Public Mergers and Acquisitions in Japan

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A Practice Note Overview outlining the law and regulation of public takeovers and principal considerations involved in a public takeover in Japan.

This note looks at, in outline, the law and regulation of public takeovers in Japan, focusing on offers which aim at achieving 100% control of the target company. Control of varying degrees can be obtained through other means, but if 100% control is desired the usual alternative (and then in practice only in a situation when the bid is recommended) is a tender offer under Japan's *Financial Instruments and Exchange Act (Act No. 25 of 1948)* (FIEA).

Unless otherwise stated, references to General Principles, Rules, Notes and Appendices are references to those contained in the *Japan Guidelines for Corporate Takeovers* (the Guidelines).

Regulation of Public M&A

Regulation of Public Takeovers

Public takeovers are regulated by the FIEA. If a party intends to purchase the shares of a company that is required to submit annual securities reports (including listed companies and over-the-counter (OTC) companies), this must be done by a tender offer in the following cases (with several exceptions):

- If the purchase is made outside a stock exchange market (including the OTC market) and, after the purchase, the aggregate voting rights held by the purchaser and any affiliated persons (as defined in the FIEA) divided by the total voting rights of the target (total voting ratio) exceeds 5% (Article 27-2.1(1), FIEA). An exception applies if the aggregate number of sellers in the contemplated share purchase and the sellers of shares to the purchaser outside the stock exchange market (total sellers) equals ten or fewer in the 60 days before the day the purchase is made.
- If the purchase is made outside a stock exchange market (including the OTC market), and the number of total sellers is ten or fewer in the 60 days before the day the purchase is made and the total voting ratio of the purchaser and any affiliated persons exceeds one-third after the purchase (Article 27-2.1(2), FIEA).
- If the total voting ratio of the purchaser and any affiliated persons exceeds one-third after the purchase and the purchase is made by a purchase method prescribed by the Prime Minister (including purchasing through the Tokyo Stock Exchange Trading NeTwork System (ToSTNeT) of the TSE and certain off-floor trading methods) (Article 27-2.1 (3), FIEA).
- If, within three months:
    - over 5% of the voting shares are purchased outside a stock exchange market (including the OTC market) or by a purchase method prescribed by the Prime Minister as mentioned above;

  - a total of over 10% of the voting shares are obtained through the purchase (including purchases described in the preceding bullet point) or the issuance of new shares; and
  - the total voting ratio of the purchaser and any affiliated persons exceeds one-third after the purchase or issuance.

  (Article 27-2.1 (4), FIEA.)

- If, during the period in which one party's tender offer is made, another party, whose total voting ratio before the purchase exceeds one-third, purchases over 5% of the voting shares (Article 27-2.1 (5), FIEA).
- In other specified cases set out in a Cabinet order (Article 27-2.1 (6), FIEA).

There is no Japanese institution corresponding to the UK Takeover Panel. The Japanese *Financial Services Agency* (FSA) supervises the securities markets.

Regulation of Mergers

Mergers are regulated by the Companies Act (Act No. 86 of 2005) (CA) (see *CA, Parts I, II, III, and IV* and *CA, Parts V, VI, VII, and VIII*). The following are required for a merger:

- Conclusion of a merger agreement (Article 748, CA).
- Advance disclosure of certain documents, including the merger agreement (Articles 782 and 794, CA).
- Shareholders' meeting approval of the merging companies (Articles 783 and 795, CA).
- Procedures to protect creditors (Articles 789 and 799, CA).
- Procedures to resolve share purchase demands from dissenting shareholders (Articles 785 and 797, CA).
- Merger registration (Article 921, CA).
- Disclosure of certain matters post-merger (Article 801, CA).

Where shares are issued or delivered through a corporate reorganisation (including a merger) satisfying certain conditions, the issuer of the shares must disclose the issuance or delivery of the shares (by submitting a securities registration statement) (Article 4.1, FIEA). Afterwards, it must make the continuous disclosure prescribed in the FIEA if the disclosure meets both of the following criteria:

- It concerns shares of the reorganisation target.
- It does not concern shares that will be issued or delivered to shareholders of the target through the reorganisation.

(Article 24.1(3), FIEA.)

Additional Regulation

In addition, the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947)* (Anti-Monopoly Act) (AMA), the procedural requirements under the *Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949)* (FEFTA), industry-specific regulations, the *Fair M&A Guidelines*, and the Guidelines, also affect public takeovers and mergers (see *Takeover Code, Takeover Rules and Other Statutes*, *Regulatory Restrictions* and *Exchange Control Restrictions*).

Takeover Code, Takeover Rules and Other Statutes

On 31 August 2023, the *Ministry of Economy, Trade and Industry* (METI) issued the Guidelines. The purpose of the Guidelines is to present principles and best practices that should be shared throughout all industries to develop fair rules for M&A transactions, with a focus on how parties should behave in the context of acquiring corporate control of a listed company. While the primary focus of the Fair M&A Guidelines is on management buyouts and acquisitions of a controlled company by a controlling shareholder, the scope of the Guidelines encompasses arm's-length acquisitions between third parties. The Guidelines include the following:

- Principles and basic perspectives (Chapter 2, the Guidelines): the following three principles, in general, should be respected in the acquisition of corporate control of listed companies:
  - the principle of corporate value and shareholders' common interests (1st principle);
  - the principle of shareholders' intent (2nd principle); and
  - the principle of transparency (3rd principle).

  Whether an acquisition is desirable should be determined based on whether it will secure or enhance corporate value and shareholders' common interests (1st principle), and the 2nd and 3rd principles are required to realise the 1st principle.
- Code of conduct for directors and boards of directors regarding acquisition proposals (Chapter 3, the Guidelines): the target's board must give sincere consideration to a bona fide offer as a basic rule. Sincere consideration should be undertaken from the perspective of whether the transaction, if completed, would contribute to the enhancement of the company's corporate value, among other factors (such as appropriateness of the acquisition price).
- Provisions for increased acquisition transparency (Chapter 4, the Guidelines): the acquirer should provide sufficient disclosure of information and sufficient time for the target's shareholders and board to consider the takeover offer. The target should also provide sufficient disclosure of information for its shareholders to make an informed judgment.
- Takeover response policies and countermeasures (Chapter 5, the Guidelines): this is essentially a code of conduct for the use of takeover response policies and countermeasures.

