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Overview of Guidelines for Corporate Takeovers: Enhancing Corporate Value and Securing Shareholders' Interests – Part II

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This article has been divided into two parts. Part I[1] covered the scope, basic principles and perspectives of the Guidelines for Corporate Takeovers (the "**Guidelines**")[2] as well as the code of conduct that directors and the board of directors must observe concerning acquisitions. This Part II discusses increased transparency of acquisitions and takeover response policies and countermeasures.

I. Greater Transparency of Acquisitions

1. Disclosure of Information and Provision of Time by the Acquiring Party

At each stage of its progress in acquiring the shares of a target company, the acquiring party is expected to comply with the large shareholding reporting rule, the tender offer rule, and other regulations to increase transparency. Based on such rules and regulations, it would be ideal for the acquiring party to provide shareholders not only sufficient information but also enough time to make an informed decision.

(a) Disclosure of Information at the Time of Acquisition

The acquiring party should aim to provide the capital markets and the target company with at least the same level of appropriate information as contained in the tender offer registration statement and in a timely manner and in an appropriate form. Such minimum information includes the purpose of the purchase, number of shares to be purchased, summary of the acquiring party, and basic management strategy after the acquisition.

(b) Disclosure of Intent to Acquire

If the party intending to make an acquisition is definite about its intention to make a subsequent tender offer, then prior to such tender offer, it would be ideal for it to provide information to the capital markets and the target company when it is moving ahead with its plan to purchase the target company's shares in the market.

(c) Information Disclosure of Advance Notice of Planned Tender Offer

When announcing an advance notice of a planned tender offer, the potential acquirer should aim to have a reasonable basis for actually commencing such tender offer, such as having the financial resources needed for the acquisition, and disclosing specific

1. Available at https://www.ohebashi.com/jp/newsletter/NL_en_2023winter_all.pdf.
2. Available at https://www.meti.go.jp/shingikai/economy/kosei_baishu/pdf/20230831_3.pdf.

information that can contribute to market understanding, such as the conditions for the launch of the tender offer and the scheduled commencement date thereof.

If an advance notice of a planned tender offer is announced, but such tender offer cannot be commenced within a reasonable period of time in light of market stability, then in principle, it is advisable to withdraw the notice.

(d) Information Provision and Disclosure of Substantial Shareholders

If the person making the acquisition proposal is a "substantial shareholder," then the target company must be provided with information regarding the fact that the acquirer is a substantial shareholder as well as its relationship with the nominee shareholder(s).

The acquirer should respond in good faith when asked by the target company about the extent to which there are any joint holders.

If a target company recognizes based on objective facts the possibility of an acquisition by a specific entity or person, and seeks to confirm certain facts to engage in a dialogue with that entity or person, then such entity or person should confirm certain facts such as whether it is a substantial shareholder as well as the existence of any joint holder relationships.

As to custodians who are nominee shareholders for such entities or persons, they should cooperate in confirming certain facts regarding the "substantial shareholders" for which they hold shares after confirming the intention of such entities or persons.

(e) Provision of Time for an Acquisition Proposal to be Considered

The acquiring party should ideally set a longer tender offer period than originally proposed or extend the period for a reasonable time, taking into account the needs of the target company and its shareholders.

2. Information Disclosure by the Target Company

An informed decision by the shareholders will be possible through substantial information disclosure by the target company.

(a) Disclosure at the Implementation Stage of an Acquisition

Ideally, the target company should voluntarily disclose in a full and complete manner information regarding the process of how the board of directors or the special committee considered the acquisition proposal and its involvement in the negotiation process with the acquiring party with respect to the transaction terms.

If any competing proposal is made, then the target company should disclose in the explanation of the reasons for supporting the offer that there was such other competing proposal, but that the target company decided that the offer being supported was more desirable together with the reasons for such decision.

(b) Disclosure of Information regarding Media Reports while Acquisition Proposal is Still Under Consideration

It should be noted that if media reports or rumors spread during the stage an acquisition proposal is being considered, then it may be necessary to disclose information regarding the accuracy of the information reported as well as other facts.

Careful consideration will be required in deciding whether to maintain strict information control, or instead disclose information about the acquisition proposal.

