METI issues "Fair M&A Guidelines" and publishes an English version

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Japan's Ministry of Economy, Trade and Industry completely revised the 2007 MBO guidelines on June 28, 2019.[1] The new guidelines, now termed "Fair M&A Guidelines," include within their scope acquisitions by controlling shareholders of controlled companies as well as MBOs. These guidelines set out a practice guide and way of thinking about transactions like this in Japan. Now, on September 20, 2019, METI has released the English version of the guidelines, in light of the increased presence of global private equity funds and other foreign investors in the domestic Japanese M&A market.[2]

I Introduction

Japan's Ministry of Economy, Trade and Industry ("**METI**") completely revised the September 4, 2007 *Guidelines for Management Buyouts (MBO) to Enhance Corporate Value and Ensure Fair Procedures* (the "**MBO Guidelines**")[3] on June 28, 2019. The new guidelines are entitled *Fair M&A Guidelines – Enhancing Corporate Value and Securing Shareholders' Interests* (the "**Guidelines**"). The revision takes place more than 10 years after the MBO Guidelines were published. The Guidelines were formulated under the leadership of METI's Corporate System Division based on the past 10 or so years of practice since the issuance of the MBO Guidelines. METI held seven meetings of the *Fair M&A Study Group* (the "**Study Group**")[4] as part of this process from November 2018. The Guidelines were formulated based on the discussion at the Study Group, a public comment process and other input. Now, on September 20, 2019, METI has released an English version to further promote the Guidelines, in light of the increased presence of global private equity funds and other foreign investors in the domestic Japanese

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1 Public announcement of the Guidelines is available online in Japanese at https://www.meti.go.jp/press/2019/06/20190628004/20190628004.html (last visited September 23, 2019).

2 Public announcement of the English language version of the Guidelines is available online at https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/kachikenn.html (a Japanese language website) with the PDF of the English language version of the Guidelines available online at https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/fairmaguidelines_english.pdf (last visited September 23, 2019).

3 The text of the MBO Guidelines (Japanese language) is available online at https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/MBOshishin2.pdf (last visited September 23, 2019) and the public announcement of the MBO Guidelines is available online in Japanese at https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/kachikenn.html (last visited September 23, 2019).

4 Website (Japanese language) is available online at https://www.meti.go.jp/shingikai/economy/fair_ma/index.html (last visited September 23, 2019).

M&A market.[5] White & Case was deeply involved in the formulation process, including by conducting and reporting to the Study Group on the results of a four-country comparative legal system survey on behalf of METI, specifically covering the United States, England & Wales, Germany and France.[6] We would like to take this opportunity to share with you an outline of the Guidelines.

The Guidelines' characteristics include the addition of controlling shareholder acquisitions of controlled companies, in addition to the MBO Guidelines' original scope of MBOs.[7] Also, the Guidelines lay out a way of thinking about these transactions including basic principles.[8] We note that practice details for handling these transactions are included in the Guidelines.[9] Lastly, we note that the Guidelines are positioned as "best practices" for fair M&A, and that some mention is made of the important role of outside directors to achieving fair M&A.[10]

White & Case coordinated a team centered in our Tokyo office covering the United States, England & Wales, France and Germany to provide the Study Group with a survey of the legal systems in these countries for comparative purposes, in parallel with the meetings of the Study Group.[11] We were deeply involved in the process of formulating the Guidelines, including to make reports to the Study Group several times,[12] in addition to many meetings with the METI team who led the formulation of the Guidelines.

We set out below a more detailed summary of the Guidelines.

II Overview of the Guidelines

1 Way of thinking about Fair M&A transactions

(1) Transactions subject to the Guidelines

The 2007 MBO Guidelines were limited in scope to MBOs. However, the new Guidelines add controlling shareholder acquisitions of controlled companies to their scope, in addition to MBOs. These transactions are thought to contain some of the same structural conflicts of interest and information asymmetries as MBOs, given the amount of influence a controlling shareholder has over controlled companies, such as through selecting directors and exercising voting rights at shareholders meetings, in addition to the conflict of interest between the controlling shareholder as buyer and ordinary shareholders as sellers. There are also noteworthy differences in considering the specific measures to adopt to secure fairness. For example, the controlling shareholder's influence may be more indirect in controlling shareholder acquisitions of controlled companies, as the control derives from the exercise of influence through rights as a

5 The Japanese language version of the Guideline is available at https://www.meti.go.jp/press/2019/06/20190628004/20190628004_01.pdf

The English language version of the Guideline is available at https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/fairmaguidelines_english.pdf

6 Please refer to the end of the Guidelines as well as the Japanese-language METI website available online at https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/kachikenn.html (under "related materials" for 2019) (last visited September 23, 2019).