The Guidelines are only soft law and do not carry the force of law, but they do have a strong influence on M&A practices in Japan, as is the case with the Fair M&A Guidelines (see *Trends in Deal Structures*).

Statute and Regulation

Apart from the Guidelines, the parties to a takeover will be subject to other statutory and regulatory requirements such as:

- The FIEA (see *Regulation of Public Takeovers* and *Announcing the Offer*).
- The FEFTA (see *Approvals for Listed Companies in Regulated Industries*).
- The AMA (see *Additional Regulation* and *Merger Control*).
- The *Securities Listing Regulations of Tokyo Stock Exchange, Inc* (TSE) (Securities Listing Regulations of TSE).

For an overview of the legal regime governing foreign investment in companies and industries in Japan, see *Practice Note, Regulation of Foreign Investment in Japan*.

Obtaining Control

The main structures to obtain the control of a Japanese company are as follows.

Stock purchase. Shares of a listed target company (target) can be purchased through or outside a stock exchange or outside a stock exchange. This must be done by a tender offer in some situations (see *Regulation of Public M&A*). This method does not require an agreement with the target and can therefore be used for hostile bids. Foreign companies can also use this method.

Merger, stock-for-stock exchange, and share delivery. These methods of obtaining control require an agreement with the target, and therefore are used only for recommended bids. Further, where the acquirer is the target's controlling shareholder, as defined in the Securities Listing Regulations of TSE, the target must obtain an opinion, from a person independent from the acquirer, that the contemplated merger, or stock-for-stock exchange, or share delivery is not disadvantageous to its minority shareholders (Articles 441-2, 402(1)i, 402(1)j-2, and 402(1)k, Securities Listing Regulations of TSE):

- Merger: a merger integrates two or more companies into one corporate entity (Article 748, CA). The shareholders of the absorbed company are usually allotted shares in the absorbing company according to the merger ratio (which is based on multiple factors, including the corporate value of the absorbed company relative to that of the absorbing company). Foreign companies cannot use this method to obtain control of a company. However, by using a triangular merger (in which a subsidiary absorbs and merges with the target and then provides its parent's shares to shareholders of the absorbed target), a foreign company's subsidiary in Japan can absorb a Japanese company using its parent's shares (Articles 749.1(2) and 751.1(3), CA).
- Stock-for-stock exchange: Company A becomes a wholly-owning parent of Company B, by issuing new shares in Company A in exchange for all the shares in Company B (Article 767, CA). Foreign companies cannot use this method to obtain control of a company. A stock-for-stock exchange in which the parent's shares are used for consideration is also permitted (Articles 768.1(2) and 770.1(3), CA).
- Share delivery: through a share delivery (*kabushiki kofu*), Company A becomes the parent of Company B, by issuing new shares in Company A in exchange for a portion of the shares in Company B. A share delivery, unlike a stock-for-stock exchange, is a method that can be used even where a company does not intend to establish a wholly-owned subsidiary. As with stock-for-stock exchanges, foreign companies cannot use this method.

Issue of new stock. The acquirer makes a subscription agreement with the target and receives new shares issued by the target (Article 199, CA).

There are potential problems with this method, namely that minority shareholders remain and more funds are needed to obtain control of the target in an issue of new stock than in a stock purchase. The issue of new stock is a method available to foreign companies.

The issue of new stock requires a decision by the target's board and therefore cannot be used in a hostile bid. In addition, where a listed company issues new shares and the ratio of voting rights of newly issued shares is 25% or more of the outstanding shares, or it is expected that the company's controlling shareholder will change due to the issuance, the company must obtain either of the following:

- An opinion from an entity with a certain degree of independence from the company's management about the necessity and suitability of the issuance.
- The shareholders' confirmation given by a general shareholders' meeting resolution or other similar procedure.

(Article 432, Securities Listing Regulations of TSE.)

Where a public company is willing to conduct a third-party allotment of new shares or new share warrants, resulting in a certain entity holding a majority of the company's voting rights, that company must give notice to shareholders or a public notice that contains certain matters required by law (Article 206-2,1, 2, CA).

If shareholders holding 10% or more of the company's voting rights notify the company that they oppose the third-party allotment, the third-party allotment must be approved by a shareholders' meeting resolution (Article 206-2,4, CA).

Business transfer and company split. An acquirer takes over part or parts of a business, composed of, among others, the target's integrated assets, employees, and commercial rights (Articles 4-67 and 757, CoA). A business transfer and company split are used when a company intends to selectively choose which assets and debts to acquire.

In addition, with the issue of new stock, in a business transfer and company split where the acquirer is the target's controlling shareholder, the target must obtain an opinion from an entity with a certain degree of independence from the acquirer that the contemplated issuance of shares, business transfer, or company split is not disadvantageous to the target's minority shareholders (Articles 441-2 and 402(1)a, l, m, Securities Listing Regulations of TSE).

Trends in Deal Structures

A notable trend in recent M&A arrangements has been the increasing number of unsolicited tender offers following the introduction of the Guidelines (see *Takeover Code, Takeover Rules and Other Statutes*).

In the following cases, unsolicited tender offers became friendly deals due to negotiation between the acquirer and the target following the Guidelines:

- Nidec Corporation's acquisition of Takisawa Machine Tool Co Ltd in 2023.
- Dai-ichi Life Holdings Inc's acquisition of Benefit One Inc in 2023 (prior to this acquisition being announced, another tender offer for Benefit One Inc's shares by M3 Inc had already commenced).

Conversely, in the following cases the targets opposed the acquisition offers following the Guidelines:

- The 2023 attempt to acquire Toyo Construction Co Ltd by Godo Kaisha Yamauchi-No.10 Family Office and Kabushiki Kaisha KITE.
- Brother Industries Ltd's attempt to acquire Roland DG Corporation in 2024. Prior to this acquisition attempt being announced, an MBO offer had already commenced.