3. Preventing Acts that Distort Decision-Making by the Shareholders

It is important to ensure that shareholders are provided with the necessary information and are not prevented from making an informed decision. From

this perspective, the following actions by either the acquiring party or the target company are not advisable (and any action that would constitute a violation of any law or regulation should not be taken):

The Acquiring Party	The Target Company
Engaging in aggressive coercive acquisition techniques, such as a coercive two-step acquisition	N/A
Disclosing inaccurate information or misleading information to shareholders	Same
Notwithstanding an intention to make an acquisition proposal, to conceal such intent and advance in making share purchases	N/A
Announcing an advance notice of a planned tender offer without a reasonable basis for actually commencing the tender offer, such as lacking the financial resources required for the acquisition	N/A
Leveraging its superior position, such as approaching its business partners who are also shareholders of the target company	Same
Providing money or goods in soliciting votes and proxies	Same

II. Takeover Response Policies and Countermeasures

Regarding takeover response policies, establishing and disclosing the rules before a specific acquiring party appears (i.e., the normal phase) would enhance predictability among the stakeholders, such as acquirers and shareholders. However, there are circumstances where the assessment of the response policy differs between the company adopting it and institutional investors, and it is practically difficult to utilize it without obtaining the understanding and consent of the shareholders and institutional investors.

On the other hand, during an emergent phase, case-specific decisions may be suitable. Adopting a response policy after an acquiring party emerges (i.e., the emergent phase) is an option, though less predictable. In any event, reliance on the rational intent of the shareholders is crucial.[3]

1. Respecting the Intent of the Shareholders

Invoking a countermeasure based on a response policy should be based on the rational intent of the shareholders since it concerns corporate control of the target company. The legitimacy of invoking a countermeasure will be much more likely to be acknowledged if approval at a shareholders' meeting is obtained at the stage of either adopting the response policy or of invoking the countermeasure based on such response policy.

It must be noted that invoking a countermeasure based on a resolution passed at a shareholders' meeting which excluded the voting rights of the acquiring party, the target company's directors and their related parties from being counted must not be abused and may only be permitted in very exceptional and limited cases, taking into consideration the special circumstances of the case concerning the mode of acquisition, among other factors (such as coercion arising from the acquisition method, legality, and period for confirmation of the shareholders' intentions).

Invoking a countermeasure based on the judgment of the board of directors can be permitted only when the need for such action is high under specific circumstances, such as an acquisition by criminal elements or one where there is a high probability that the acquiring party will gain an unfair advantage at the expense of the target company and its general shareholders. In addition, it should be taken into account that there is an increased risk that such

3. For the details of each factor, please refer to "Appendix 3: Takeover Response Policies and Countermeasures (Particulars)" of the Guidelines.

invocation of a countermeasure will be enjoined by a court if a resolution approving the same has not been passed at the shareholders' meeting.

2. Ensuring Necessity and Proportionality

The invocation of a countermeasure based on the response policy should be carried out in a manner that is based on necessity and proportionality, taking into consideration, among other factors, the principle of shareholder equality, protection of property rights, and prevention of abuse by management to protect its own interests.

3. Prior Disclosure

By adopting and disclosing the response policy during the normal phase, predictability can be enhanced among the acquiring parties, shareholders and other stakeholders anticipating the possibility of a countermeasure being utilized in the event of an acquisition of more than a certain number of shares. In addition, just because it is predictable that a countermeasure may be used, it does not necessarily mean that there is a possibility of avoiding the invocation of such countermeasure, and thus, it is considered important to have a high degree of predictability as to "in what circumstances the countermeasure will be used."

4. Communication with the Capital Market

If a target company is considering adopting a response policy, it must first make reasonable efforts to enhance corporate value during the normal phase, and then take steps to ensure that such increase in its corporate value is reflected in its market capitalization.

If the target company believes that the adoption of a response policy is necessary as part of its management strategy, then it should communicate and disclose information in detail regarding its reasons for adopting such response policy, ensure fairness by enhancing the independence of the composition of its board of directors (for example, by increasing the ratio of outside directors to at least majority of the members of the board), and respect, to the maximum extent possible, the judgment of a special committee consisting mainly of outside directors.