7 Please refer to Chapter 1, item 1.5 of the Guidelines for definitions of these terms as used in the Guidelines. Also, please refer in particular to Chapter 2, item 2.1 of the Guidelines.

8 Please refer to Chapter 2, items 2.2-2.4 of the Guidelines.

9 Please refer to Chapter 3 of the Guidelines.

10 Please refer to Chapter 4 and Chapter 3, item 3.2.4.2, of the Guidelines.

11 The materials White & Case provided to the first meeting of the Study Group are available online (in Japanese) at https://www.meti.go.jp/shingikai/economy/fair_ma/pdf/001_03_00.pdf (see page 31) (last visited September 23, 2019) and attachment 2 to the Guidelines.

12 The materials White & Case provided to the third/forth meetings of the Study Group (in Japanese) are available online at https://www.meti.go.jp/shingikai/economy/fair_ma/003.html and https://www.meti.go.jp/shingikai/economy/fair_ma/004.html (last visited September 23, 2019).

shareholder. Management may have more direct and unfettered access to the target company's information in MBOs, as compared with the buyer in a controlling shareholder transaction. Further, it may be difficult for companies with an existing controlling shareholder to consider an alternative potential buyer, per the Guidelines.

(2) Purchase Price

The Guidelines lay out a process to secure fair deal terms, and do not attempt to set a standard for fair price or a premium to market price. This is based on the thought that it would be difficult to set a single objective standard such as by amount of the premium to market price that shareholders should receive, or a rigorous distinction between the amount of value shareholders should receive, even in a squeeze-out, as between (a) the price possible to achieve on a stand-alone basis and (b) the price achievable solely due to the M&A transaction at hand.

(3) Basic Perspective and Principles for Considering Fair Procedures

The Guidelines set out (1) increasing corporate value and (2) securing ordinary shareholders' interests through a fair process as the principles that should be respected in M&A. The basic concepts thought to be important to achieve a fair process to secure ordinary shareholders' interests are (i) to create a situation that can be viewed as equivalent to a transaction between independent third parties (primarily from the view of the target company), and (ii) to secure an opportunity for ordinary shareholders to make an appropriate decision based on sufficient information (to eliminate the information asymmetry).

2 Specific Measures for Use in Practice

(1) Overview

The Guidelines set out measures to secure fairness, but they do not require each to be implemented in all cases to achieve fair terms and conditions. Rather, the Guidelines provide that practitioners should consider how much and which measures to implement based on the situation, such as the degree of information asymmetry and the degree of conflicts of interest in each individual M&A transaction.[13]

(2) Special Committee[14]

A Special Committee is to evaluate and decide (i) whether transaction terms are appropriate and (ii) whether the process conducted was fair, both to protect ordinary shareholders' interests and to increase corporate value. With respect to whether transaction terms are appropriate:

- The Guidelines call for Special Committees to secure an environment where reasonable efforts are made to conduct M&A transactions on terms that are as favorable as possible to ordinary shareholders, while increasing corporate value, in the negotiation process with the buyer.[15]

- They also call for the Special Committee to confirm the reasonability of the financial forecasts on which the valuation was based, the assumptions underlying those forecasts and the details of the valuation itself.

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13 See footnotes 23 and 24 to the Guidelines for examples of specific situations.

14 The Guidelines refer to these committees as "special committees" to distinguish them from the committees used in corporate scandals, which like these committees are sometimes called "third party committees," in light of the fact that the special committees are intended to act on behalf of the ordinary shareholders and the target company, not as an independent neutral third party.

15 The committee is to consider not only the suitability of the amount of the purchase price, but also the acquisition method and the type of consideration offered. Please refer to footnotes 28, 29 and 52 of the Guidelines for specific examples of financial projections and conditions precedent that should be considered.

