

**International  
Comparative  
Legal Guides**



# **Mergers & Acquisitions**

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**glg** Global Legal Group

# Expert Analysis Chapter

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## How May Companies React to Takeover Offers by Controlling Shareholders?

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# Japan

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## 1 Relevant Authorities and Legislation

### 1.1 What regulates M&A?

#### Companies Act

The Companies Act regulates stock purchases, mergers, share exchanges, share deliveries, company splits, issuances of shares for subscription and assignments of businesses.

#### Financial Instruments and Exchange Law

The Financial Instruments and Exchange Law (the “FIEL”) regulates tender offers and certain disclosure requirements.

#### Anti-Monopoly Law

Stockholdings, mergers, company splits and assignments of businesses that will substantially restrain competition in a particular market are prohibited under the Anti-Monopoly Law (the “AML”).

#### Securities Listing Regulations

The Securities Listing Regulations (the “SLR”) of each stock exchange regulate issuances of shares for subscription, transactions involving controlling shareholders and certain disclosure requirements.

### 1.2 Are there different rules for different types of company?

The rules for large-volume possession reports and the SLR apply where the target company is a listed company. Tender offer rules apply not only to a listed company but also to a company that is obliged to file an annual securities report under the FIEL. If a company is organised under the Companies Act, the rules applicable thereto under said Act do not differ according to the type of company. The AML also provides essentially the same rules for different types of company.

### 1.3 Are there special rules for foreign buyers?

Under the Foreign Exchange and Foreign Trade Law (the “FEFTL”), when a foreign investor obtains shares of a listed company or a non-listed company that operates a designated business that is likely to impair national security, such as weapons, aircraft, nuclear power, space development, or related electric devices or software industries, and, in the case of a listed company, the total shareholding ratio of the foreign investor and its affiliated entity(ies) (as defined in the Cabinet Order) is

1% or more after the purchase (and in the case of a non-listed company, there is no threshold), the foreign investor, in principle, must provide prior notification to the Minister of Finance and the minister in charge of the relevant industry, and the foreign investor cannot obtain such shares until 30 days after the notification is received by the ministers. In certain situations prescribed in the FEFTL, the Minister of Finance and the minister in charge of the relevant industry may advise or order to stop or modify the investment. However, subject to compliance with certain requirements: (a) foreign financial institutions operating with a licence under the relevant laws are exempted from the requirement for such prior notification in the cases of (i) acquisition of shares of a listed company, and (ii) acquisition of shares of a non-listed company that does not operate a business that is highly likely to threaten national security; and (b) other foreign investors, except for foreign governments, entities owned by foreign governments (other than those authenticated by the Minister of Finance), etc., are also exempted from such requirement in some cases.

Even if prior notification is not required, in many cases, the foreign investor must notify the Minister of Finance and the minister in charge of the relevant industry, via the Bank of Japan, within 45 days of such acquisition taking place.

Furthermore, there are other restrictions on capital injections by foreign entities in specified industries, as explained in (i) and (ii) of the first part of question 1.4.

### 1.4 Are there any special sector-related rules?

#### Main restrictions regarding capital injections

- (i) Under the Nippon Telegraph and Telephone Corporation Law, foreign entities cannot hold one-third or more of the voting rights in the Nippon Telegraph and Telephone Corporation.
- (ii) The Radio Law provides that a radio station licence cannot be granted to a company where foreign entities with shares in the company hold one-fifth or more of the voting rights of the company.
- (iii) If an entity intends to obtain over one-fifth of the voting rights of a banking company, an insurance company or a company operating a stock exchange, it must obtain approval from the Prime Minister.

#### Approvals and licences in relation to mergers, company splits and assignments of business

- (i) If a banking company, an insurance company or a trust company intends to become a party to a merger, company split or assignment of business, it must obtain approval from the Prime Minister.

- (ii) Many other types of companies operating a business that requires approvals or licences may be required to obtain a new approval or licence for a surviving entity.

### 1.5 What are the principal sources of liability?

If a person gives public notice of the commencement of a tender offer, files a registration statement for a tender offer, or makes any other representations containing false statements on any material matter or omitting a material fact that must be stated or a fact necessary to avoid misleading any third party, the person may be liable to pay damages to a third party based on such a false statement or omission. In some cases, such a person, or a person who fails to give public notice of the commencement of a tender offer or file a registration statement for a tender offer, may be penalised by imprisonment and/or a fine under the FIEL.

A person who (a) files large-volume possession reports containing false statements on any material matter, or (b) fails to file large-volume possession reports, may be penalised by imprisonment and/or a fine under the FIEL.

A person who has been informed of any non-public material fact relating to a listed company by any corporate insider (including upon negotiations with the target company) and trades shares of the company before such material fact has been made public may be penalised by imprisonment and/or fines under insider trading rules. In such circumstances, it is therefore necessary for the bidder to cause the target company to disclose such material fact on or before commencement of the tender offer, in order that the contemplated tender offer can be closed legally.

Unjust trading, dissemination of rumours, trading by fraudulent means, committing assault or intimidation, and market manipulation are also prohibited under the FIEL. A person who acts in violation of these restrictions may be penalised by imprisonment and/or a fine.