Below are examples of possible features that would make it somewhat easier to gain the understanding of institutional investors when engaging in dialogue and information disclosure activities with them:

(a) Design the response policy to always require a resolution passed at a shareholders' meeting when a countermeasure is being invoked;
(b) Design the response policy so that the requirements to trigger an invocation of a countermeasure are strict; and
(c) Design the response policy as a temporary measure to be used under special circumstances.

III. Concluding Remarks

As mentioned in the introduction of Part I, the Guidelines clearly state that the economy of Japan is aiming to have a soundly functioning market in acquisitions involving the transfer of corporate control and welcomes active acquisitions that contribute both in enhancing corporate value and securing the interests of shareholders.

While the Guidelines are not legally binding, they outline the principles and best practices, and serve as a code of conduct for target companies, acquiring parties, directors, shareholders, investors, advisors, and other relevant parties at each stage of an acquisition in which an acquiring party wishes to acquire corporate control of a listed company by acquiring its shares. Therefore, it is anticipated that the Guidelines will have a significant impact on the practice of M&A in Japan.

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Updates on the LGBTQ+ Status in Japan and Duties of Companies Related Thereto

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This is an update to my previous article that was published in June 2023[1] regarding the LGBTQ+ status in Japan. The duties of companies related thereto are also discussed herein.

To achieve equality in Japan, among other things, there must be a clear right to same-sex marriage and LGBTQ+ people must be guaranteed protection against violence. In this regard, Japan has achieved significant progress, including enactment of a law, two pro-transgender Supreme Court decisions, and one new gay-friendly Supreme Court decision. This trend demands that companies take LGBTQ+ policies seriously.

I. New Law Promoting LGBTQ+ Understanding

On June 23, 2023, the "Act on Promoting Public Understanding of Diversity in Sexual Orientation and Gender Identity" (Act No. 68 of 2023) was enacted. This act is the second law[2] in Japan to mention "LGBTQ+." The law, however, does not impose any legally binding obligations or penalties on companies. Nevertheless, the law does require the Japanese government to publish its LGBTQ+ policy annually and hold a conference once every two months for the purpose of liaison and coordination efforts among the relevant ministries to achieve the effective promotion of LGBTQ+ understanding. The relevant ministries discuss therein their budget estimates for their respective promotional efforts, recent Supreme Court decisions, and LGBTQ+ survey results. These efforts will increasingly promote an understanding of LGBTQ+ in Japan. So far, this has resulted in the Supreme Court beginning to issue LGBTQ+-favorable rulings on LGBTQ+ issues.

II. Supreme Court Decisions in 2023

The Supreme Court issued two transgender-favorable decisions in 2023.

1. Illegal treatment of a transgender government officer

The first decision of the Supreme Court was published on July 11, 2023.[3] The Supreme Court ruled that the restriction imposed by a government office on a transgender employee's use of the women's restroom was illegal.

1. *See* https://www.ohebashi.com/jp/newsletter/Yamamoto_202307summer.pdf.
2. The first law was the "Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder" (Act No. 111 of 2003), which set forth the requirements for gender reassignment.
3. An English translation that was prepared by members of the Lawyers for LGBT & Allies Network (LLAN) is available at: http://llanjapan.org/llan17/cont/uploads/2023/09/Translation-products-20230920.pdf.

Under the "Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder" (Act No. 111 of 2003) ("**Act No. 111**"),[4] gender reassignment surgery is required to change a person's gender in the family register to a gender that is consistent with such person's gender identity. However, in this transgender case, the transgender employee was unable to undergo gender reassignment surgery because of her medical condition.

The transgender employee began taking female hormones in 1998, received a doctor's diagnosis of gender incongruence in 1999, has lived her personal life as a woman since 2008, and requested that her workplace allow her to work as a woman in 2009.

In 2010, her supervisor at work asked her to explain to her colleagues who were working in the same department as her about her gender incongruence. She agreed, and when she gave the briefing, there was no clear indication of opposition from her colleagues.

