EBC Press Release
November 14, 2006

EBC Rejects Media Reports Misrepresenting Cross-Border Stock Swaps in Europe

November 14, 2006 --- The European Business Council in Japan (EBC) expressed deep concern today about misleading statements appearing in Japanese media reports last week and again this week on the use of stock swaps in merger transactions in Europe. "I am particularly surprised by an inaccurate media report on November.10[1]," said EBC Chairman, Richard Collasse. "The report contains a statement maintaining that stock swaps can only be used in merger transactions among companies of EU member countries. This implies that non-EU company shares cannot be used as consideration in a merger with a European Company in the EU. This is plainly incorrect." Although the legal situation in Europe is complex, the European Commission's Takeover Directive (2004/25/EC), states clearly that at the EU level, foreign company shares can be used with no restrictions in direct stock swaps.

"Equally disturbing," Collasse continued, "is a so-called international comparison of the use of triangular mergers reportedly based on data provided by the Keidanren.[2] In that comparison, it was stated that triangular mergers are not permitted in the UK and Germany. Such a comparison of triangular mergers is simply not valid. Not only is it technically possible to conduct triangular mergers in the UK, but just as in Germany and also now in France (after adopting the EC Directive on September 18th, 2006), direct cross-border stock swaps with foreign shares is possible and triangular mergers are NOT REQUIRED. The EBC has long been advocating the introduction of direct stock swaps between foreign and Japanese stocks also in Japan, but also supported the triangular merger scheme as a second best approach to facilitating cross-border deals.

The only proviso on foreign stocks contained in the Take-over Directive is related to offer requirements under take-over bids. An investor having acquired control of a certain shareholding (30% or more to be decided in Member State legislation) of the stock in any given company is obliged to launch a full bid. If the securities offered do not consist of liquid securities admitted to trading on a regulated market (normally meaning a stock market in the European Economic Area) then the bid must offer a cash alternative. It does NOT require the securities to be listed in Europe, but merely that a cash alternative is offered. The provision could be perceived as similar to the appraisal rights (*kaitori seikyuken*) already introduced into the Japanese system.

The EBC fully shares the view of Ministry of Economy Trade and Industry (METI), the Keizai Doyukai, and the American Chamber of Commerce in Japan (ACCJ) that the carefully-designed, cautious triangular merger scheme will be a valuable tool for foreign and Japanese companies seeking friendly ways to merge. We can see no reason to make listing in Japan a de facto mandatory restriction when boards of Japanese companies are already free to impose such a condition on a company basis. What is clear, is that if listing in Japan is made a de facto pre-condition for using foreign stocks as consideration, the "cross-border" essence and indeed the very value of the triangular merger scheme will be lost in terms of attracting capital, know-how and jobs to Japan.

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1 Nihon Keizai Shimbun, November 10, 2006, Page 14; Asking About Issues on Triangular Mergers (translation); Comments by Mr. Kenji Miyahara, Vice-chairman, Keidanren

2 Asahi Shimbun, November 10, 2006, Page 8; Smouldering Triangular Mergers (translation)

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Triangular Mergers Fact Sheet

Five "safety measures" for target company boards and shareholders have been included in the Japanese triangular merger scheme:

1. Foreign entities have to set up a company in Japan before they can use their stock as consideration in mergers with Japanese companies. The foreign entity **has to** merge with the Japanese company through a domestic subsidiary, the reason for calling it "*triangular*" in the first place. Direct Cross-border Stock swaps are not permitted.
2. The board of the Japanese company *itself* must negotiate the merger agreement, and must approve the transaction before it goes to shareholders. The board has the right to refuse any offer it does not like (granting only friendly deals).
3. Because it must approve and negotiate the transaction *itself*, the Japanese board has the right to impose whatever restrictions it wants on the consideration to be used in each deal (including requiring stocks to be listed in Japan, or the provision of cash instead)
4. All Japanese boards are free to modify their company's Articles of Incorporation to insert protective measures. They could easily require in advance that a "*tokushu ketsugi*" should be needed in the case of stocks that are not listed in Japan
5. In the case of triangular mergers, dissenting minority shareholders of the company being absorbed have "appraisal rights" ("*kaitori seikyuuken*") to receive a "fair value" in cash, in an amount reflecting the post-deal synergies.

Of these five Japanese measures, the EC Takeover Directive contains provisions similar only to the fifth Japanese measure outlined in (5) above. It aims for the protection of minority shareholders and applies when an investor has acquired control of a certain share (e.g. 30% or more to be decided in Member State legislation) of the stock in any given company. In such a case, the investor is obliged to launch a full bid and if the securities offered do not consist of liquid securities admitted to trading on a regulated market (normally meaning a stock market in the European Economic Area) then the bid must include a cash alternative.

About the EBC

The European Business Council (EBC) in Japan is the trade policy arm of the 17 European national chambers of commerce and business associations in Japan. Established in 1972, the EBC works to improve the trade and investment environment for European companies in Japan. The EBC currently represents more than 3,000 local European companies and individuals who are members of their national chambers of commerce. Some 360 of these companies participate directly in the EBC's 29 sector-based committees.

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