Japan Corporate & Finance Insights March 2024

Guidelines for Corporate Takeovers (From the Perspectives of Both the Acquiring Party and the Target Company)

By Yusuke Hayashi, Yuji Nakano and Shinichiro Ishihara

March 1, 2024

I. Introduction

On August 31, 2023, the Ministry of Economy, Trade and Industry (METI) issued the Guidelines for Corporate Takeovers - Enhancing Corporate Value and Securing Shareholders' Interests (the "**Guidelines**")[1]. The purpose of the Guidelines is to present principles and best practices that should be shared for the formation of fair practical rules in merger-and-acquisition (M&A) transactions, with a particular emphasis on how parties should behave during an attempt of acquisition of control over a listed Japanese company. TMI Associates was deeply involved in preparing the English version of the Guidelines.

This article will focus on the perspectives of both the acquiring party and the target company as set out in the Guidelines along with practical implications arising from the Guidelines. We will also review how the Guidelines effectively encouraged the market by touching on a few transactions that became public since the issuance of the Guidelines.

(1) Principles and Basic Perspectives

[1] https://www.meti.go.jp/press/2023/08/20230831003/20230831003-b.pdf

The Guidelines present the following three principles that, in general, should be respected in the acquisitions of the corporate control of listed companies: (i) the Principle of Corporate Value and Shareholders' Common Interests (whether or not an acquisition is desirable should be determined on the basis of whether it will secure or enhance corporate value and the shareholders' common interests), (ii) the Principle of Shareholders' Intent (the rational intent of shareholders should be relied upon in matters involving the corporate control of the company), and (iii) the Principle of Transparency (information to assist the shareholders' decision-making should be provided appropriately and proactively by the acquiring party and the target company). The Guidelines state that whether or not an acquisition is desirable should be determined on the basis of whether it will secure or enhance corporate value and the shareholders' common interests (1st Principle), and the 2nd and 3rd Principles are required to realize the 1st Principle.

(2) Code of Conduct for Directors and Board of Directors regarding Acquisition Proposals

As we discuss in detail later, the Guidelines state that the board of directors of the target company should give "sincere consideration" to a "bona fide offer" (an acquisition proposal that is specific, has a rationale of purpose, and is feasible) as a basic rule. The "sincere consideration" should be undertaken from the perspective of whether the transaction, if consummated, would contribute to the enhancement of the company's corporate value, among other factors such as the appropriateness of the acquisition price and other transaction terms.

(3) Increased Transparency of Acquisitions

The Guidelines state that the acquiring party should provide sufficient disclosure of information as well as sufficient time for the shareholders and the board of directors of the target company to consider the takeover offer. The Guidelines also require sufficient disclosure of information by the target company to enable its shareholders to make an informed judgment.

(4) Takeover Response Policies and Countermeasures

Japanese court cases and practices have recognized companies establishing response policies including countermeasures against unsolicited acquisitions, such as through the use of gratis issuance of stock acquisition rights with unequal terms (a common takeover response measure), and invoke such countermeasures to avoid acquisitions, in certain cases, that are harmful to corporate value and the shareholders' common interests. On the other hand, as an overarching societal policy, the potential use by a target company of such a response policy should not result in hesitation by a potential acquirer in making a desirable acquisition offer, nor reduction of management discipline that functions by being a potential acquisition target, nor impede sincere consideration of acquisition proposals by the target companies. The Guidelines set out a code of conduct for the use of such takeover response policies and countermeasures in order to seek to strike the appropriate balance of these competing concerns.

Regarding the code of conduct for introduction of takeover response policies and countermeasures, a globally known leading Delaware case (*Unocal*)[2] sets out certain criteria; specifically, that a board of directors may only try to prevent a takeover where it can be shown that (i) there was a threat to corporate policy and (ii) the defensive measure adopted was proportional and reasonable given the nature of the threat. In turn, the Guidelines do not require the countermeasures or action by the board of directors to meet the standard under *Unocal.* Nonetheless, the Guidelines do require the target company's board of directors to respect shareholders' rational intent, especially since such a transaction concerns the corporate control of the company. Further, the Guidelines state that the invocation of countermeasures based on the response policy 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.

II. Matters to Be Considered by the Acquiring Party

[2] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)

1. Information to Be Included in the Takeover Offer (§ 3.1.2)[3]

The first step for a potential acquiring party is to have the target company's board of directors consider the takeover offer. To do so, the offer should be in the form and content of a "bona fide offer". For an offer to be a "bona fide offer", the following factors should be present:

- Identify the acquiring party
- Detailed description of the purpose of the acquisition
- Management strategy after acquiring corporate control
- Purchase price, timing of acquisition, and other key terms of the transaction
- Adequate financing for the transaction
- Conditions, if any, for consummation of the acquisition, such as regulatory permits and approvals, and the probability that such conditions will be satisfied
- If there is a controlling shareholder, the intent of the controlling shareholder to sell, and the status of negotiations with such controlling shareholder

Also, since the target company is expected to consider the pros and cons of the acquisition by obtaining additional information about the proposed acquisition from the acquiring party, it may be wise for the acquiring party to state in advance that it is prepared to respond to additional information requests.