The FIEL also mandates administrative monetary penalties for acts such as: (a) providing false statements in, or failing to give or file, a public notice regarding the commencement of a tender offer, a registration statement for a tender offer, or large-volume possession reports; (b) insider trading; (c) dissemination of rumours; (d) trading by fraudulent means; and (e) market manipulation, etc.

## 2 Mechanics of Acquisition

### 2.1 What alternative means of acquisition are there?

#### Stock purchase/tender offer

See question 2.5.

#### Merger

Shareholders of the absorbed company are usually allotted shares in the surviving company, but cash and other assets of any kind (including shares of the surviving company's parent company) may be allotted to shareholders of the absorbed company in a cash-out merger or the equivalent of a triangular merger under the Companies Act.

#### Share exchange

A company can make another company its wholly owned subsidiary by means of a share exchange. Shareholders of what will become the wholly owned subsidiary are usually allotted shares in what will become the absolute parent company, but cash and other assets of any kind (including shares of what will become the absolute parent company's parent company) may be allotted

to shareholders of what will become the wholly owned subsidiary in order to conduct a cash-out share exchange or triangular share exchange under the Companies Act.

#### Share delivery

A company can make another company its subsidiary (including a wholly owned subsidiary) by means of a share delivery. Shareholders of what will become the subsidiary are allotted shares in what will become the parent company, and cash and other assets (of any kind) may be allotted to the shareholders of what will become the subsidiary, in addition to shares in what will become the parent company.

#### Company split

An absorption-type company split or an incorporation-type company split can be used so that all or a part of the rights and obligations related to a business may be succeeded by another company or a newly incorporated company.

#### Issuance of shares for subscription

An acquiring company can enter into a subscription agreement with a target company and receive new shares issued by the target.

#### Assignment of business

An acquiring company can take over all or a part of a target's business.

### 2.2 What advisers do the parties need?

The parties generally need a financial adviser, legal counsel, tax counsel, a certified public accountant and other advisers as necessary.

### 2.3 How long does it take?

#### Stock purchase

Under the AML, if a company whose total domestic sales amount ("Total Domestic Sales Amount"), together with that of any entity that controls, is controlled by, or is under common control with the company (together, its "Corporate Group"), calculated by the method prescribed by the Fair Trade Commission (the "FTC") rules, exceeds 20 billion yen intends to obtain voting shares of another company whose Total Domestic Sales Amount with its subsidiaries, calculated by the method prescribed by the rules of the FTC, exceeds 5 billion yen, and the total shareholding ratio of the investing company and its Corporate Group exceeds 20% or 50% after the purchase, then such company must give prior notification to the FTC. There is a 30-day waiting period (which may be shortened by the FTC when necessary) from the filing of the formal notification to the closing of the transaction. The same rules shall apply not only to stock purchase transactions (including tender offers), but also to issuances of shares for subscription.

When the FTC requests the notifying corporation to submit reports, the period when the FTC may give notice prior to a cease-and-desist order shall be extended from 30 days to 120 days after the date of receipt of the prior notification or 90 days after the date of receipt of all reports, whichever is later.

#### Tender offer

The tender offer period generally must be between 20 and 60 business days under the FIEL.

#### Merger/share exchange/share delivery/company split/assignment of business

The transaction parties must, in principle, obtain approvals at a shareholders' meeting of each party (in the case of a share



delivery, a shareholders' meeting of what will become the parent company) (see question 2.14); if a party is a listed company, in practice, it takes at least two months to complete the required procedures, such as determining the shareholders recorded in the shareholder register, convening and holding the shareholders' meeting, and conducting certain procedures for creditors' objections and appraisal rights of opposing shareholders, etc. To save time, these procedures can take place concurrently with the shareholders' meeting.

With respect to mergers, company splits, share exchanges, share deliveries, and assignments of business, if a company whose Total Domestic Sales Amount exceeds 20 billion yen intends to purchase from another company business(es) with domestic sales in excess of 3 billion yen, or to merge or de-merge with a company whose Total Domestic Sales Amount exceeds 5 billion yen, or in certain other cases, then one or more parties to the transaction must generally give prior notification to the FTC under the AML, unless the transaction is between a company and its Corporate Group. The waiting period is the same as in the stock purchase transaction above.

#### Issuance of shares for subscription

If a public company that is obliged to file an annual securities report allots to a third party new shares in the same class as shares already allocated, and in certain other cases, the company is required to file a security registration statement with the Director General of the Jurisdictional Local Finance Bureau, and the company, in principle, cannot make an offer until 15 days (or in some cases seven days) have passed from the day on which the filing is completed under the FIEL and the Cabinet Order.

The issuance of shares for subscription by a public company, in principle, requires only a resolution of the company's board of directors. However, if: (i) the issue price is especially favourable to the subscriber; (ii) classified shares are issued in conjunction with an amendment to the issuer's articles of incorporation; or (iii) with respect to a third-party allocation of new shares whereby such third party will hold more than one-half of the votes of all shareholders, shareholders having no fewer than one-tenth of the votes of all shareholders object to such third-party allocation, it is necessary for the issuer to obtain approval at its shareholders' meeting; with respect to a listed company, in practice, it takes approximately two months before a shareholders' meeting can be held.