Outline of Offer

Bid Planning

If a friendly takeover offer is being considered, there are generally no special considerations. However, in a hostile takeover, the acquirer should be prepared to make a bona fide offer that complies with the requirements in the Guidelines.

Due Diligence

Recommended Bid Due Diligence Approach

A bidder generally undertakes business, accounting, tax, and legal due diligence. In some cases, specific additional types of due diligence are undertaken (for example, environmental, IT, or intellectual property (IP) due diligence). The bidder and the target agree on the information and documents to be provided in addition to those in the public domain.

Hostile Bid Due Diligence Approach

In general, a bidder's due diligence is based on publicly available information.

Public Domain

There are several different sources of public information:

- The commercial register: this contains the following information on all companies:
  - the company's purpose;
  - the trade name;
  - the amount of stated capital;
  - the total number of issued shares, the classes of shares, and the number of shares in each class;
  - if a transfer of shares requires the company's approval, the commercial register also includes the transfer provisions in the articles of incorporation;
  - the company's organisational bodies;
  - the directors' names; and
  - the method(s) used by the company to provide public notices and other information.

  (Article 911.3, CA.)
- The accounts: the following are publicly available:
  - the target's balance sheet (balance sheets of a stock company (*kabushiki kaisha*) are made public through a public notice or its website) (Article 440, CA); and
  - income statements for a large company (a company with a stated capital of JPY500 million or more, or liabilities of JPY20 billion or more) (Article 440, CA).

- The annual and quarterly (or semi-annual) securities reports: listed companies, OTC companies, and certain other companies must file annual securities reports and quarterly securities reports (or semi-annual reports). Annual securities reports contain the following information:
  - an outline of the company, including changes in major business indices, the company's history, the structure of the business, the status of related companies, and the number of employees;
  - the condition of the business, including problems to be resolved, and risk factors; its management's analysis of its financial situation, business performance, and cash flow; and its material contracts and research and development activities;
  - the condition of the company's facilities, including an outline of its business investments, the condition of its principal facilities, and plans for installation or removal;
  - information about shares (including the total number of shares, changes in the number of issued shares and capital, types of shareholders, and major shareholders), acquisition of treasury shares, dividend policy, changes in share price, directors' and officers' shareholdings, and corporate governance information; and
  - accounts, including consolidated financial statements and financial statements.

(Article 24, FIEA.)

It is also possible to obtain information about a rights plan that acts as a defence measure against hostile bids from annual securities reports.

Quarterly securities reports (or semi-annual reports) contain similar information to that contained in the annual securities reports (Articles 24-4-7.1 and 24-5.1, FIEA).

In addition, the articles of incorporation are attached to the annual securities reports and can be inspected by anyone.

- Extraordinary reports: a company that must file an annual securities report must also file an extraordinary report with the Prime Minister, without delay, if it intends to make a tender offer or secondary offering in a foreign country, or if so required under *Cabinet Office Order on Disclosure of Corporate Affairs (Ministry of Finance Order No. 5 of 1973)* (COODCA) (Article 24-5.4, FIEA). COODCA requires an extraordinary report in the following cases:
  - a change of the company's major shareholder;
  - a disaster affecting the company; and
  - a decision to undertake a stock-for-stock exchange, stock transfer, company split, merger, or business transfer.

  The extraordinary report serves as the means of publicising those events (Article 25, FIEA).
- The large shareholder report system (see *Disclosure Requirements*).
- Timely disclosure: disclosure regulations of the stock exchanges or securities dealers' associations require that listed companies and OTC companies make timely disclosure to investors of information that may impact their investment decisions. Information to be disclosed includes the following:

    - certain actions of a company or its subsidiaries, including capital reductions, stock-for-stock exchanges, stock transfers, company splits or mergers, business transfers, and dissolution;
    - significant facts affecting the company or its subsidiaries, including damage caused by a disaster or occurring in business operations, major shareholder changes, and any events that may cause de-listing; and
    - account settlement by the company or its subsidiaries.

  (Securities Listing Regulations of TSE.)

- Corporate governance reports: listed companies must file corporate governance reports providing investors with information on corporate governance in a comparable format. The reports must contain the following information:
    - basic views on corporate governance, capital structure, corporate attributes, and other basic information;
    - business management organisation and other corporate governance systems regarding decision-making, execution of business, and managerial oversight;
    - implementation of measures for shareholders and other stakeholders, including revitalisation of general shareholders' meetings and investor relations activities;
    - matters related to internal control systems; and
    - others (including the adoption of anti-takeover measures and other matters concerning corporate governance systems).

  (Securities Listing Regulations of TSE.)

In addition, listed companies must provide explanations for non-compliance with the principles of *Japan's Corporate Governance Code* in corporate governance reports.

Maintaining Secrecy

There are no rules on maintaining secrecy until the bid is made. However, in recommended bids, confidential agreements mutually obliging the parties to keep matters confidential are often concluded.

Committed Funding

Committed funding is required before announcing an offer subject to the following requirements:

- A bidder must disclose information about funding, including the method of funding, in the tender offer notification (see *Announcing the Offer*).
- A bidder must also file a document indicating that it has the necessary funds for the offer (for example, its bank balance). This must be attached to the tender offer notification.

It is also common practice to consult with the Local Finance Bureau on an informal basis several weeks prior to announcing a tender offer, during which both the method of funding and the sufficiency of funds for the acquisition are examined.

The target's board and special committee (if any) will take the method of funding into consideration when expressing their opinions on the tender offer.

In the Guidelines, financing certainty is mentioned as a factor in considering whether an unsolicited takeover offer is a bona fide offer, and loan certificates and commitment letters are mentioned as documents which can be used to support such financing certainty.

Announcing the Offer

Public Notice of Commencement of Tender Offer

If the bidder making a tender offer is a listed company, it must disclose the following immediately after the board or other decision-making body decides to make the offer:

- The purpose of the purchase.
- A description of the target.
- The tender offer period.
- The purchase price.
- The grounds for calculating the purchase price.
- The number of shares to be purchased.
- Any other matters required by the Security Listing Regulations.

