

Key Issues

Cooperation between the Japan Fair Trade Commission and Competent Ministers for Antimonopoly Law Procedures

Take-Over-Bid by way of Exchange Offer

Squeeze Out

Two-step Loan

Other Points

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Among recent business reorganisation plans, some were viewed to amount to oligopolisation. For example, the recently announced business integration between Nippon Steel Corporation and Sumitomo Metal Industries, Ltd. However, such reorganisation programmes are still considered necessary in terms of strengthening the global competitiveness of Japanese industries. Therefore, the amendment bill will seek to strengthen and align competent ministers' cooperation with the JFTC to make prompt judgments on such cases when considering the global competitiveness of Japanese industries.

Take-Over-Bid by way of Exchange Offer

A take-over-bid ("**TOB**") by way of a share for share exchange offer is often used as consideration by parties in other jurisdictions. Although consideration for TOBs in Japan has not always been limited to cash, a TOB using shares as consideration has rarely been made in Japan for the following key reasons: excluding taxation issues for applicant shareholders, (a) securities registration statements of shares of consideration are required; and (b) in the case where the shares delivered as consideration are new shares, such new shares will be issued through in-kind contribution. The above in-kind contribution issue includes: (i) it is unclear if such shares are subject to the provisions of the Enforcement Ordinance of the Company Law concerning the price valuation method for shares which are issued through an in-kind contribution (i.e., shares to be acquired through a TOB); and (ii) there is a possibility that those who accept new shares (i.e., shareholders who responded to the TOB) will be liable for any shortfall with respect to the relevant valuations.

Among the issues outlined above, the amendment bill includes provisions to potentially eliminate two such issues: applicability of in-kind contribution in the case where new shares are issued for consideration; and the possibility of any shortfall liability for those who accepted shares with unfair valuation. This means that any TOB authorised by a competent minister is not subject to the provisions on procedures for in-kind contribution under the Company Law and the only requirement at any general shareholders meeting which resolves to issue new shares would be to determine the relevant exchange ratio between new shares to be issued and shares subject to the TOB. Moreover, the provision on liability for those who accepted shares with unfair payment under the Company Law will not be applicable.

Squeeze Out

Currently for a squeeze out, class shares subject to a call option is, amongst others, a commonly used method under the Company Law to effect a squeeze out of minority shareholders. The introduction of class share subject to a call option was previously introduced to allow a capital reduction; however as there is no statutory limit for the use of class share, these class shares are frequently used for squeeze outs.

In order to have a squeeze out this way, a special resolution of a general shareholders meeting is required under the Company Law to amend the articles of incorporation to issue class shares subject to a call option and to acquire the issued class shares subject to the call option. A class meeting of shareholders therefore is required as well. This allows a company to introduce a mechanism making all such shares subject to repurchase by the company.

The amendment bill provides that, in the case where 90% or more of the voting rights are acquired in the TOB in accordance with a business plan authorised by any competent minister, no resolution of a general shareholders meeting or class meeting is required. This is on the condition that the TOB does not violate any laws or regulations or the Articles of Incorporation and the amount equivalent to the TOB price is delivered to the remaining minority shareholders. No permission of the court is required for disposal of fractional shares as such disposal will be included in the authorised plan.

The Ministry of Economy, Trade and Industry, which prepared the amendment bill, estimates that in light of the above proposal the time required for a squeeze out can be shortened by approximately three months.

Two-step Loan

The amendment bill provides for establishment of a system to lend funds necessary to conduct and prepare authorised business plans, i.e. a specific financing system necessary for business operators to conduct business restructuring. This financing system would be provided in the Cabinet Order in accordance with their authorised plans. Under this financing system, the business operators would be financed by financial institutions which would be further financed by the Japan Finance Corporation.

For the purpose of this financing system, the government plans to provide 100 billion yen to the Japan Finance Corporation through fiscal investment and loans, etc.

This two-step loan is intended for financing from the financial institutions to business operators on a long term basis and with low interest rates. However, no details of conditions of the financing have been released.

Other Points

Other than the above matters, the amendment bill contains the following additional matters: (i) a guarantee system by the Organisation for Small & Medium Enterprises and Regional Innovation intended to underwrite obligations from the issuance of corporate bonds or borrowings to finance production facilities for new products developed by venture companies or medium-sized companies; and (ii) a support system for brokerage and advice on the succession of a business from a small or medium-sized company by another company and the obligation of the government to provide financial support for that purpose.

The date of enforcement provided in the amendment bill is within three months from announcement and as provided in the Cabinet Order. Accordingly, if the amendment bill is passed at the 177th Diet (this is the ordinary session starting on 24 January and ending on 22 June 2011 unless the session is extended), the amended Law should come into force within 2011.

Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.

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