#### 2.4 What are the main hurdles?

These include executing the agreements for the transaction, obtaining approval at the shareholders' meeting, and negotiating and consulting with the relevant authorities.

#### 2.5 How much flexibility is there over deal terms and price?

There are no rules that provide for a minimum offer price.

Under the FIEL, if a party intends to purchase shares of listed companies or other companies that must file an annual securities report outside of the stock exchange market, the purchases in the following cases must be made by tender offer:

- (a) the aggregate number of voting rights held by the buyer and any affiliated persons (as defined in the FIEL and the Cabinet Order) divided by the total number of voting rights of the target (the "Total Voting Ratio") after the purchase to be made outside of the stock exchange market exceeds 5% (excluding the case in which the aggregate number of

sellers under the contemplated share purchase and other sellers of shares to the purchaser that traded outside of the stock exchange market within 60 days prior to the day of the purchase does not exceed 10 persons);

- (b) the aggregate number of sellers under the contemplated share purchase to be made outside of the stock exchange market and other sellers of shares to the purchaser that traded outside of the stock exchange market within 60 days before the day of the contemplated share purchase does not exceed 10 persons, and the Total Voting Ratio exceeds one-third after the purchase;
- (c) the purchase is made according to certain methods of purchase prescribed by the Commissioner of the Financial Services Agency (including purchasing through the Tokyo Stock Exchange Trading Network System), and the Total Voting Ratio exceeds one-third after the purchase;
- (d) within any three-month period (i) over 5% of the voting shares are purchased according to certain methods of purchase prescribed by the Commissioner of the Financial Services Agency or outside of the stock exchange market (including purchases made in the over-the-counter security market), (ii) in total, over 10% of the voting shares are obtained through purchases inside and outside of the stock exchange market or issuance of shares for subscription, and (iii) the Total Voting Ratio exceeds one-third after the purchases or the issuance;
- (e) during the period in which another purchaser makes a tender offer for the shares, and a person whose Total Voting Ratio exceeds one-third intends to purchase over 5% of the shares of the listed company, etc.; or
- (f) certain other cases prescribed in the Cabinet Order.

With respect to the deal conditions and termination, see questions 7.1 and 7.2.

A shareholder who tenders can cancel a tender at any time during the tender offer period.

#### 2.6 What differences are there between offering cash and other consideration?

##### Stock purchase/tender offer

A purchaser can use securities as consideration for a purchase. However, to do so, the purchaser may have to: (i) obtain approval at a shareholders' meeting for an issuance at an especially favourable issue price; and (ii) conduct in-kind capital contribution procedures. In addition, in the case of a tender offer, the offeror may have to (iii) file a security registration statement for a public offering. However, a purchaser may be able to avoid the requirements of (i) and (ii) above, under the Industrial Competitiveness Enhancement Act (the "ICEA").

##### Merger/share exchange/share delivery/company split

With respect to mergers, share exchanges, and company splits, if the parties use only stock (including a parent company's shares in the case of a triangular merger, etc.), in principle, taxation on the capital gains of target shareholders can be deferred, but taxation on cash-out-mergers, etc., or mergers that use other consideration cannot be deferred unless the surviving company, etc. has no fewer than two-thirds of the shares of the target company. Please note that if the requirements for a qualified (tax deferred) group reorganisation as set out in the Corporate Taxation Law are fulfilled, taxation on the gains and losses on the transfer of the absorbed company or the wholly owned subsidiary's assets and liabilities can be deferred.

With respect to share deliveries, if the value of the stock delivered to target shareholders is equal to or exceeds 80% of the

value of all consideration delivered to such target shareholders, taxation on the capital gains of target shareholders can be deferred.

Under the FIEL and the Cabinet Order, if parties intend to use stock as consideration, a security registration statement for corporate reorganisation must be filed with the Director General of the Jurisdictional Local Finance Bureau in certain cases set out in the FIEL.

#### Issuance of shares for subscription

If a person makes an in-kind capital contribution, an investigation procedure by an inspector appointed by a court for evaluation of the asset in-kind is generally required, except in certain limited circumstances, and the procedure takes more than one month in practice. Therefore, consideration for issuance of shares for subscription is usually cash.

#### 2.7 Do the same terms have to be offered to all shareholders?

The stock purchase price for a tender offer must be the same for all shareholders.

With respect to mergers, share exchanges and share deliveries, the surviving company, the absolute parent company or the parent company must allot the same consideration *pro rata* to the number of shares owned by the shareholders in the absorbed company, the wholly owned company or the subsidiary.

#### 2.8 Are there obligations to purchase other classes of target securities?

When a bidder purchases non-equity securities (provided that the non-equity securities are not prepared so that they may be exchanged with securities with voting rights in the future), tender offer rules do not apply to the transaction.

#### 2.9 Are there any limits on agreeing terms with employees?

No, there are no such limits.