The Guidelines place importance on securing the effectiveness of the Special Committee and its role in securing the fairness of deal terms in controlled company acquisitions by controlling shareholders and MBOs in light of the above. In particular, the Guidelines suggest taking steps similar to the below.

a. When to Establish the Special Committee

The Guidelines provide that Special Committees should be established as promptly as practicable upon receipt of an acquisition proposal from the buyer, if a sincere interest is expressed to acquire on concrete, achievable terms. The Guidelines recommend this to prevent a situation where it is difficult to overturn a decision that has in effect already been made as to the deal terms, etc. as of the time the Special Committee was formed, and permit the Special Committee to function with respect to the full process of forming deal terms.

b. Committee Composition

Special Committee members are expected to be independent not only from the buyer, but also from the completion or failure to complete of the relevant transaction.[16] This independence should be evaluated separately for each particular M&A transaction, taking into account the substance of the relationship between the candidate, on the one hand, and the buyer and target, on the other hand, and any interest the candidate may have in the completion of the M&A transaction. The requirements to qualify as an outside director under the Companies Act[17] and as an independent director under standards established by a stock exchange[18] may be useful points of reference for the relationship with the buyer, but the Guidelines declined to establish a single uniform standard. The Guidelines instead provide for a decision to be made based on the facts and circumstances of each individual transaction.[19]

The Guidelines recommend that the Special Committee be selected from among those outside directors who have the kind of independence described above, because they may have an impact on management's decisions, and are subject to potential damage claims by shareholders, given their legal obligations to the target company. In addition, outside company auditors may be included to fill out the Special Committee since the number of outside directors on a typical Board of Directors is small, and auditors are appointed at a general meeting of shareholders, they have legal obligations and liability to the company, and they may also be subject to damage claims from shareholders. While corporate auditors are not by nature expected to be directly involved in business decisions, they are indirectly involved in company management in various ways through their obligation to attend and state their opinions at board meetings, and through their right to request that directors cease an action.

In contrast, outside experts are not appointed at a general meeting of shareholders, their accountability to the company and shareholders is unclear, and it is difficult for shareholders to hold them directly liable for their decisions. However, appointing outside experts as Special Committee members to supplement the Special Committee's M&A expertise is not rejected by

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[16] This refers to the absence of a material interest that differs from the interests of ordinary shareholders. A typical example that would call into question one's independence would be the receipt of a contingent payment on successful completion of the M&A transaction in question.

[17] Refer to Companies Act Article 2, item 15 (a). It is recommended that at minimum they not have served as an officer of the controlling company within the past ten (10) years at minimum in a controlling shareholder acquisition of a controlled company.

[18] See "Guidelines Concerning Listed Company Compliance, etc." of the Tokyo Stock Exchange, Inc. III. 5. (3)-2.

[19] For example, the time at which the relationship existed and the importance of the relationship to the candidate etc. is considered important.

the guidelines.[20] At the same time, an outside director's lack of M&A expertise does not disqualify them from service as a Special Committee member, per the Guidelines.[21]

c. Process to Establish a Special Committee and Select Committee Members

The Guidelines provide that the independent outside directors and auditors of the target company should be substantially involved as the leaders of the process to decide on the Special Committee's membership and compensation, as well as to establish the authority and responsibilities of the committee, and to decide whether to establish a Special Committee in the first place.

d. The Special Committee's Involvement in Negotiations with the Buyer

The Guidelines provide that the Special Committee should be substantially involved in negotiations between with the buyer on deal terms, including the purchase price. The means of such involvement are left to be decided based on the particular circumstances of the individual transaction. However, one example includes having the Board of Directors pre-commit to rejecting any deal that the Special Committee determines is not appropriate, and the Board of Directors can delegate the authority to directly negotiate the deal terms to the Special Committee based on such decision. Alternatively, the negotiation itself may be handled by the officers and other management of the target company, members of the project team, and advisors, but the Special Committee may confirm the direction of negotiations in advance, receive reports on negotiation status, and at important junctures provide their instructions. In these ways, the Guidelines aim to secure the Special Committee's substantial involvement in the negotiation of deal terms.

e. Advisors to the Special Committee

The Guidelines provide that the Special Committee should retain financial advisors, third party valuation advisors and legal advisors (collectively, "**advisors**") that the Special Committee can trust to provide specialized advice.

