

Call for Opinions and Information on Best Practice for Takeovers

-Major issues that have emerged from the discussions so far-

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Economic and Industrial Policy Bureau, Ministry of Economy, Trade and Industry

With a view to a further analysis and consideration of the following key issues currently being discussed by the Fair Acquisition Study Group, METI is calling for opinions and information on these issues from the general public in Japan and abroad.

1. General Principles for Takeovers

- What should be the general principles for the best practice for takeovers? For example,
 - The desirability of an acquisition should be judged on the basis of whether it enhances the corporate value of the target firm.
 - Takeovers should be conducted in a fair manner by both the target company and the acquirer so as to protect the interests of the target company's shareholders.
 - Upon determining whether an acquisition contributes to the enhancement of the corporate value of the target firm, the decision of the target firm's shareholders should be respected, and the information necessary for the shareholders to make an informed decision should be provided in a timely manner.
 - The acquirer and the target company should comply with the laws and regulations that apply to the acquisition, and ensure transparency of the acquisition process.

2. Actions of Directors and Board of Directors in relation to Takeover Proposals

(1) Treatment of Takeover Proposals

- When the management of a target company (e.g., executive directors, executive officers) reviews a takeover proposal for the company, it should consider the outcome of the takeover from the viewpoint of whether it will contribute to enhancing corporate value of the company.
- The main issue is how should the management handle the takeover proposal, on the basis that “serious takeover proposals should be considered seriously”. When there is a concrete takeover proposal being put forward, the management should conduct an initial evaluation, and then the proposal should be reviewed by the board of

directors, which should determine whether the proposal can be considered as a serious one.

- If the board of directors determines that the takeover proposal is not a serious one, should the board of directors fulfill its responsibility by thoroughly explaining the reasons of its decision to its shareholders and publicly disclose such explanation?
- If the board of directors considers a takeover proposal to be serious, it should be involved in analyzing and evaluating the takeover proposal and negotiating with the buyer, while also playing a monitoring role.

(2) Consideration and Negotiation of Takeover Proposals

- What should be the best practices that the target management should follow when they are involved in reviewing or negotiating a takeover proposal? For example,
 - When considering and negotiating, the management team should negotiate in good faith so that the proposed acquisition would contribute to enhancing corporate value and protecting the common interests of shareholders by improving the terms of the acquisition.
 - They must be fully aware of the importance of being accountable to shareholders when responding to a takeover proposal, and must seriously consider and evaluate the details of the takeover proposal, such as management policies after the acquisition, and the buyer's management capabilities, attributes, funding ability, and so on.
 - If a target company receives several serious takeover proposals, it must review them in a fair manner.
 - The relevant information should be handled in an appropriate manner, including by outside directors.
- Particularly as due diligence is conducted on the basis of non-public information of a company, in what cases and to what extent should this be allowed for the potential buyer?
- How should the target company judge and act if, among several takeover proposals, the proposal that further enhances its corporate value is different from the one that is most beneficial to shareholders?

(3) Role of the Board of Directors and the Special Committee

- It is important to ensure the fairness of the transaction, when a company receives several takeover proposals, cash-out proposals, and so on. Particularly for companies that have a board of directors that is not composed mainly of outside directors, would it not be beneficial for such companies to establish a special committee independent of the parties involved in the acquisition (i.e., the management and the buyer) in order to complement board independence and ensure

the fairness of transactions? From this viewpoint, how should the existence of a higher level of board independence and the structure which fully respects the decision of the special committee, which is independent of the parties involved in the acquisition, be evaluated in "normal times" (when there is no potential buyer)? And in the event of defensive measures being implemented towards a specific potential buyer?

- There could also be other situations, where it might be beneficial to establish a special committee upon responding to a takeover proposal, in order to speed up the decision-making process and to supplement the expertise of the board of directors. In such cases, what would be the ideal size and composition of the committee?

3. Enhanced Transparency Regarding Takeovers

(1) Information Disclosure by the Target Company

- What are your thoughts on the target company making information disclosure at the appropriate time, so that shareholders can evaluate how the board of directors and outside directors responded to a concrete and serious takeover proposal?
- In particular, would it be necessary to disclose information that demonstrates how each outside directors have fulfilled their responsibilities?