One week later, she began working in women's clothing and was given permission from her employer to either use the women's restroom at least two floors away from her workspace or the men's restroom on her workplace floor. She was prohibited from using the women's restroom on her workplace floor.

In a subsequent discussion with her supervisor, he said to her, *"If you don't get gender reassignment surgery, why don't you go back to being a man?"*

In 2013, she asked the National Personnel Authority ("**NPA**") to rescind the government office's restriction on restroom use because it was illegal. However, in 2015, the NPA ruled that the limitation was legal. She then filed a lawsuit seeking reversal of the NPA's decision.

As a result, while a 2021 High Court ruling held that it was legal, the 2023 Supreme Court ruled that the long-term restriction of not allowing her to use the bathroom according to her gender identity was illegal.

The reason why the Supreme Court decision declared such restriction illegal is that although the government office has a duty to maintain an appropriate work environment for all of its employees, the office did not fulfill its duty to maintain a proper work environment by imposing long-term bathroom use restrictions on transgender female employees and instead placed too much emphasis on the discomfort of other employees who had not expressed any clear opposition to the gender identity of the subject transgender employee.

Since companies, like government offices, have the same obligation to maintain an appropriate work environment for all of their employees,[5] they must respond appropriately to the requests of transgender employees.

The Supreme Court ruled that the NPA's decision in 2015 was illegal. Notably, 2015 was also just around the time when the Shibuya and Setagaya wards introduced same-sex partnership certificates for the first time in Japan,[6] and LGBTQ+ understanding was not yet widespread in Japan. However, even at that time, companies were being required to respond in good faith to earnest requests based on the attributes of their employees. Thus, for new matters involving employees' attributes, companies should approach such matters seriously bearing in mind the above considerations of the Supreme Court in its decision.

4. A copy of this law is available at https://www.japaneselawtranslation.go.jp/en/laws/view/2542/en.
5. Labor Contracts Act (Act No. 128 of December 5, 2007), art. 3(4) and 5.
6. S. Ito and M. Lim, *"Tokyo issues Japan`s first same-sex partner certificates,"* Reuters, November 5, 2015, at https://jp.reuters.com/article/us-japan-samesex-idCAKCN0SU0MV20151105/.

Also, in this transgender case, the transgender employee agreed to give a briefing about her gender incongruence, and the government office held such session. But even if the transgender employee refused to give a briefing, this would not mean that the government office would not have to take any action. For example, suppose a company is aware that an employee's health is deteriorating due to a poor work environment but does not respond to the situation. The company may be held liable for violating its duty to maintain an appropriate work environment.[7]

Companies can fulfill their obligation by taking requests from LGBTQ+ employees as an opportunity to raise awareness and promote D&I efforts successfully.

2. Unconstitutionality of the forced sterilization requirement of Act No. 111 (2023)

In October 2023, the fourth requirement of Article 3 (1) of Act No. 111 (i.e., that the subject person has no reproductive glands or the reproductive glands thereof have permanently lost their function, or in other words, that the subject person has been permanently sterilized) was declared unconstitutional.[8] The fifth requirement thereof, which requires external genital removal and genital reconfiguration surgery, is also under review by the Hiroshima High Court and might be similarly declared unconstitutional.

If gender-affirming surgery to meet the fifth requirement is no longer mandatory to change one's gender in the family register, then more transgender people can live according to their gender identity. However, even if the fifth requirement is found to be unconstitutional, Japanese public bathhouses may still require customers to use the gendered baths in accordance with their external genitalia.[9]

A summary of the legal status of the requirements for the change of a person's gender identity is provided below.