(Article 402(1)x, Securities Listing Regulations of TSE; Part 2, Chapter 1, section 11, Timely Disclosure Guidebook.)

If a bidder must purchase shares through a tender offer due to exceeding a certain ownership threshold (see *Regulation of Public M&A*), it must give a public notice containing information on the following:

- The purpose of the tender offer.
- The purchase price.
- The number of shares to be purchased.
- The tender offer period.
- Any other matters required by *Cabinet Order for Enforcement of the FIEA (Cabinet Order No. 321 of 1965)* (COEF).

(Article 27-3.1, FIEA; Article 9-3, COEF.)

In some cases, the acquirer discloses a document stating that the tender offer is scheduled to commence upon fulfilment of certain preconditions (see *Possible Offer Announcements*).

Filing of Tender Offer Notification

On the same day as the bidder gives the public notice (see *Public Notice of Commencement of Tender Offer*), *Cabinet Office Order on Disclosure Required for Tender Offer for Share Certificates by Persons Other Than Issuers (Ministry of Finance Order No. 38 of 1990)* (COO) requires that it file with the Prime Minister a tender offer notification, setting out:

- The offer conditions (including the grounds for calculating the purchase price).
- Information about funding, including the method of funding, and a document indicating that it has the necessary funds to fulfil the offer (see *Committed Funding*).
- The contents of any agreement in which the bidder, after giving a public notice of commencement of tender offer, agrees to purchase the target's shares by a method other than the tender offer.
- The purpose of the offer. If de-listing is contemplated, this possibility and the reasons for it must also be disclosed.
- Any other matters required by COO.

All documents required by COO must also be attached (Article 27-3.2, FIEA).

A tender offer notification is made public at the Local Finance Bureau and a stock exchange or securities dealers' association (Article 27-14, FIEA).

In addition, it is common practice to consult with the Local Finance Bureau on an informal basis to request that a tender offer notification be reviewed several weeks prior to announcing the tender offer. Therefore, typically, a draft tender offer notification is prepared by that time.

Preparing and Delivering a Tender Offer Statement

A public bidder must prepare a tender offer statement covering matters required in a tender offer notification (see *Filing of Tender Offer Notification*), and other matters prescribed by COO (see *Documents*). COO requires that a public bidder delivers a tender offer statement to any person intending to sell shares (Article 27-9, FIEA).

Tender Offer Period

The bidder must determine the period in which shareholder acceptances are to be filed. This must be between 20 and 60 business days from issuance of the public notice of tender offer commencement (Article 27-2.2, FIEA; Article 8. 1, COEF).

As a general rule, during the offer period, a public bidder cannot purchase target shares other than by the tender offer (Article 27-5, FIEA).

If a competing bid is made during the offer period, the tender offer period can be extended until the final day of the competing tender offer period (Article 13.2 (2), COEF). If the original tender offer period (as stated in the public notice of commencement of tender offer) is less than 30 business days, the target can require that the tender offer period be extended to 30 business days (Article 27-10.3, FIEA; Article 9-3. 6, COEF).

Target's Position Statement

See *Recommended Offers*.

Public Notice of Effects of a Tender Offer

On the day after the last day of the offer period, the bidder must give a public notice of or publicly announce the number of shares applied for in the tender offer and other matters prescribed by COO (Article 27-13.1, FIEA).

Delivery and Other Procedures for Settlement of the Purchase
A notice containing the matters set out in COO, including the number of shares to be acquired by the bidder, must be sent without delay to an accepting shareholder after the offer period ends.

In addition, delivery, settlement, and other procedures must be carried out without delay after the tender offer period (Article 27-2.5, FIEA; Article 8.5, COEF).

These procedures and timetables apply regardless of whether a bid is recommended or hostile.

Distribution of the Announcement

The decision to commence the tender offer will be announced on the date the acquirer's board makes that decision. This decision will be made public through timely disclosure. For details regarding disclosure, see *Public Notice of Commencement of Tender Offer*.

Possible Offer Announcements

Where the acquirer and target agree on implementation of the tender offer, and a certain period of time is required for the procedures mandated under competition law, the acquirer must disclose a document stating that the tender offer is scheduled to commence upon fulfilment of preconditions (such as the completion of such procedures). This document will be announced as of the date of the decision on commencement of the tender. Similar disclosures to those in the tender offer notification are required in such documents (see *Filing of Tender Offer Notification*).

The Guidelines state that when giving prior notice of a planned tender offer, it is advisable for the potential acquirer:

- To have a reasonable basis for actually commencing the tender offer (such as having the financial resources required for the acquisition).
- To disclose specific information that contributes to a better understanding of the market (such as the conditions under which the tender offer will be launched and the scheduled commencement date).

Recommended Offers

The documents prepared by the tender offeror and the target are disclosed separately. However, the target's opinion also is included in the tender offeror's disclosure documents. If a tender offer agreement is reached between the offeror and target, the contents of that agreement must be disclosed in accordance with the FIEA and the timely disclosure rules. Generally, disclosure by both the tender offeror and the target is coordinated to occur simultaneously.

Failed Bid

A bidder is not restricted from launching a new offer or buying shares in the target if it fails to obtain control of the target through a tender offer.

Offer Timetable

Offer Period

The tender offer period must be within a range of 20 to 60 business days from the date of the offeror's public notice announcing commencement of the tender offer (Article 27-2.2, FIEA; Article 8.1, COEF). This procedure remains consistent whether the offer is hostile or recommended.

In friendly tender offers, it is common practice to set a tender offer period of 30 business days, which is based on the Fair M&A Guidelines. In an unsolicited offer, the target has the right to request an extension of the offer period set by the offeror to a minimum of 30 business days if it is initially shorter (as stipulated in Articles 27-10.2.2 and 9-3.6, COEF). However, in practice, the target may also request that the offeror extends the offer period.

See *Tender Offer Period*.

Electronic Communications and Use of Websites

Two methods of public notice for commencement of a tender offer are permitted:

- Publication in a daily newspaper.
- Electronic public notice (*Electronic Disclosure for Investors' NETwork* (EDINET) public notice).