#### 2.10 What role do employees, pension trustees and other stakeholders play?

When a company conducts a corporate split, the assignor must consult with and give notice to employees and labour unions. Also, in some companies, a collective labour agreement sets out the procedures (e.g. prior notification to or sufficient consultation with employees and labour unions) when the companies intend to conduct a merger, corporate split, share exchange or other transaction. In such a case, the companies must comply with the procedures set forth therein. Pension trustees do not usually play significant roles in M&A transactions. If agreements with customers, contractors or stakeholders contain change-of-control clauses, the target company (and the acquiring company) usually tries to obtain prior consent from such customers, contractors or stakeholders.

#### 2.11 What documentation is needed?

##### Tender offer

- Public notice of the commencement of a tender offer and registration statement for a tender offer (see question 4.3).

- Tender offer explanatory statement.
- Notice of the purchase.
- Public notice of the number of tendered shares and tender offer report.

##### Merger/share exchange/share delivery/company split

- Agreement with respect to the merger, share exchange, company split, or share delivery plan that provides the terms and conditions for the transaction.
- Security registration statement (in certain cases set out in the FIEL).
- Certain documents subject to advanced disclosure, including the relevant agreement or share delivery plan.
- Public notice in relation to the procedures for creditors' objections.
- Certain other documents regarding matters subject to disclosure after the execution of the transaction.
- Notice in relation to the appraisal rights of opposing shareholders.

##### Issuance of shares for subscription

- Share subscription agreement or share application certificate, etc.
- Security registration statement (in certain cases set out in the FIEL).

#### 2.12 Are there any special disclosure requirements?

The special disclosure requirements are as follows:

- Timely disclosure is required according to the SLR (see question 4.3).
- An extraordinary report must be filed (in certain cases set out in the FIEL).
- Large-volume possession reports are required for shareholders who own more than 5% ("Large Holders") (see question 5.3).

#### 2.13 What are the key costs?

The key costs of an M&A transaction consist of the premium paid to the target company or target shareholders and the fees for advisers, including the cost of the due diligence review.

#### 2.14 What consents are needed?

The following consents are required:

- In principle, a merger, share exchange, or company split must be approved at a shareholders' meeting of each party, and a share delivery must be approved at a shareholders' meeting of the parent company. In addition, in principle, an assignment of business must be approved at a shareholders' meeting of the assignor (and the assignee in the case of assignment of all of the business of the assignor) (see question 2.15).
- In certain cases as set forth in the AML, prior notice of a stock transfer, merger, share exchange, share delivery, company split, assignment of business or issuance of shares for subscription must be filed with the FTC, and clearance must be obtained before the completion of the transaction (see question 2.3).
- An approval or a licence in relation to mergers, share delivery, company splits or assignment of business of certain companies must be obtained (see question 1.4).

## 2.15 What levels of approval or acceptance are needed?

### Stock purchase

In principle, neither party is required to pass a shareholders' meeting resolution to transfer shares. However, a shareholders' meeting resolution is required to transfer shares of a subsidiary company in cases where (i) the book value of the shares of the subsidiary company exceeds 20% of the total asset amount of the parent company, and (ii) the parent company will not hold a majority of the voting rights after the transfer.

### Merger/share exchange/share delivery/company split/assignment of business

In principle, at a shareholders' meeting of each party (with respect to share delivery, at a shareholders' meeting of the parent company), an affirmative vote from shareholders comprising two-thirds or more of the shareholders with voting rights present at the shareholders' meeting is required.

If the total price of: (a) the amount obtained by multiplying the number of shares to be delivered to the shareholders of an absorbed company or a wholly owned company, a subsidiary, or a company effecting a company split by the amount of net assets per share; and (b) the book value of the other consideration offered to the aforementioned shareholders, or a company effecting a company split, does not exceed 20% of the net assets of a surviving company, an absolute parent company, a parent company, or a successor company, approval at a shareholders' meeting of the surviving company, absolute parent company, parent company, or successor company is not required in principle. With respect to an assignment of business, if the consideration offered to the business assignor does not exceed 20% of the total assets of business assignee, approval at shareholders' meetings of the business assignee, in principle, is not required. Also, with respect to a company split and an assignment of business, if the assets succeeded to by the other party do not exceed 20% of the total assets of a predecessor company or business assignor, approval at shareholders' meetings of the predecessor company and business assignor, in principle, is not required (summary merger, etc. (*Kani-Soshikisaiben*)).

With respect to a merger, company split, share exchange and assignments of business, if either party, together with its wholly owned entity(ies), if any, holds 90% or more of the aggregate number of voting rights of another party, approval at a shareholders' meeting of such other party is not required in principle (short-form merger, etc. (*Ryakushiki-Soshikisaiben*)).