Specifically, it is thought to be desirable for the Special Committee to be able to appoint its own advisors. However, the Guidelines also provide that the Special Committee is not forbidden to use advisors appointed by the Board of Directors if the Special Committee decides that it can trust the relevant advisors to provide specialized advice, for example, where such advisors have high levels of expertise and there are no independence issues. However, if the Special Committee will use advisors appointed by the Board, the Guidelines recommend making efforts to secure their trustworthiness, such as by granting the Special Committee authority to approve (perhaps retroactively) the advisors selected by the Board of Directors or to select such advisors in the first place.[22]

f. The Special Committee's Ability to Gather Information

M&A transactions may be conducted on terms that are unfavorable to ordinary shareholders due to information asymmetry with the buyer. However, the Guidelines have accepted that companies find it difficult to address information asymmetry issues solely by making disclosure

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20 It is recommended to clearly provide that the committee members have a fiduciary duty as a good manager in favor of the company in the contract between outside expert members and the subject company to supplement for this lack of clear responsibility.

21 Pages 26-27 of the Guidelines provide that they hope to make it easier to adopt the most preferred form that would be to "*form a special committee comprised solely of outside board members, with expert advice provided by specialized M&A advisors*" (W&C Note: This is our translation of the original Japanese, and differs from the official English translation.)

22 Please refer to footnotes 43-45 of the Guidelines regarding the involvement of advisors retained prior to the establishment of the Special Committee and the situation where such advisors are not approved by the Special Committee and whether or not advisors need to be retained by the board of directors of the target company.

to ordinary shareholders, because they are not accustomed to disclosing such confidential information to the public. Therefore, the Guidelines permit the Special Committee to receive material information in lieu of the shareholders and provide that the Special Committee use such information to evaluate and decide on the transaction.

g. Compensation for Special Committee Members

The Guidelines recommend that the details and amount of compensation paid to Special Committee members correspond appropriately to their responsibilities. In particular, outside directors are expected to perform the duties of Special Committee members as part of their responsibilities as outside directors. However, the duties of a Special Committee member require a considerable commitment of additional time and effort beyond an outside directors' ordinary role. Thus, the Guidelines recommend that additional compensation to Special Committee members be considered for their duties on the Special Committee where their original compensation did not include such compensation.

h. Relationship with the Board of Directors of the Target Company

The final decision to proceed with a transaction is decided by the Board of Directors, even where Special Committees are established. The Guidelines recommend that the Board of Directors conduct their decision-making process giving as much respect as possible to the Special Committee's determinations after having appropriately considered them.[23] As a result, the Guidelines express the view that a Board of Directors can discharge their obligation to explain their decision by making a decision in reliance on the determination of the Special Committee, in principle, provided that the Special Committee was established and functioned effectively. On the other hand, if the Board of Directors makes a different decision from the determinations of the Special Committee, the Guidelines recommend that they provide ample explanation of the reasons for their decision.

The Guidelines further recommend developing a structure within the target company to consider and negotiate the transaction as independently as possible from the buyer, such as by excluding those directors of the target company who have a certain level of relationship with the buyer based on the particular facts and circumstances of the transaction. This would exclude those directors who have a special relationship with the buyer from the process of considering and negotiating the deal, above and beyond excluding those directors who, under Article 369, Paragraph 2 of the Companies Act, have "a special interest"[24] from voting on the resolution of the Board of Directors of the target company to approve or reject the M&A transaction.[25]

(3) Advice from Outside Experts

The Guidelines provide that legal advisors play an important role in the selection process and evaluating the independence of third party experts and financial advisors, as well as the board members and Special Committee members, who will be involved in the Special Committee. This role is in addition to their role assisting the target company with understanding the significance of taking measures to secure fairness.

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[23] Reference may also be made to 2.(2)(d) above regarding the ability of the Special Committee to effectively reject the transaction.

[24] Refer to footnote 47 of the Guidelines regarding problems of interpretation on the scope of "directors with a special interest" in transactions subject to the scope of the Guidelines.

[25] Please refer to Chapter 3, item 3.2.6 of the Guidelines, which provides that "*One might view it as sufficient to exclude directors who also serve as current officers of the buyer, for example… it is not necessary to think that all persons who formerly served as officers of the buyer must be excluded, on that basis alone, from the directors and officers who participate in the consideration and negotiation of the deal, if an independent special committee is established and functions effectively*" (W&C Note: This is our translation of an excerpt of the Guidelines, and differs from the official English translation).

The Board of Directors of a target company or the Special Committee should, per the Guidelines, obtain a valuation report from an independent third party valuation advisor to use this report as the basis for their decision, in circumstances where there are information asymmetry issues or structural conflicts of interest. In any case, the Guidelines recommend that the Board of Directors of a target company and the Special Committee evaluate, negotiate, and decide on transaction terms based on the particular circumstances of individual deals. This is because the valuation report results will not directly resolve the question of how much value ordinary shareholders and the buyer should each receive, the existence and details of alternative transactions and the level of the premium offered ordinarily in transactions of the same nature, as well as the methods used in valuation and the probability of achieving the targets set out in the business plan.