(Article 9-3.1, COEF).

In practice, public notice of tender offer commencement is usually made through EDINET public notice, which is less costly.

Minimum Period for Which Offer Must Remain Open for Acceptance

The tender offer period must be within a range of 20 to 60 business days from the date of the offeror's public notice announcing commencement of the tender offer (Article 27-2.2, FIEA; Article 8.1, COEF).

Revised Offers

Changing tender offer terms and conditions in a way that would disadvantage the tendering shareholders is prohibited. Specific cases in which changes may not be made are as follows:

- Lowering the purchase price.
- Reducing the number of share certificates sought for purchase.
- Shortening the purchase period.
- Increasing the minimum number of shares to be purchased.
- Extending the purchase period beyond 60 business days (with certain exceptions).
- Changing the types of purchase consideration.
- Changing the terms and conditions of tender offer withdrawal.

(Article 27-6.1, FIEA; Article 13.2, COEF.)

A tender offeror can make changes to the purchase terms other than those specified above (Article 27-6.2, FIEA). The specific procedures to be taken in such cases are as follows:

- Publicly announcing the details of the changes to the tender offer conditions during the tender offer period (Articles 27-6.2 and 3, FIEA).
- If the public notice above is made by electronic public notice, giving public notice in a daily newspaper without delay (Article 9-3.3, COEF).
- The purchaser submitting an amendment to the tender offer notification (Article 27-8.2, FIEA).
- Amending the tender offer statement and delivering the amended tender offer statement to those who have already received the tender offer statement (Article 27-9.3, FIEA).

Acceptance Condition

The target's shareholders can tender their shares in the tender offer within the tender offer period set by the tender offeror. If the tender offer results in more shares being tendered than the minimum number of shares to be purchased, such tendered shares will be purchased by the tender offeror.

Interruptions to the Timetable

If a competing tender offer is publicly announced during the tender offer period, the target must consider and announce its opinion on each tender offer. The tender offeror will consider raising the tender offer price based on the competing proposals. In addition, the tender offeror may extend the tender offer period until the last day of the competing tender offer period (Article 13.2.2, COEF).

If the tender offeror is unable to obtain the necessary permissions and so on to acquire share certificates by expiration of the initially set tender offer period, the tender offeror will consider either extending the tender offer period or withdrawing the tender offer. However, the grounds for withdrawal of the tender offer are strictly limited (see *Offer Document*).

Long Stop Date

The maximum tender offer period that an offeror may set is 60 business days (Article 27-2.2, FIEA; Article 8.1, COEF). However, extending the tender offer period beyond 60 business days is permissible under certain exceptional circumstances:

- If an amendment of the tender offer notification is filed after less than ten business days remain in the tender offer period, in principle, the tender offer period must be extended until the day on which ten business days have elapsed from the day the amendment of the tender offer notification is filed (Article 27-8.8, FIEA; Articles 22.1 and 2, COO).
- If a competing tender offer is publicly announced during the tender offer period, the offeror has the option to extend the tender offer period until the last day of the competing tender offer period (Article 13.2.2, COEF).

Stakebuilding

Disclosure Requirements

A holder (including a joint shareholder) of more than 5% of the voting shares (including a holder of options to obtain a shareholding larger than 5%) issued by a listed company (including an OTC company) (large shareholder) must make the following disclosures:

- File a large shareholding report within five business days of the day on which it became a large shareholder (Article 27-23, FIEA).
- File an amendment report within five business days of the day on which its shareholding has increased or decreased by 1% or more after becoming a large shareholder (Article 27-25, FIEA).

The FSA is currently discussing amendments to the FIEA to strengthen enforcement of the large shareholding reporting system.

Regulations
Shareholders with 3% or more voting rights or issued shares can demand to inspect or copy the accounting books and materials (Article 433, CA). These shareholders are classified as corporate insiders.

If a corporate insider becomes aware of a material fact about a listed company when exercising its inspection rights, the corporate insider cannot purchase, sell, assign, or acquire for value any securities of the listed company, until that material fact has been made public (Article 166.1(2), FIEA).

There are two important insider trading regulations that have a significant influence on M&A practices in Japan:

- If the target's officers or employees come to know relevant facts concerning a tender offer, they become " tender offeror related parties" (*koukai-kaitsukesha-tou-kankeisha*) to whom the insider trading regulations apply. In addition, people who receive insider information from those officers or employees are also subject to the insider trading regulations (Article 167.1 (5), FIEA).
- If an entity which decides to launch a tender offer tells another entity information or facts concerning that launch before publication of the offer, the latter is not subject to the insider trading regulations and can launch a tender offer in the following two cases:
    - when the latter publicises certain information or facts concerning the former's launch of a tender offer by a public notice of tender offer comments or a tender offer notification (Article 167.5(8), FIEA); or
    - six months after the latter receives the information or facts from the former (Article 167.5 (9), FIEA).

Purchase Thresholds Imposed by the Code/Takeover Rules/Other

Mandatory Offers
If a party intends to purchase shares of a public company, it must do so by a tender offer in certain cases (Article 27-2.1, FIEA) (see *Regulation of Public M&A*).

In addition, if, after the purchase, the total holding ratio of share certificates increases to two-thirds or more, the bidder must make a mandatory offer for all shares (all types of voting shares) in the target and purchase all shares for which the bidder receives an acceptance (Article 27-13.4, FIEA; Articles 14-2-2 and 8.5(3), COEF).

Consideration
Generally, only cash is offered as consideration in a public takeover.

Legally, there are no special regulations concerning the form consideration must take, so shares (including a bidder's own shares) can be used. However, there have been no tender offers in which shares have been used as consideration. The main reason for this is likely that shareholders cannot benefit from tax credits in a tender offer (unlike in a stock-for-stock exchange).

If a bidder uses its own shares as consideration, continuous disclosure by the bidder is required under the FIEA. Continuous disclosure in Japanese is time-consuming and costly for foreign companies, but continuous disclosure in English has, since 2005, begun to be allowed under certain conditions (Articles 24.8 and 24-5.7, FIEA).