### Issuance of shares for subscription

The issuance of shares for subscription by a listed company, in principle, requires only a resolution of the target's board of directors. However, if (i) the issue price is especially favourable to the subscriber, (ii) classified shares are issued in conjunction with an amendment to the issuer's articles of incorporation, or (iii) with respect to a third-party allocation of new shares whereby such third party will hold more than one-half of the votes of all shareholders, shareholders having no fewer than one-tenth of the votes of all shareholders object to such third-party allocation, it is necessary for the target to obtain approval at its shareholders' meeting, generally comprising two-thirds or more of the shareholders with voting rights present at the shareholders' meeting. Also, if a listed company issues new shares that dilute the ratio of existing shares by 25% or more, the company is additionally required to obtain and disclose either (a) an independent third-party (usually a third-party committee) opinion regarding the necessity and reasonability of such issuance, or (b) a confirmation of the decision from the shareholders (e.g. at a shareholders' meeting).

## 2.16 When does cash consideration need to be committed and available?

### Tender offer/issuance of shares for subscription

Consideration is usually cash (see question 2.6). With respect to the issuance of shares for subscription, the subscriber settles consideration at the closing of the issuance of shares for subscription. However, if the target company is a listed company, when deciding on the issuance of shares for subscription, it must state in a timely disclosure that it has confirmed that the buyers have funds available. Therefore, in practice, a buyer needs to prepare available funds when the target company decides to make an issuance. With respect to a tender offer, the offeror settles consideration several business days after the period of the tender offer. However, an offeror needs to state the available funds comprising bank deposits, money that the offeror has borrowed and will borrow, and other ways of raising funds in the registration statement for the tender offer and to attach to the registration statement copies of documents proving the available funds.

### Merger/share exchange

In contrast, consideration is usually (only) stock, but if a buyer intends to squeeze out any remaining shareholders of the target, the bidder can use cash consideration in a cash-out merger or a cash-out share exchange (see question 7.4). In principle, the buyer settles consideration when the transaction closes.

### Share delivery

Consideration must contain stock, and in order to make a deferral of capital gains tax on stock sales available, the amount of the stock must be 80% or more of the total consideration. In principle, the buyer settles consideration when the transaction closes.

## 3 Friendly or Hostile

### 3.1 Is there a choice?

It is possible to engage in a hostile transaction with respect to a stock purchase, a share delivery (except where the transfer of the shares of the target company requires the approval of the target's board of directors), and a tender offer.

In other transactions, a buyer needs to first gain control of a majority of the target's board of directors because the implementation of such transactions requires the approval of the target's board of directors. In order to control the majority of the target's board of directors, a buyer may exercise its shareholder's right to make a proposal, propose the election of a sufficient number of directors of the target company, and launch a proxy fight.

### 3.2 Are there rules about an approach to the target?

Generally, no. However, when a target institutes guidelines against hostile takeovers ("Takeover Guidelines"), a bidder should obey such Takeover Guidelines. Generally speaking, Takeover Guidelines require that a bidder provide information related to the bidder and transaction to the target, and that a bidder wait two to three months for the target to react to the bidder's proposal, as stipulated in the Takeover Guidelines.

### 3.3 How relevant is the target board?

#### Stock purchase/tender offer

Under the FIEL, with respect to a tender offer, the target company must file a position statement report within 10 business days of



the first date of the tender offer period, and its position is generally decided by a board resolution; however, stock purchases and tender offers can be made without the approval of the target board. There are some companies that institute Take-over Guidelines, which generally stipulate that if a target board receives a proposal, the target board will decide whether such a proposal will maximise shareholder value, and announce the terms of the offer and the position of the target board.

#### Share delivery

Approval of the target's board of directors is not required, unless required pursuant to the Articles of Incorporation of the target company.

#### Other acquisition transactions

A board resolution is required in a merger, share exchange, company split, issuance of shares for subscription and assignment of business transactions in order to conclude the agreement for the transaction.

### 3.4 Does the choice affect process?

See question 3.1. Please note that even if the bidder wins a proxy fight, and directors of the target are, or become friendly to, the bidder, a target's shareholder who opposes a merger, share exchange, share delivery, company split or assignment of business in accordance with the Companies Act has the right to make a demand upon the target that the target purchase the shares owned by such a shareholder at a fair price.

## 4 Information

### 4.1 What information is available to a buyer?

#### Commercial register

The commercial register is available at the Regional Legal Affairs Bureau and contains an outline of certain matters for each registered company.

#### Annual, semi-annual and quarterly securities reports

Listed companies and other companies, as prescribed in the FIEL, must file these reports. These reports must contain (i) an outline of the company, (ii) conditions of the business, (iii) conditions of facilities, and (iv) accounting conditions and other information.

These reports can be accessed free of charge on the Internet at the Electronic Disclosure for Investors' Network ("EDINET") provided by the Financial Services Agency.

#### Timely disclosure and extraordinary reports

The SLR of each stock exchange requires that listed companies disclose, in a timely manner, information to investors that may affect their investment decisions. Timely disclosures for the past five years are available on the Internet at the Timely Disclosure Network, with a paid subscription to the Tokyo Stock Exchange (the "TSE"). Extraordinary reports disclose information regarding corporate actions or other important matters that have occurred in relation to the company that are prescribed in the FIEL. Extraordinary reports contain information that is, in some respects, similar to information that must be disclosed in a timely manner, and they can be accessed free of charge on the Internet at the EDINET.

