

# The International Comparative Legal Guide to: **Mergers & Acquisitions 2007**

**A practical insight to cross-border Mergers & Acquisitions**



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### 1 Relevant Authorities and Legislation

#### 1.1 What regulates M&A?

##### Corporate Law

Stock purchases, mergers, stock-for-stock exchanges, corporate de-mergers, issues of new stock and business transfers are regulated by the Corporate Law, which came into effect in May 2006.

##### Securities and Exchange Law

The Securities and Exchange Law (“SEL”) regulates tender offers and certain disclosure requirements. The SEL was amended in June 2006, and such amendment’s effective date will be determined within this year, at which point the SEL will be renamed the Financial Instruments and Exchange Law (“FIEL”); among others, the effective date of those articles of the amendment concerning tender offers and large shareholding reports will be determined in a Cabinet Order to be issued by 14 December 2006.

##### Anti-Monopoly Law

Stockholdings, mergers, corporate de-mergers and business transfers that will substantially restrain competition in a particular market are prohibited under the Anti-Monopoly Law (“AML”).

#### 1.2 Are there different rules for different types of public companies?

If a public company is organised under the Corporate Law of Japan, the rules applicable thereto under the Corporate Law, the AML and the tender offer and extraordinary report rules of the SEL/FIEL do not differ according to the public company. The tender offer rules apply where the target company is obliged to file an annual securities report, which must be filed by listed companies, over-the-counter companies and certain other companies prescribed in the SEL/FIEL.

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

When a foreign company obtains over 10% of the shares of a company listed on the stock exchange or an over-the-counter company, it must, in principle, provide notification to the Minister of Finance and the minister in charge of the relevant industry within fifteen (15) days. However, concerning certain regulated industries, it must provide prior notification to the minister in charge of the relevant industry.

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

##### Main restrictions regarding capital injections

Under the Nippon Telegraph and Telephone Corporation Law, foreign entities cannot hold one-third or more of the voting rights in Nippon Telegraph and Telephone Corporation.

The Radio Law provides that a radio station licence cannot be granted to a company where foreign entities with shares in the company hold 20% or more of the company’s vote.

Under the Aviation Law, a licence to engage in the air transport business cannot be granted to a company where foreign entities with shares in the company hold one-third or more of the company’s vote.

If an entity intends to obtain over 20% of the voting rights of a banking company, an insurance company or a company operating a stock exchange, it must obtain approval from the Prime Minister.

##### Approvals and licences in relation to mergers, corporate de-mergers and business transfers

If a banking company, an insurance company or a trust company intends to become a party to a merger, corporate de-merger or business transfer, it must obtain approval from the Prime Minister.

Additionally, many other types of companies operating a business that requires obtaining an approval or a licence may be required to obtain a new approval or licence for a surviving entity.

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

If a person serves a public notice of the commencement of a tender offer, files a registration statement of a tender offer or makes any other representations that contains a false statement regarding any material matter or omits a material fact necessary to ensure that a statement is not misleading, the person may be liable to pay damages to a third party based on such falsehood contained in or omission from the representations, and may be penalised by imprisonment and/or fine.

There are restrictions against insider dealing as well. A person who has been informed of any material fact relating to a listed company by any corporate insider may not purchase any shares of the company until such material fact has been made public. Unjust trading, the dissemination of rumours and market manipulation are also prohibited under the SEL/FIEL. A person who acts in violation of these restrictions may be penalised by imprisonment and/or fine.

## 2 Mechanics of Acquisition

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

#### Stock purchase / Tender offer

See question 2.5.

#### Merger

Shareholders of the absorbed company are usually allotted shares in the surviving company (cash and other assets will be permitted to be allotted to shareholders of the absorbed company in 2007, which will make it possible to conduct a cash-out-merger or equivalent to triangular merger).

#### Stock-for-stock exchange

Shareholders of what will become the wholly-owned subsidiary are usually allotted shares in what will become the absolute parent company (cash and other assets will be permitted to be allotted to shareholders of what will become the wholly-owned subsidiary in 2007).

#### Corporate de-merger

A company can affect an absorption-type de-merger in order to have all or a part of its business succeeded by another company.

#### Issuance of new stock

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

#### Business transfer

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

### 2.2 What advisers do the parties need?

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

### 2.3 How long does it take?

#### Tender offer

The tender offer period must be between twenty (20) and sixty (60) calendar days under the SEL. This period may be changed when the new FIEL becomes effective.

#### Merger / Stock-for-stock exchange / Corporate de-merger / Business Transfer

It is necessary for the parties to the transaction to obtain approvals at shareholders' meetings of both parties; if a party is a listed company, it takes approximately two (2) months before a shareholders' meeting can be held.

With respect to mergers, corporate de-mergers and business transfers, generally, if a company with gross asset exceeding 10 billion yen intends to purchase domestic gross assets exceeding 1 billion yen or merge or de-merge with a company with domestic gross assets exceeding 1 billion yen, a party or parties to the transaction must give prior notification to the Fair Trade Commission ("FTC"). Pre-notification consultation with the FTC takes approximately one (1) month, and there is 30-day waiting period which runs from completion of the formal notification to the

execution of the transaction.

#### Issuance of new stock

If a listed company allocates new stock to a third party, the company is required to file a security registration statement with the Prime Minister, and the company, in principle, cannot make an offer until fifteen (15) days have passed from the day on which the filing is complete.