If the bidder is a Japanese company, regulations apply concerning the making of in-kind capital contributions (Article 207, CA) and the issuance of new shares to non-shareholders at a favourable issue price (Articles 199.3 and 201.1, CA), unless certification under the *Act on Strengthening Industrial Competitiveness (Act No. 98 of 2013)* is obtained. Therefore, it is difficult for Japanese companies to use their own shares as consideration in takeover bids.

In a takeover of a listed company by share delivery (*kabushiki kofu*), a tender offer should be made. However, foreign companies are not permitted to use this method (see *Obtaining Control*).

There are no regulations providing for a minimum level of consideration.

There are no additional restrictions on, or requirements for, the consideration that foreign bidders may offer to shareholders.

Irrevocable Undertakings

Bidders often obtain a memorandum of understanding or an undertaking from key shareholders to sell their shares (or to apply for a tender offer).

A listed company must disclose certain matters when an "organ of administrative decision", including a board, decides to make a tender offer or makes another important decision about, for example, its management, operations, or assets (Stock Exchange Rules). Accordingly, a bidder or target may need to disclose that it has entered into a memorandum of understanding and/or certain elements of the agreement (see *Announcing the Offer*).

In addition, under certain conditions, the bidder must disclose an agreement with key shareholders as an important agreement concluded regarding the shares in the tender offer notification (*Announcing the Offer*).

Overseas Shareholders

See *Foreign Ownership Thresholds in Designated Industries*.

Documents

A bidder must provide a tender offer statement to shareholders intending to accept a tender offer and sell their shares (Article 27-9, FIEA) (see *Announcing the Offer*).

The following are the main items required in a tender offer statement:

- The tender offer notification, excluding the name of any financial institution from which the public bidder is borrowing money.
- A statement that the offer is subject to Chapter 2-2, section 1 of the FIEA.

- A statement that the tender offer statement has been made in accordance with Article 27-9 of the FIEA (Article 24, COO).

If a tender offer statement contains a material misstatement or is not delivered, the bidder will be subject to a penalty (Articles 197-2(8) and 200(9), FIEA).

This procedure remains consistent whether the offer is hostile or recommended.

Traditionally, it was not common to have a formal agreement between the bidder and target. This may have been because all agreements between the bidder and target must be disclosed in the tender offer notification (see *Announcing the Offer*).

However, the number of cases in which the bidder and target execute a formal agreement has increased. In those cases, the main issues that are likely to be covered in the agreement include the following:

- The target's obligation to express its affirmative opinion regarding the tender offer and not to solicit or recommend other offers.
- The break fees.
- The fiduciary-out provision (see below).
- The rules governing operations after the tender offer has been completed, including the selection of the target's board members, the target's dividend policy, and the relationship between the bidder and the target.

The target must, under COO, file with the Prime Minister a document stating its position on the tender offer and other matters required by COO (Position Statement) within ten business days of the date of the public notice of tender offer commencement (Article 27-10.1, FIEA) (see *Announcing the Offer*). As a result, the agreement between the bidder and the target can include provisions obliging the target to express its affirmative opinion on the tender offer.

The target's directors must perform their duties with the care of a good manager and owe a duty of loyalty to the company (Articles 330 and 355, CA; Article 644, *Civil Code (Act No. 89 of 1896)*). The board can agree not to solicit or recommend other offers if this is in compliance with its duties. Therefore, if the target makes an agreement with the bidder, it is advisable for the target's directors to establish fiduciary-out provisions in the agreement that allow the target to be released from that agreement if a third party makes a better offer.

Offer Document

A bidder must offer the same terms and conditions to all shareholders (uniform price and proportional distribution) (Article 27-2.3, FIEA). The following conditions are usually attached to a takeover offer:

- The bidder will not purchase:
    - any shares tendered by the shareholders if the number of shares for sale is less than the number it originally planned to purchase (Article 27-13.4, FIEA); or
    - part or any of the tendered shares exceeding the number of shares it originally planned to purchase (Article 27-13.4, FIEA). (However, if the bidder's total holding ratio of share certificates increases to two-thirds or more after the purchase, the bidder must make a mandatory offer for all shares (see *Mandatory Offers*)).

- A tender offer can be withdrawn if an important change takes place in the target's business or property, or if another event seriously hinders the execution of the offer. This only applies in situations set out in a Cabinet order, including where:
    - the target's decision-making body decides to carry out certain actions, including petitioning for bankruptcy, civil rehabilitation, corporate reorganisation, or imposing or sustaining certain defence measures against hostile bids;
    - a situation arises in relation to the target, including the filing of a petition to suspend its business; or
    - a necessary permission from a government body is not obtained before the last day of the offer period, or where bankruptcy or other changes set out in a Cabinet order take place in relation to the bidder.

(Article 27-11.1, FIEA; Article 14, COEF.)

The pre-conditions that may be attached to the tender offer are limited to the above.

As a general rule, the bidder cannot make changes to the offer conditions that are disadvantageous to shareholders that have accepted the offer. However, the bidder can reduce the purchase price, within certain limitations, where the target splits shares or makes a free issue of shares or share warrants, on the condition that this is clearly stated in advance in both the public notice of tender offer commencement and the tender offer notification (Article 27-6.1, FIEA; Article 13.1, COEF) (see *Announcing the Offer*).

Responsibility Statement

In the event of a tender offer, the target board must determine whether to support the tender offer and whether to recommend that shareholders tender their shares.

See *Recommended Offers*.

Buying up Outstanding Minorities

In mergers and stock-for-stock exchanges, an absorbing company or a company that will be a 100% parent after the stock-for-stock exchange can use not only its shares but also any other kind of asset (including money) as consideration for shares of the absorbed company or the company that will be a wholly-owned subsidiary after the stock-for-stock exchange or merger (Articles 749.1(2) and 768.1(2), CA).

A bidder can therefore obtain the shares of the remaining minority shareholders via a merger or stock-for-stock exchange. In this case, the absorbed company or the company that will be a wholly owned subsidiary after the stock-for-stock exchange must publish in advance a document addressing the suitability of the consideration offered (Article 782.1, CA; Articles 182.1(1) and 184.1(1), *Ordinance for Enforcement of the Companies Act (Ordinance of the Ministry of Justice No. 12 of 2006)*).