### 4.2 Is negotiation confidential and is access restricted?

It is generally possible to conduct negotiations with a target and/or with target shareholders without any requirement for public disclosure, provided that, where the target company is a listed company, timely disclosure is required if the target company decides, or certain events occur with respect to, material facts concerning the operations, business, assets or securities of the target company that may have a significant impact on the investment decisions of investors.

### 4.3 When is an announcement required and what will become public?

#### Tender offer

In the public notice of the commencement of a tender offer and the registration statement for a tender offer, the following information must be made public at the start of the tender offer: (i) the terms and conditions of the tender offer, including the purpose of the tender offer, the tender offer period, the price and number of shares to be purchased; (ii) information on the offeror and the target; and (iii) the trades or agreements with the target company or target director.

#### Merger/share exchange/share delivery/company split/assignment of business

If a buyer or a target company decides to execute an M&A transaction, the following information must be disclosed in a timely manner: (i) the purpose and summary of the transaction; (ii) the basis of the calculation of the exchange ratio of the consideration (including the opinion of an outside adviser); (iii) a description of the parties; (iv) the status after the transaction; (v) the outline of accounting treatment; and (vi) future prospects.

#### Issuance of shares for subscription

If a target company decides to issue new shares, the following information must be disclosed in a timely manner: (i) an outline of the issuance of new shares; (ii) the reason for the issuance; (iii) the amount of funds to be collected, how and when the funds will be used; (iv) the conception of the rationality of the use of the funds; (v) the rationality of the terms and conditions of the allotment (including the basis for and the detailed contents of the calculation of the issue price and an opinion from a corporate statutory auditor stating that such an issue price is not especially favourable to the subscriber); (vi) a description of the subscriber, the reason why the target chose the subscriber and the retention policy of the subscriber; (vii) the status and the ratio of the major shareholders after the transaction; and (viii) the future prospects of the target company.

### 4.4 What if the information is wrong or changes?

If the information is incorrect or if it changes, the target company and/or the bidder must promptly disclose such change (see question 1.5).

In addition, in principle, the offeror cannot withdraw the offer or cancel the contract for the tender offer after the offeror has served a public notice of the commencement of a tender offer (see question 7.1).

## 5 Stakebuilding

### 5.1 Can shares be bought outside the offer process?

Neither the offeror nor any affiliated persons can, other than by a tender offer, purchase target shares during the tender offer period.

### 5.2 Can derivatives be bought outside the offer process?

Neither the offeror nor any affiliated persons can, other than by a tender offer, purchase share options, bonds with share options or other derivatives prescribed in the Cabinet Order during the tender offer period.

### 5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

See question 4.3.

### 5.4 What are the limitations and consequences?

See questions 1.4 and 2.5. In addition, in cases where a company issues new shares that dilute the ratio to over 300%, or where the controlling shareholder of the company changes and the soundness of the transaction with the new controlling shareholder is materially prejudiced within a period of three years after the transaction, the company may be delisted if the TSE deems it necessary pursuant to the SLR.

## 6 Deal Protection

### 6.1 Are break fees available?

Yes, provided the directors of the target board do not violate their fiduciary duties or offend public order and morals. However, the offeror cannot obtain break fees from the target shareholders.

### 6.2 Can the target agree not to shop the company or its assets?

Yes, provided the directors of the target board do not violate their fiduciary duties.

### 6.3 Can the target agree to issue shares or sell assets?

Yes, with respect to the issuance of share purchase warrants. However, in the *Livedoor-Nippon Broadcasting* case (2005), the Tokyo High Court ruled that such an issuance must be suspended if the company's primary purpose is to: (i) lower the shareholding ratio of a specified shareholder fighting for the control of the company through a hostile takeover; and (ii) maintain and ensure the control of the company by present management or the specified shareholder who supports present management and has actual influence. There are a few exceptions to this rule.

The disposal of crown jewel assets requires approval by an extraordinary resolution at a shareholders' meeting as a business transfer, and gives rise to legal concerns regarding the fiduciary duties of directors.

### 6.4 What commitments are available to tie up a deal?

It is possible to give the right to exclusive negotiation to the preferred bidder before the conclusion of the definitive agreement.

Upon the integration of the Mitsubishi Tokyo Financial Group ("MTFG") and the UFJ Group, UFJ Bank, a wholly owned subsidiary of UFJ Holdings, issued preferred shares to MTFG with veto rights over amendments to the articles of incorporation, mergers, the issuance of shares for subscription, the election and removal of directors and other matters of UFJ Bank in 2004.

## 7 Bidder Protection

### 7.1 What deal conditions are permitted and is their invocation restricted?

The bidder can condition its offer by stating in a public notice announcing the commencement of a tender offer and a registration statement for such a tender offer to the effect that: (i) the offeror will not purchase any tendered shares if the total number of tendered shares is less than the number of shares it plans to purchase; and/or (ii) the offeror will not purchase more tendered shares than it plans to purchase if the total number of tendered shares is greater than the number of shares it plans to purchase; provided, however, that if the offeror intends to obtain a Total Voting Ratio greater than two-thirds by means of a tender offer, the offeror must purchase all of the tendered shares.