Requirements	Judicial Decision
(a) Medical diagnosis of gender incongruence by more than two qualified doctors	
(b) Be at least 18 years of age	
(c) Is not currently married	Constitutional (Supreme Court, 2020)
(d) Currently has no child who is a minor	Constitutional (Supreme Court, 2021)
(e) Has no reproductive glands or whose reproductive glands have permanently lost function (be permanently sterilized)	Constitutional (Supreme Court, 2019) > **Unconstitutional (Supreme Court, 2023)**
(f) Has a body which appears to have parts that resemble the genital organs of the opposite gender (requires external genital removal and genital reconfiguration surgery)	Now pending before the Hiroshima High Court

7. 2416 Hanrei jiho 92 (Tokushima District Court, July 9, 2018).
8. ILGA ASIA, *"Japan: Supreme Court Strikes Forced Sterilization Requirement for Gender Recognition in Landmark Victory for Transgender Rights,"* November 10, 2023, at https://www.ilgaasia.org/news/2023/11/10/japan-supreme-court-strikes-forced-sterilization-requirement-for-gender-recognition-in-landmark-victory-for-transgender-rights. An English translation of the Supreme Court decision that was prepared by members of the Lawyers for LGBT & Allies Network (LLAN) is available at: http://llanjapan.org/lgbtinfo/2498.
9. Circulars (*tsutatsu*) of the Ministry of Health, Labour and Welfare, 0623 Yakuseieihatsu No. 1 of June 23, 2023.

III.Upcoming and New Judicial Decisions on the Constitutionality of the Ban on Same-Sex Marriages

Japan does not legally allow same-sex marriages. In 2022, the Nagoya High Court ruled that a same-sex partner was not entitled to receive benefits as a crime survivor when his partner was killed due to a crime since he was not the spouse or in a de-facto marital relationship with his partner.[10] However, the Supreme Court has granted leave to appeal this case and has heard arguments in court on March 5, 2024.[11] Such hearing before the Supreme Court is required to change the decision of the Nagoya High Court. The decision was published on March 26, 2024. The Supreme Court ruled that the survivor of a same-sex couple is entitled to such benefits.[12]

Moreover, several same-sex marriage lawsuits about whether a ban on same-sex marriage is unconstitutional are still ongoing. So far, two district courts (i.e., the Sapporo District Court[13] and Nagoya District Court[14]) have declared such ban unconstitutional, two district courts (i.e., the Tokyo District Court[15] and Fukuoka District Court[16]) have declared such ban almost unconstitutional, and one district court (i.e., the Osaka District Court[17]) has declared such ban constitutional.

On March 14, 2024, the first decision by a high court on this legal issue was released by the Sapporo High Court. The Sapporo High Court ruled that not allowing same-sex marriage is an unconstitutional violation of Article 14, which establishes the right to equality, and Article 24, which states that marriage shall only be based on the mutual consent of "both sexes."[18] On the same day, in a case filed by another group of Tokyo plaintiffs, the Tokyo District Court declared such ban "a deprivation of a key part of [one's] personal identity" and is very close to being unconstitutional.[19]

These developments may result in companies altering their treatment of such same-sex married couples.

IV. Conclusion

As shown in the discussion above, 2023 was a year of significant progress for the LGBTQ+ status in Japan. This year is seeing further developments for LGBTQ+ people. Moreover, now that it is becoming clearer what companies need to address with respect to LGBTQ+ issues, companies should respond appropriately.

10. Jiji Press, *"High Court Rejects Survivor Benefits for Same-Sex Partner,"* August 26, 2022, at https://sp.m.jiji.com/english/show/21618.
11. The Japan Times, *"Supreme Court may review judgement against benefits for same-sex partner,"* January 18, 2024, at https://www.japantimes.co.jp/news/2024/01/18/japan/crime-legal/supreme-court-same-sex-couple-benefits/.
12. T. Endo, *"Top court rules same-sex couples eligible for crime victim benefits,"* The Asahi Shimbun, March 26, 2024, at https://www.asahi.com/ajw/articles/15210350.
13. 2508 Hanrei jiho 152 (Sapporo District Court, March 17, 2021).
14. 516 Hogaku kyoshitsu 107 (Nagoya District Court, May 30, 2023).
15. 2547 Hanrei jiho 45 (Tokyo District Court, November 30, 2022).
16. 1588 Jurist 66 (Fukuoka District Court, June 8, 2023).
17. 2537 Hanrei jiho 40 (Osaka District Court, June 20, 2022).
18. The Mainichi, *"Sapporo High Court rules same-sex marriage ban unconstitutional,"* March 14, 2024,at https://mainichi.jp/english/articles/20240314/p2g/00m/0na/042000c.
19. *Id.*

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