2. Disclosure of Information by the Acquiring Party (§ 4.1.1)

Regarding the disclosure of information by the acquiring party, the Guidelines state that the acquiring party is expected to increase transparency by complying with applicable laws and regulations, and to provide the target company's shareholders with sufficient information and time to make an appropriate decision (informed judgment). The Guidelines provide basic principles with respect to different stages of a takeover (i.e., when an acquirer commences the purchase of target company shares, when it acquires more than 5% of the target company shares, and when it acquires corporate control of the target company).

---

[3] The section numbers in parenthesis in the caption headings here and thereafter correspond to sections of the Guidelines.

3. Securing Time for Shareholders to Consider the Acquisition Proposal (§ 4.1.2)

If a tender offer is launched without negotiating with the target company, the shareholders and board of directors of the target company may not have enough time to consider and react on the offer. Therefore, the Guidelines state that the acquiring party should take the following actions to allow the shareholders and board of directors of the target company to consider and react on the offer:

- Under the tender offer regulation, a target company may extend the tender offer period for up to 30 business days, but if such extended time period is objectively considered insufficient, it is advisable for the acquiring party to set a longer tender offer period from the outset, or to extend the period for a reasonable time period, taking into account the needs of the target company and its shareholders.
- If the target company's shares are acquired through a rapid open-market purchase rather than by way of a tender offer, the target company's shareholders and the board of directors may not have sufficient time to make decisions. Generally, it is advisable for the acquiring party to design a process and time schedule that allows sufficient time for shareholders and the board of directors of the target company to make their respective decisions.

The Guidelines do not mention in what cases the tender offer period can objectively be considered insufficient. However, as an example, if the target company decides to call a general shareholders' meeting to implement defensive countermeasures and the initial tender offer period does not allow for a general shareholders' meeting to be held within the tender offer period, such tender offer period may be considered to be objectively insufficient.

4. Avoid Acts that Distort Shareholder Decision-Making (§ 4.3)

When shareholders make decisions on acquisition proposals, it is important to ensure that they are provided with the necessary information and are not interfered from making

rational decisions.

Therefore, the Guidelines provide that it is not advisable for the acquiring party to take any of the following actions:

- Engaging in aggressive coercive acquisition techniques, such as coercive two-step acquisitions
- Disclosing inaccurate or misleading information to the target company shareholders
- To conceal the intent to make an acquisition proposal and purchase up the target company shares
- Announcing advance notice of a planned tender offer without a reasonable basis for actually commencing the tender offer, such as when lacking financial resources required to effect the acquisition
- If the acquiring party has a dominant position over the target company shareholders, leveraging such dominant position
- Offering money or goods when soliciting votes and proxies

III. Matters to Be Considered by the Target Company

1. Bringing the Proposal to the Board of Directors (§ 3.1.1)

The Guidelines state that, in principle, upon receipt of an acquisition proposal to acquire corporate control, management or directors of the target company should promptly report such matter to the board of directors. Further, if the proposal is specific enough, such as being in a written form rather than oral, identifying the acquiring party rather than being anonymous, and includes the purchase price and timing of the acquisition, then the proposal should be resolved at the board of directors meeting. Credibility of the acquiring party, for example its track record as an acquiring party and the probability of its financial strength, also may be considered.

2. Consideration by the Board of Directors (§ 3.1.2)

If the offer is a “bona fide offer” discussed earlier in II.1., then the board of directors shall

give “sincere consideration” to it.

In the process of giving “sincere consideration”, the target company should obtain additional information about the acquisition proposal from the acquiring party and consider whether or not the acquisition based on the “bona-fide offer” would contribute to increasing the company’s corporate value. The economic conditions of the offer (e.g., comparison of the target company’s historical stock price level with the acquisition price) should be regarded seriously.

3. If the Board of Directors Decides to Move Forward with the Acquisition (§ 3.2)

If the board of directors of the target company decides to move towards negotiating and reaching an agreement regarding the proposed acquisition, the directors and board of directors of the target company should determine the merits of the acquisition from the perspective of whether or not it will increase the corporate value of the company, and should make reasonable efforts to ensure that the acquisition is conducted on transaction terms that will secure the benefits of shareholders. The target company should act in a manner so that it can be accountable for its response to the acquisition offer and the reasonableness of its decision, to meet the expectation that an accepted acquisition will increase corporate value and that the acquisition price and other transaction terms will ensure such increased corporate value to be fairly distributed among the acquiring party and the shareholders.

4. Ensuring Fairness - Supplementary Functions of the Special Committee and Matters to be Noted (§ 3.3)

To ensure fairness of the process of considering an acquisition offer, establishment of a special committee can be effective.

The Guidelines state that the necessity of establishing a special committee should be considered on a case-by-case basis, depending on the degree of conflicts of interest, the need to supplement the independence of the board of directors, and the need to

explain to the market.