In addition, the bidder can withdraw a tender offer in the following cases:

- (a) if any important matter prescribed in the Cabinet Order that seriously hinders the accomplishment of the purpose of the bidder, such as a share split, allotment of shares or share options without contributions, issuance of shares or share options, disposition or assignment of material assets, large amount of borrowing or other important change in relation to the business or property of the target company or failure of the bidder to obtain clearance by the FTC or other necessary permission or approval of an administrative agency, takes place in relation to the target company; or
- (b) if any important change prescribed in the Cabinet Order takes place in relation to the bidder.

However, if a bidder intends to withdraw in the event of (a) above, it is necessary for the bidder to stipulate this in the public notice of the commencement of a tender offer and the registration statement for a tender offer.

In cases where the bidder withdraws a tender offer, the bidder should give public notice of its intention to withdraw the tender offer, the reason thereof and other matters specified by the FIEL and the Cabinet Order, and submit a written withdrawal of tender offer to the Prime Minister.

### 7.2 What control does the bidder have over the target during the process?

The bidder can change certain purchase conditions by serving a public notice during the tender offer period; this excludes changes with respect to a reduction of the purchase price and the number of shares to be purchased, curtailment of the tender offer period, etc.

However, under the FIEL, the bidder can reduce the purchase price if the bidder stipulates in a public notice of commencement of the tender offer and the registration statement for the tender offer that the bidder may reduce the purchase price if the target company conducts a share split, etc., during the tender offer.

### 7.3 When does control pass to the bidder?

Control of the target company will pass to the bidder when the target board is majority-controlled by the bidder after the M&A transaction.

### 7.4 How can the bidder get 100% control?

The bidder may squeeze out any remaining shareholders of the target by taking one of the following measures:

- (1) share exchange with the target company;
- (2) cash-out merger, triangular merger, cash-out share exchange, or triangular share exchange;
- (3) stock purchase after stock transfer or incorporation-type company split;
- (4) consolidation of the target's outstanding shares;
- (5) in the case of a bidder who has acquired no fewer than nine-tenths of the votes of all shareholders (or, if acting pursuant to a "business restructuring plan" or a "special business restructuring plan" that has been approved under the ICEA, a bidder who has acquired no fewer than two-thirds of the votes of all shareholders), a demand that the remaining shareholders sell their shares to the bidder following a resolution of the board of directors of the target; or
- (6) conversion of the target's outstanding shares to special class shares with a call option exercisable by the target company after the tender offer, and the target company exercises the call option with fractional shares allotted to the target's minority shareholders. The target company sells the fractional shares to the bidder with the permission of the court, followed by minority shareholders receiving the proceeds from such a sale on a *pro rata* basis.

## 8 Target Defences

### 8.1 What can the target do to resist change of control?

The target company can, subject to the directors' fiduciary duties, take the following actions under the Companies Act:

- institute a rights plan using share options with discriminatory conditions, under which only certain shareholders can exercise the share options;
- amend its articles of incorporation to alter the necessary requirements for resolutions for the removal of directors or approvals of mergers, etc.;
- grant share options with a call option exercisable by the company and/or a put option exercisable by the shareholder with discriminatory conditions;
- issue new shares or classified shares with veto rights concerning certain transactions to an amicable third party; and
- merge, conduct a share exchange or form a joint holding company by stock transfer with an amicable company.

### 8.2 Is it a fair fight?

Generally, the target board, with the opinion of an outside adviser, decides whether a proposal will maximise shareholder value (see question 3.3).

## 9 Other Useful Facts

### 9.1 What are the major influences on the success of an acquisition?

The most important influences are as follows:

- Communication with the target board.
- Price of the acquisition (including the premium).
- Prospective synergies between the businesses of the target company and the bidder.
- Employee assent and the integration of corporate cultures.

### 9.2 What happens if it fails?

A bidder is not prohibited from making a new offer for the target if its initial bid fails. Alternatively, the bidder can dispose of the shares acquired (in many cases, at a minority discount price). Upon such disposition, if the bidder holds one-third of the voting rights of the target company and would like to dispose of all of such shares, a purchaser must make a tender offer (see question 2.5).

## 10 Updates

### 10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

#### Formulation of "Guidelines for Corporate Takeovers"

In recent years, Japan has experienced an increasing number of deals where acquisition proposals induce other competing proposals from third parties. This trend is raising more complex issues that must be considered and dealt with by boards of directors of target companies.

Taking into account trends including the above, the Ministry of Economy, Trade and Industry formulated the "Guidelines for Corporate Takeovers-Enhancing Corporate Value and Securing Shareholders' Interests" (the "Guidelines"), which present the principles and best practices that should be shared in economic society to form fair M&A rules. An outline of the Guidelines is as follows:

#### (1) Code of conduct for directors and board of directors regarding acquisition proposals

In principle, upon receipt of an acquisition proposal to acquire corporate control, management or directors should promptly submit or report such matter to the board of directors, and the board of directors to which the matter is submitted shall in general give "sincere consideration" to a *bona fide* offer". Further, when the board of directors decides on a direction toward reaching an agreement on an acquisition of the target company, directors should make reasonable efforts to ensure that the acquisition will be based on terms that will secure the interests that shareholders should enjoy, in addition to determining whether the acquisition is appropriate from the perspective of enhancing the company's corporate value.