In addition, a bidder can obtain the shares of the remaining minority shareholders via the following methods:

- Shares subject to wholly call (*zenbu-shutoku-joukoutsuki-kabushiki*).
- Share consolidation (*kabushiki-heigou*).
- Special controlling shareholders' right to demand a share sale (*kabushikitou-uriwatashi-seikyu*).

Employee Consultation

There are no laws requiring that a target's board inform or consult its employees about an offer.

Target's Response

Preparing for a Hostile Bid

Pre-Bid

A target's board can take the following defensive actions, depending on the situation:

- Introduce a rights plan using share warrants (with discriminatory conditions under which only certain shareholders can execute the warrant).
- Issue a class of shares with, in effect, powers of prevention. That is, a resolution of a shareholders' meeting of the holders of this class of shares is required to approve a merger, election, or removal of directors (Article 108.1(8), CA), or an issuance of shares with multiple voting rights to an amicable third party in advance (Article 108.1(3), CA).
- Amend the articles of incorporation so that the company can impose restrictions on the shareholders' meeting's approval of a merger or the removal of directors (limited to cases where the directors are elected under Articles 342.3 to 342.5 of the CA). In particular, the company can require approval of over two-thirds of the attending holders of voting shares (the default requirement is approval of at least two-thirds of these shareholders) (Article 309.2 (7), CA).

In practice, listed companies cannot use defensive measures if the TSE believes that they unreasonably restrict shareholder rights or the exercise of these rights (Article 601.1 (17), Securities Listing Regulations of TSE). The company will be de-listed if it introduces these kinds of measures.

It should be noted that since the Guidelines contain a code of conduct for directors in the event of a bona fide offer, the target's board is effectively obligated to adhere to it.

Post-Bid

The following measures are considered defence measures but almost all of them have legal concerns and limited effects:

- **A significant increase in dividends.** This decreases a bidder's incentive to obtain control of the target by removing liquid assets.
- **A reduction of capital or fund reserves with compensation.** This has an effect similar to a significant increase in dividends.
- **Issuing new shares to an amicable third party.** This aims to increase the funds required to obtain control of the target by increasing the number of shares issued. A company issues new share warrants to all shareholders with discriminatory conditions, so a hostile bidder cannot execute the warrant (among other things).
- **Merger.** This increases the funds required to obtain control of the target by increasing the number of shares issued.

- **Forming a joint holding company with an amicable company by a stock transfer, or acquiring an amicable company by a stock-for-stock exchange.** This increases the funds required to obtain control of the target (or its successor company) by increasing the number of shares issued.

In past decisions the Supreme Court of Japan has generally respected the judgment of the shareholders' meeting concerning the use of defensive measures against hostile bids.

Following the introduction of the Guidelines, the number of hostile bids is expected to increase. In the following cases in 2023, unsolicited tender offers became friendly deals due to negotiation between the acquirer and target following the Guidelines:

- Nidec Corporation's acquisition of Takisawa Machine Tool Co Ltd in 2023.
- Dai-ichi Life Holdings Inc's acquisition of Benefit One Inc in 2023.

Internal Housekeeping

It is important that the target's directors understand the code of conduct for directors and boards of directors regarding acquisitions as set out in the Guidelines.

Looking out for Dealings in Shares

Prior to commencing a tender offer, the tender offeror and its officers and employees should be aware of the insider trading regulations.

During the tender offer period, the tender offeror and any affiliated persons (as defined in the FIEA) must not purchase target shares other than through that tender offer (Article 27-5, FIEA).

Marshalling Defences

An effective means of preventing a hostile bid from acquiring target shares is a competing offer by a third party friendly to the target's management (white knight). There are no regulations prohibiting requests for white knights.

Defence, Strategy, and Tactics

For a description of the main defensive strategies and tactics, see *Preparing for a Hostile Bid*.

Recommended Offers

In the event of a tender offer, the target's board must determine whether to support the tender offer and whether to recommend that shareholders tender their shares.

The target must issue a press release regarding the expression of such opinion on the date of the board resolution (Article 402(1)y, Securities Listing Regulations of TSE; Part 2, Chapter 1, section 12, *Guidebook for the Timely Disclosure of Corporate Information, Tokyo Stock Exchange, Inc*). The following are the main items required in the press release:

- An outline of the tender offeror.

- The tender offer price.
- The details, basis, and reasons for the opinion concerning the tender offer.

In addition, the target must provide its position statement within ten business days from the date of the public notice of tender offer commencement. However, in practice, it is generally submitted on the same date as the public notice of tender offer commencement (Article 27-10.1, FIEA; Article 13-2.1, COEF). The following are the main items required in the position statement:

- An outline of the tender offeror.
- The type of shares to be purchased by the tender offeror.
- The details, basis, and reasons for the opinion concerning the tender offer.

Directors' Duties

A target's tender offer opinion can be broadly described as covering:

- Approval or disapproval of the tender offer.
- Whether to recommend that shareholders tender their shares.

It is understood that a target's directors must consider the common interests of shareholders when expressing such an opinion as part of the duty of care of a good manager.

Offer-Related Arrangements

It is uncommon for the target or bidder to agree to pay a break fee if a bid is not successful. One reason for this is that a target and bidder cannot control whether a bid succeeds.

However, there has been an increase in the number of cases in which the target agrees with the bidder to express an affirmative opinion on the offer and not to solicit or recommend other offers (see *Documents*). The agreement can provide that if the target breaches this requirement, it must pay a break fee.

Regulatory Restrictions

Merger Control

Mergers, company splits, joint share transfers, business acquisitions, and share acquisitions that will substantially restrain competition in a particular market are prohibited under the AMA (see *Statute and Regulation*). The AMA is enforced by the *Japan Fair Trade Commission* (JFTC). If such transactions are assessed as restraining competition, the JFTC can order the entity concerned to dispose of all or part of its stock, to transfer a part of its business, or to take any other measures necessary to remedy the situation (Article 17-2, AMA).