On the other hand, fairness opinions[26] can provide highly-important, direct reference information on the value of the target company. The Guidelines point out the value of fairness opinions in explaining the decision made to ordinary shareholders, including investors who are active internationally in places like the US and Europe where it is standard practice to obtain a fairness opinion. In Japan, though, there are no rules applicable to issuing entities or the fairness opinion issuance process. In that light, the Guidelines deem it appropriate to decide whether a fairness opinion would be useful in light of the particular circumstances of the relevant transaction.[27]

The Guidelines call for independence from the success or failure of the transaction in question by the party issuing a fairness opinion or a third party valuation report. Thus, it would be better not to retain a third party valuation provider who has significant potential conflicts of interest such as where such advisor is providing buy-side acquisition financing.[28] However, the Guidelines provide that ample explanation should be provided, such as by disclosure of the details of the financial benefit to be received by the relevant advisor in the transaction, in the event that they will be selected as an advisor anyway.

(4) Conducting a market check[29]

The Guidelines provide that conducting a market check could be an effective means of securing fairness, by strengthening the bargaining power of the target company in discussing deal terms and acquiring important reference information regarding the fairness of the proposed price and terms. Such a market check is conducted so as to secure an opportunity to conduct a sale transaction to an alternative potential bidder for the target company.

The Guidelines, however, accept the view that it is unlikely that a serious competing proposal will be made in cases where the buyer is unwilling to sell to a third party and the buyer is a controlling shareholder. Thus, the Guidelines provide, there are only a limited number of exceptional situations where a market check will effectively work to ensure fairness.[30] In contrast, the Guidelines consider indirect market checks or active market checks as measures of ensuring fairness where the buyer is not a controlling shareholder. Some have expressed concerns that active market checks can deter M&A activity, and present confidentiality concerns

[26] Please refer to Chapter 3, item 3.3.2 of the Guidelines for the differences between a valuation report and a fairness opinion.

[27] Please refer to Chapter 3, item 3.3.2.2 B) of the guidelines regarding the credibility of the third party valuation firm that supports the effectiveness of the fairness opinion.

[28] Please refer to footnote 59 of the Guidelines on consideration of the situation where group companies have severe conflicts of interest, in addition to the third party valuation firm itself, as well as various views expressed regarding the role of the third party valuation firm in providing financing and the relationship between the third party valuation firm's business size as a whole and the amount of financing being provided.

[29] Please refer Chapter 3, item 3.4 for information on types of market checks (active, indirect) and detailed implementation means.

[30] Please refer to Chapter 3, item 3.4.3.2 of the Guidelines for details of these situations.

in practice. In light of those concerns, the Guidelines provide that a market check need not always be conducted and may not always be desirable depending on the particular situation. Thus, the Guidelines provide that in general, a market check should be implemented as an effective method to ensure fairness in light of on the particular facts and circumstances of a transaction.

The Guidelines provide that it is inappropriate for the target company to reject a serious, concrete and feasible competing third party acquisition proposal without reasonable grounds.[31] As such, the Guidelines recommend that the target company fully examine which alternative would more substantially increase its corporate value. Further, the Guidelines recommend that the target company provide ample explanation as to the reasonableness of its decision if the target company decides to accept an acquisition proposal that provides a substantially lower price than a competing proposal. The Guidelines recognize that some have called for equal information to be made available to alternative prospective buyers in order to facilitate fair competition, but ultimately permit targets to refuse to provide information to, or limit the information provided to, alternative potential bidders in light of concerns some have voiced on the possibility that confidential information would be leaked to competitors. The degree of information to be provided may be determined based on factors such as the degree of concreteness, feasibility, and sincere interest expressed in the acquisition proposal, and a staged approach to disclosure may also be appropriate.

(5) Majority-of-Minority[32]

The Guidelines recognize that establishing a majority-of-minority condition would enable ordinary shareholders to confirm directly whether they are satisfied with the deal terms by majority vote among such ordinary shareholders. Further, such a condition precedent may improve the negotiating power of the target company in coming to an agreement on deal terms. The Guidelines therefore recognize such a condition as a meaningful method of securing fairness. However, some have expressed concerns that M&A activity may be discouraged as a result of a majority-of-minority condition where the percentage held by the buyer in a controlled company is high. As a result, the Guidelines take the position that a majority-of-minority condition is not always appropriate. Instead, the Guidelines provide that such a condition should be considered in light of the specific circumstances of the relevant transaction.[33] Factors cited as potential considerations include the percentage of voting rights held by the buyer in the target company, the relationship between the buyer and the target company such as the degree of independence of the target company, and the negotiating position of the buyer.