#### (2) Increased transparency regarding acquisitions

In recent years, in some cases, shares that could affect corporate control were acquired in a short period of time through open-market purchases, which are not subject to the tender offer regulations, and in which information that contributes to shareholder judgment of the merits of an acquisition was not provided. Considering that situation, it is advisable for an acquirer to provide at least the same level of appropriate information to the capital markets and the target company as in the tender offer registration statement in a timely manner and an appropriate

form, such as the purpose of the purchase, the number of shares to be purchased, a summary of the acquiring party, and the basic management strategy post-acquisition. Further, it is advisable for the target company to voluntarily disclose information regarding the board of directors or the special committee on the process in relation to how it considered the proposal and its involvement in the negotiation process with the acquiring party in relation to the transaction terms.

*(3) Takeover response policies and countermeasures*

Takeover response policies may enable shareholders to be furnished with sufficient information and time to consider, equip the board of directors with negotiating power in relation to the acquiring party, and contribute to ensuring shareholders' common interests and transparency by extracting more favourable acquisition terms from the acquiring party or other third parties; however, takeover response policies should not be intended to protect or entrench incumbent management from "parties who are undesirable to the incumbent management".

The invocation of countermeasures based on a response policy should rely on the rational intent of shareholders, since it concerns the corporate control of the company, and should be carried out in a manner based on necessity and proportionality, taking into consideration the principle of shareholder equality, protection of property rights, and prevention of abuse by management to protect its own interests, among other factors.

With respect to introducing a response policy during a normal phase, the predictability of acquiring parties, shareholders, and other stakeholders regarding countermeasures being utilised in the event of an acquisition of more than a certain number of shares can be relatively enhanced.

**Movement toward revision of tender offer regulations and large-volume possession report regulations**

Given the recent changes in the environment of M&A market, such as the increase in hostile acquisitions through open-market purchases and M&A diversification, a working group of experts (the "Working Group") established by the Financial System Council started discussing a revision of the tender offer regulations and large-volume possession report regulations. If a major revision is realised for the tender offer regulations, it would be the first since 2006.

*(1) Tender offer regulations*

(a) Applications for open-market purchases

Under the current rule in Japan, open-market purchases are not subject to the tender offer regulation due to their level of transparency and fairness.

However, in recent years, it has been pointed out that, in some cases, more than one-third of all voting rights are acquired through open-market purchases, in which sufficient information and time necessary for shareholders to make investment decisions is not provided and carries a risk of coercion.

Therefore, whether the tender offer regulations should apply to open-market purchases has been set as one of the main agenda items of the Working Group.

(b) Applications to issue new shares

Under the current rule in Japan, acquisitions of shares through issuances of new shares are not subject to the tender offer regulations. Based on various factors, including the fact that in European countries, tender offer regulations apply to acquisitions of shares through issuances of new shares, the Working Group is discussing whether the tender offer regulations should apply to acquisitions of more than one-third of the voting rights via acquisitions of shares through issuances of new shares.

(c) Lowering threshold of one-third rule

Under the current tender offer regulations, a tender offer bid is required when an acquirer will possess more than one-third of the shares post-acquisition, because if a shareholder possesses one-third of the voting rights, the shareholder can reject special resolutions of the company's shareholders meeting (for details, please see question 2.5 above).

However, taking into account the actual percentage of voting rights exercised, it is possible for a shareholder to reject special resolutions with a percentage of voting rights lower than one-third.

Therefore, one of the agenda items of the Working Group is considering whether to lower that threshold.

(d) Resolution of problem of coercion

It has been pointed out that with respect to a tender offer bid after which the target company's corporate value is expected to be damaged, there are risks that shareholders of the target company will apply to tender their shares in the tender offer bid to avoid suffering a disadvantage from the reduction in the target company's corporate value (problem of coercion) and will be forced to accept an unfairly low tender offer price, and those risks are likely to occur in partial tender offers.

To deal with the problem of coercion, the Working Group is discussing whether to lower the current threshold (acquiring voting rights of two-thirds or more) of the obligation to tender for all shares.

*(2) Large-volume possession report regulations*

(a) Scope of Joint Holder

Under the large-volume possession report regulations, the number of shares held by a person who agrees to exercise shareholder rights, including voting rights, jointly ("Joint Holder") will be added to the shareholding ratio.

Given the increase in joint engagements to acquire shares in target companies, the Working Group is discussing clarifying the definition of "Joint Holder."

(b) Enforcement

Failure to submit a large-volume possession report and misrepresentations in a large-volume possession report are subject to a surcharge system; however, despite failures to submit large-volume possession reports being repeatedly committed, it is rare for a surcharge to be imposed.

Therefore, how to ensure the effectiveness of the large-volume possession report regulations has been set as one of the main agenda items of the Working Group.



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