Where mergers, company splits, joint share transfers, and business acquisitions meet certain thresholds, the parties concerned must file a pre-merger notification or a pre-acquisition notification with the JFTC, and the parties cannot complete the transaction until 30 days have passed from the date that the JFTC accepted the notification (Articles 15, 15-2, 15-3, and 16, AMA). Under the AMA, this also applies to share acquisitions that meet certain thresholds (Article 10, AMA). This applies not only to share purchase transactions (including tender offers), but also to issuances of shares for subscription and stock-for-stock exchange transactions.

In a tender offer, if the 30-day waiting period has not ended by the last day of the tender offer period, the tender offer can be withdrawn, on the condition that this withdrawal is expressly provided for in the public notice of tender offer commencement and the tender offer notification (see *Offer Document*). However, the FSA has announced that the bidder must arrange for the waiting period to end by the last day of the tender offer period when it determines any of the following:

- Start date of the tender offer.
- Filing date of the pre-acquisition notification.
- Period of the tender offer.

There have been an increasing number of cases where it is likely that competition law clearances in each country will take a long time. As a result, the bidder and target announce that they will make a tender offer if they obtain clearance under all applicable competition laws, and launch the tender offer once they have obtained clearance. Therefore, competition law is a significant factor when considering the time schedule.

For a flowchart overview of the notification process and typical form of a merger inquiry in Japan, see *Japan Merger Notifications Flowchart*.

To view and customize comparison charts on merger control, see *Quick Compare Chart, Merger Control*.

Regulated Industries

Approvals in the Banking and Insurance Sectors

An entity intending to hold more than a certain percentage (generally 20%) of the voting rights in a bank must obtain approval from the Commissioner of the FSA (Articles 2.9, 52-9.1, and 59.1, *Banking Act (Act No. 59 of 1981)*).

Approval must be obtained by, at the latest, purchase settlement. If the entity concerned does not do this, it is subject to administrative fines (Article 65(14), Banking Act).

It takes at least one month from the application date to obtain approval (or at least two months for certain banks designated by the Commissioner of the FSA) (Article 40, *Ordinance for Enforcement of the Banking Act (Ordinance of the Ministry of Finance No. 10 of 1982)*). For practical reasons, the entity should take the following steps:

- Consult with the FSA before issuing the public notice of tender offer commencement (see *Announcing the Offer*).
- Apply for approval in the early stages of the transaction.

Similar regulations apply to insurance companies (Article 271-10.1, *Insurance Act (Act No. 56 of 2008)*).

Other Approvals

On 28 June 2019, the Ministry of Economy, Trade, and Industry issued the Fair M&A Guidelines These mainly focus on management buyouts and acquisitions of controlled companies by controlling shareholders, and set out best practice procedures for achieving fair M&A in Japan. The guidelines include both:

- Specific, practical, and functional measures for ensuring that M&A is conducted using fair procedures.
- The typical measures generally considered to be highly effective in achieving fair M&A, for example, establishing an independent special committee.

The guidelines do not carry the force of law, but have a strong influence on M&A practices in Japan. In particular, special committees are commonly organised in tender offers involving a squeeze-out. The arrangement and terms are rigorously reviewed by the special committee and comprehensively negotiated with the target and/or special committee. Normally, if the special committee does not agree to the transaction, it will not be endorsed by the board as the Fair M&A Guidelines recommend. Therefore, from the acquirer's perspective, it is essential to convince the special committee of the fairness of the transaction. The process generally takes approximately one to two months, while some complicated cases take longer.

Foreign Ownership

Approvals for Listed Companies in Regulated Industries

If a foreign company intends to obtain 1% or more of the shares in a listed company operating in certain regulated industries, it must give prior notice to the Minister of Finance and the minister in charge of the relevant industry (Articles 26.2(3) and 27, FEFTA). These industries include aircraft, weapons, atomic energy, and space development.

Where prior notice is necessary, the foreign company generally cannot invest until 30 days after the date on which the notification was received (this can be extended to up to five months by the relevant ministers). The Minister of Finance and the minister in charge of the relevant industry can recommend that the foreign company alter the scope of the investment or suspend it on national security grounds (Article 27, FEFTA; Article 3, *Cabinet Order on Inward Direct Investment, etc (Cabinet Order No. 261 of 1980)*).

Where prior notice is unnecessary, if a foreign company intends to obtain 10% or more of the shares in a listed company, it must notify the Minister of Finance and the minister in charge of the relevant industry (with several exceptions) by the fifteenth of the month following the month in which the acquisition took place.

Foreign Ownership Thresholds in Designated Industries

Other significant restrictions on the foreign ownership of shares of companies operating in designated industries are as follows:

- The *Act on Nippon Telegraph and Telephone Corporation, etc* (NTT Act) provides that foreign entities cannot hold one-third or more of the voting rights in the NTT (Article 6, NTT Act).
- Under the *Radio Act (Act No. 131 of 1950)*, a radio station licence (which is necessary for broadcasting) cannot be granted to a company where foreign entities hold one-fifth or more of the voting rights (Article 116, Radio Act).
- Under the *Civil Aeronautics Act (Act No. 231 of 1952)*, approval of the Minister of Land, Infrastructure, Transport, and Tourism (which is necessary to conduct air transport business) cannot be granted to a company where foreign entities hold one-third or more of the voting rights (Articles 4.1(4) and 101, Civil Aeronautics Act).

Blocked Transactions

A recommendation to discontinue an investment, based on the FEFTA has been issued only once in relation to the investment by TCI, a British investment fund, in J-Power Corp, which owned nuclear power plants.

Exchange Control Restrictions

For a repatriation of profits exceeding JPY30 million, a report on payment or receipt of payment must be submitted after the event (Article 55, FEFTA; Article 18-4.1, Cabinet Order Concerning Foreign Exchange and Foreign Trade; Article 1, Ministerial Order Concerning Report of Foreign Exchange and Foreign Trade).

The department to which the report must be submitted and the relevant time limits, vary depending on factors including the payment method. It is therefore advisable for an entity to consult with the Bank of Japan on a case-by-case basis.

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