(6) Provision of Information to Ordinary Shareholders

The Guidelines provide that disclosure of additional information beyond that required to comply with Japan's Financial Instruments and Exchange Law ("**FIEL**") on a voluntary basis is desirable. It is thought important to provide disclosure of additional information, after direct disclosure to shareholders at the time of deal announcement and the provision of information as evidence in court proceedings, in order to address the large information asymmetries between the buyer and ordinary shareholders.

The Guidelines make specific mention of the following information's disclosure.[34] First, the Guidelines note information regarding the Special Committee, such as the independence and expertise of the committee members, the authority granted to the Special Committee, the

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[31] Please refer to footnote 67 of the Guidelines on the consideration of alternative acquisition proposals.

[32] Please refer to Chapter 3, item 3.5 of the Guidelines on the significance of Majority-of-Minority approvals, the scope of minority shareholders, and how to fix the terms.

[33] Please refer to Footnote 74 of the Guidelines on the possible deterrent effect on M&A transaction.

[34] Please refer to pages Chapter 3, item 3.6.2.1-3.6.2.3 of the Guidelines for the specific content of each item.

history of deliberations at the Special Committee and their involvement in the negotiations of deal terms with the buyer, the reasons for their determinations regarding the fairness of the procedure and the appropriateness of the deal terms and the necessity of the transaction itself, and the compensation system for committee members. The Guidelines also cite information regarding the fairness opinion as suitable for disclosure, including the method of calculating the per share value under each method of valuation employed, the issuance process and thoughts on legitimacy of the fairness opinion itself, and material conflicts of interest of the third party valuation provider. Further, the Guidelines cite information on the reasons for opposition by any directors and auditors who voted against the transaction as well as their names, whether or not alternative proposals or acquisition methods were considered, the detailed negotiation history of deal terms among the parties, the conflicts of interests associated with the relevant transaction at the board of the target company, the reasons for deciding to proceed with the transaction and the process by which the target company ended up moving forward with a sale transaction.

(7) Elimination of Coerciveness

Lastly, the Guidelines provide that all takeover offers should observe the following methods to avoid coercion, whether or not the transactions are otherwise within the scope of the Guidelines as MBOs or acquisitions of a controlled company by the controlling shareholder. First, structures that do not secure the ability of the shareholders who oppose the transaction to demand the repurchase of the shares they hold or demand appraisal should not be adopted in connection with squeeze-outs following a tender offer. Second, squeeze outs should be conducted based on the same price as the tender offer price absent special circumstances in a squeeze-out, and the squeeze-out should be conducted as promptly as possible after a supermajority of the shares have been acquired in a tender offer. A statement to this effect should also be disclosed in the tender offer documents.

III Influence on M&A practices in Japan going forward, and White & Case's related capabilities

The Guidelines took effect immediately as of their formulation and publication on June 28, 2019. They are expected to have a significant impact and function as practical rules and guidelines for M&A practice in Japan, like the MBO Guidelines that were formulated around ten years ago. The Guidelines' impact may be impossible to ignore: they may have an impact on the practice i.e. the ability to demand damages from board members, or prevent or even undo a deal which is viewed as unfair in particular M&A deals. Thus, even though the Guidelines do not have the same legal effect as laws, regulations or decided court cases, we expect that their impact on Japanese public M&A practice will be significant.

All advisors and participants in transactions will need to evaluate the degree to which measures of securing fairness should be implemented in each acquisition transaction based on the analysis of each type of transaction individually, and then implement such measures as appropriate.

White & Case conducted the survey on foreign law that formed the basis for formulating these Guidelines, based on coordination between our Tokyo office and our offices in England & Wales, France and Germany. The authors of this client alert in our Tokyo office also participated as observers in the Study Group, and made reports to the Study Group on several occasions, so we were deeply involved with the process of formulating the Guidelines. We think it will become of increasing importance in Japanese public M&A deals to give careful advice based on the global M&A practices that were referenced in formulating these Guidelines, while also considering their compatibility with the practicalities of M&A practice in Japan.

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