For example, a special committee can be effective in the following context:

- When the appropriateness of the transaction terms is considered particularly important to the interests of shareholders because the proposal includes cash-out (going private)
- When considering takeover response policies or countermeasures
- Other cases where accountability to the market is considered highly important (e.g., when there are multiple publicly known acquisition proposals to the same target company)

5. Information Disclosure by Target Company (§ 4.2)

In a transaction where the acquiring party aims to acquire corporate control, informed judgment by shareholders will be possible through substantial information disclosure by the target company and through providing important decision-making materials. In addition, by encouraging the target company to disclose information after it makes the decision in order to secure transparency of the decision-making process, the management of the target company and the acquirer are expected to carefully negotiate being conscious that such negotiation process will later be reviewed by the shareholders and other stakeholders.

IV. Practical Implications

In Japanese practice, historically, unsolicited takeovers of listed companies were not common. However, after the introduction of the Guidelines, the number of unsolicited takeover attempts is expected to increase. In some cases, unsolicited takeovers may become friendly deals as a result of negotiation between the acquiring party and target company following the Guidelines.

In the acquisition of Takisawa Machine Tool Co., Ltd. ("**Takisawa**") by Nidec Corporation ("**Nidec**"), Nidec announced that it will comply with the Guidelines in seeking to execute

the transaction[4] [5]. This transaction originally began without consent to Nidec's proposal by Takisawa's board, but the takeover ended successfully, after Takisawa's board eventually consented to Nidec's proposal. Takisawa announced that it consented because it recognized the synergies between Nidec and Takisawa that will increase Takisawa's corporate value, that the proposed purchase price provided reasonable opportunity to Takisawa's shareholders to sell their shares at a price with appropriate premium, and that the offered terms and the proposal to take Takisawa private were reasonable.

In the acquisition of Benefit One Inc. ("**Benefit One**") by Dai-ichi Life Holdings, Inc. ("**Daiichi Life**"), Daiichi Life also announced that it will comply with the Guidelines and that its offer was a "bona fide offer"[6]. Prior to Daiichi Life's announcement, another tender offer for Benefit One shares by M3, Inc. ("**M3**") had already commenced. However, Benefit One's board of directors agreed to Daiichi Life's offer, and Daiichi Life's offer ultimately prevailed. One of the reasons of this success was due to the price of Daiichi Life's offer (it was approximately 35% higher than that of M3, and Benefit One's share prices had risen approximately 45% since the announcement of Daiichi Life's proposal), which is an important factor for the target company to "sincerely consider" the offer. This was a rare case in Japan where a traditional Japanese financial corporation conducted an unsolicited takeover. We expect to see more of such examples in Japan, since the Guidelines demonstrate the principles and best practices in takeover attempts, and unsolicited takeovers may be successful if the acquiring party follows the Guidelines.

On the other hand, we have seen cases where the target company followed the Guidelines and as a result, decided to oppose to an acquisition offer. In the acquisition attempt of Toyo Construction Co., Ltd. ("**Toyo**") shares by Godo Kaisha Yamauchi-No. 10 Family Office and Kabushiki Kaisha KITE (collectively, "**YFO**"), Toyo's board opposed to YFO's acquisition offer, and in doing so referred to the Guidelines and explained that

---

[4] https://www.nidec.com/-/media/www-nidec-com/corporate/news/2023/0713-01/230713-01e.pdf?rev=d59bb093618946d7b526f291c8da053d&sc_lang=en-US

[5] The announcement of this transaction was made before the official release of the final Guidelines, but was made apparently reflecting the draft Guidelines that was published by METI on June 8, 2023, prior to the announcement.

[6] https://www.dai-ichi-life-hd.com/en/newsroom/newsrelease/2023/pdf/index_018.pdf

it had conducted "sincere consideration" of the offer before announcing its opposition[7]. The main reasons for the board's opposition were because Toyo considered YFO's measures to enhance Toyo's corporate value were not specific enough, and that the purchase price proposed by YFO was below Toyo's market share price which had raised by that time.

As demonstrated by these cases, the Guidelines have quickly emerged as a practical standard referred in Japanese takeover cases. Since the Guidelines were announced last summer and with only half a year having passed since then, it remains to be seen how they will be applied in the diverse contexts of M&A practice. However, we recognize that the Guidelines are already respected by both M&A market participants (eventually possibly by courts), and that the Guidelines had become an important part of the framework in Japanese M&A activity. Our firm is cognizant of the intricacies inherent in takeovers, and will be able to assist clients as they navigate the challenges faced when considering such transactions.

* * *

If you have any questions regarding the matters covered in this memorandum, please reach out to your usual TMI contact or the attorneys listed below.

Authors

Yusuke Hayashi
Phone: +81 75 256 5580
Email:
yusuke_hayashi@tmi.gr.jp

Yuji Nakano
Phone: +81 3 6438 4592
Email:
yuji_nakano@tmi.gr.jp

Shinichiro Ishihara
Phone: +81 3 6438 5315
Email:
shinichiro_ishihara@tmi.gr.jp

[7] https://www.toyo-const.co.jp/en/wp/wp-content/uploads/2023/12/20231215E.pdf