(2) Information Disclosure by the Acquirer

- From the viewpoint of ensuring that information necessary to evaluate the acquisition offer is provided for the target company and its shareholders, it is considered worth suggesting to ask the potential buyer to provide or disclose information such as the below. What would be your thoughts on this point?
 - Information on the impact of the acquisition on the target company's shareholders and stakeholders, as well as any other impact on the company's corporate value.
 - Even before a potential buyer actually makes a proposal, when a company recognizes the possibility of an acquisition and tries to know the facts (of beneficial shareholders and communications among certain shareholders) for dialogues, such "related" shareholders should respond to the company's request on who the beneficial shareholders are and whether there is acting in concert (in the sense not limited to the definition of "joint holders" under the Financial Instruments and Exchange Act).
 - If a potential buyer acquires shares prior to the tender offer, it should inform the market in a timely manner that the intention of purchasing shares is to obtain controlling rights.
 - In particular, if the potential buyer is announcing its plan to make a potential tender offer in advance of the official filing, the buyer should disclose information, such as the conditions of commencement of the tender offer, which will help other market

participants make an informed decision. And after having a reasonable basis for the funding necessary to make the acquisition. (In the event that the tender offer cannot be commenced within a reasonable period, should the announcement be withdrawn in principle?)

- What are your thoughts on the view that if certain requirements are met, shareholders who are not currently planning a takeover should also respond to requests seeking confirmation of beneficial shareholders?

4. Preventing Actions that Distort Shareholder Decision-making

- The best practice with a view to prevent actions which distort shareholder decision-making could include, for example, the following:
 - Refrain from using coercive “two-step transactions” or other structurally coercive takeover methods.
 - Refrain from soliciting proxies by distributing money or properties, etc.
 - Proactively provide information that contributes to the reasonable decision-making of shareholders, and refrain from disclosing information that is inaccurate or misleading to shareholders.
 - Refrain from engaging in activities that distort the reasonable decision-making of shareholders or undermine their interests, such as appealing to the shareholders who are business partners by taking advantage of their business relationships.

5. Takeover Defense Measures

(1) Ways of thinking that do not frustrate takeovers that enhance corporate value

- To avoid frustrating takeovers that enhance corporate value, it seems worth emphasizing the importance of providing shareholders with the information and opportunities to make appropriate decisions (informed decisions). And also the importance of making it clear for the buyer on how they can avoid takeover defense measures being implemented or avoid any disadvantages.
- With a similar viewpoint, what kind of practices do you think are desirable, in term of design and operation of defensive measures?

(2) “Target-Specific” Takeover Defense Measures

- Given that it is beneficial to ensure the predictability of relevant parties in the market, it should be worth considering to also describe best practice for the “target-specific” takeover defense measures (types adopted only after a specific potential buyer appears), which were not covered in the current Takeover Defense Guidelines.
- In the case of “target-specific” takeover defense measures, the necessity of the measures is in principle inferred by confirming the shareholders' intent. Given this, it seems reasonable to offer shareholder vote regarding the implementation of the

defensive measures at least after the implementation, however what would be your thoughts? On the other hand, what about exceptions in cases that have a high degree of urgency or in cases where it is clear that corporate value will be damaged, any points to note based on these exceptions?

- From the viewpoint of eliminating the impact of rapid purchases within the market (without an tender offer which result in certain ownership), there seem to be situations in which it would be reasonable to confirm the intent of shareholders other than the acquirer and the management (so-called majority of minority (MOM) resolutions).
- Institutional investors and proxy advisors should not merely apply their criteria formally, but should also take into account the situation of the investee company, the content of the dialogue with the company, management policies after acquisition, and other matters, in accordance with the Stewardship Code, when deciding whether to vote for or against a proposal related to takeover defense measures.

(3) “Advance-Warning” Takeover Defense Measures

- METI has issued guidelines for companies to introduce “advance-warning” takeover defenses in normal times as a mechanism for shareholders to make an informed decision on whether an acquisition would enhance the corporate value. In light of recent discussions, what would be your perspective on “advance-warning” takeover defense measures?
- Currently, many institutional investors vote against the proposal to introduce “advance-warning” takeover defense measures in normal times due to potential concerns that it may lead to long-term underperformance of corporate value or discourage desirable takeovers. What are the actual points within the structure of the takeover defense measures, that are leading to general concerns? For example, is it the rationale for introducing defense measures, the percentage of outside directors, the type of takeover method, whether the implementation is subject to a shareholder vote, the conditions that trigger the measure etc.? What is the impact of these points on the decision in voting in favor or against the proposal?
- In particular, is it possible for institutional investors to change their views when (1) an “advance-warning” defense measure has a mechanism to confirm the shareholders' intent at a shareholders meeting at the time of implementation (after a specific buyer appears), or (2) when there is a lack of discretion, such as when the structure is designed for the sole purpose of obtaining time to negotiate?

6. Terminology

- What terminology in Japanese should be used for takeover bids in situations where the management does not agree, given that negotiations may result in an amicable transaction? Would any value-neutral language (rather than the term “*Tekitai-teki*”

Baisyu” (hostile takeover)) be more appropriate?

- What is the appropriate terminology in Japanese to be used for so-called “advance-warning” takeover defenses and certain type of “target-specific” takeover defense measures, which do not necessarily correspond to the meaning of the word “*Boueī*” (defense) when used merely as a negotiating tool to require acquirers to comply with certain procedures?

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