The issuance of new stock, in principle, requires only a resolution of the target's board of directors. However, if the issue price is especially favourable to the subscriber, or classified stock is issued accompanied with an amendment to the issuer's articles of incorporation, it is necessary for the issuer to obtain approval at its shareholders' meeting; with respect to a listed company, it takes approximately two (2) months before a shareholders' meeting can be held.

### 2.4 What are the main hurdles?

Those include the execution of the agreements for the transaction (particularly the purchase agreement), obtaining approval at the shareholders' meeting, and negotiations and consultations with relevant authorities.

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

- There are no rules that provide for a minimum offer price.
- Under the current SEL, if a party intends to purchase shares of listed companies, over-the-counter companies or other companies that must submit annual securities reports outside of the stock exchange market, the purchase is required, in principle, to be made by means of a tender offer; except for a purchase that takes place under at least one of the following circumstances:
  - (a) the aggregate voting rights held by the buyer and any affiliated persons (as defined in the SEL) divided by the total voting rights of the target ("Total Voting Ratio") after the purchase does not exceed 5%;
  - (b) the Total Voting Ratio does not exceed one-third after the purchases, and the aggregate number of sellers of the contemplated share purchases and sellers of shares to the buyer traded outside of the stock exchange market within sixty (60) days before the day the purchase is made is ten (10) or less; or
  - (c) the Total Voting Ratio does not exceed one-third after the purchase, and the purchase is made according to the particular methods of purchase as prescribed by the Prime Minister (including purchasing through ToSTNeT of the Tokyo Stock Exchange).
- In addition to the above, under the new FIEL, purchases that take place under the following circumstances also must be made by means of a tender offer:
  - (a) the purchases of shares of a specified Total Voting Ratio is conducted outside of and on the stock exchange market within a specified period, and the Total Voting Ratio exceeds one-third after the purchases; or
  - (b) another purchaser makes a tender offer for the shares of a listed company, etc. and a person whose Total Voting Ratio exceeds one-third intends to purchase shares of the listed company, etc. at a specified ratio within a specified period.

(The specified ratios and periods above and below will be prescribed in a Cabinet Order which has not been legislated as of 31 July 2006.)

- A tender offeror can condition its offer by stating in a public notice of the commencement of a tender offer and a registration statement of a tender offer that (i) the tender offeror will not purchase all of the tendered shares if the total number of tendered shares is less than the number of shares it plans to purchase; and/or (ii) the tender offeror will not purchase a part or all of the tendered shares in excess of the number of shares it plans to purchase if the total number of tendered shares is greater than the number of shares it plans to purchase; provided, however, that under the FIEL, if the tender offeror intends to have a greater Total Voting Ratio than the specified Total Voting Ratio by means of a tender offer, the tender offeror must purchase all of the tendered shares.
- See questions 7.1 and 7.2. A shareholder who tenders can cancel a contract in connection with the tender offer at any time during the tender offer period.

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

### Tender offer

A tender offeror can use securities as consideration for a tender offer. However, to do so, the tender offeror may have to (i) file a security registration statement for a public offering; (ii) obtain approval at a shareholders' meeting for an issuance at a specially favourable issue price; and (iii) conduct in-kind capital contribution procedures. Therefore, consideration for a tender offer is usually cash.

### Merger / Stock-for-stock exchange / Corporate de-merger

If parties intend to use cash as consideration for a merger, stock-for-stock exchange or corporate de-merger before 2007, they have to obtain approval under the Industrial Revitalization Special Measures Law ("IRL"). If the parties use only stock, taxation on the capital gains of target shareholders can be deferred. Under the Corporate Law, cash-out-mergers, etc. can be executed in 2007, but the tax treatment of such transactions has not yet been determined.

Under the FIEL, if parties intend to use stock as consideration, a security registration statement must, in principle, be filed with the Prime Minister.

### Issuance of new stock

If a person makes an in-kind capital contribution, an investigation by an inspector appointed by a court is generally required; except in certain limited circumstances.

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

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

With respect to mergers and stock-for-stock exchanges, the surviving company or the absolute parent company must allot the consideration pro rata to the number of shares owned by the shareholders in the absorbed company or the wholly-owned company.

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

No, there are no such limits.

## 2.9 What documentation is needed?

### Tender offer

- Public notice of the commencement of a tender offer and registration statement for a tender offer (see question 4.3).
- Notice of the purchase.
- Public notice of the number of tendered share certificates and tender offer report.

### Merger / Stock-for-stock exchange / Corporate de-merger

- Agreement that provides the terms and conditions for the transaction.
- Certain documents subject to advanced disclosure, including the relevant agreement.
- Public notice in relation to the procedures to protect creditors.
- Certain other documents regarding matters subject to disclosure after the execution of the transaction.

### Issuance of new stock

- Stock subscription agreement or share application certificate, etc.

## 2.10 Are there any special accounting procedures?

- Timely disclosure according to the stock exchange regulations (see question 4.3).
- An extraordinary report must be filed if the target company must file an annual securities report.
- Large shareholding reports are required for greater than 5% shareholders ("Large Holders") (see question 5.2).
- If a company obtains more than 10% of the voting shares of certain Japanese companies, such company must file a shareholding report with the FTC within thirty (30) days after the completion of the transaction.

## 2.11 What are the key costs?

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

## 2.12 What consents are needed?

- Prior notice of a merger, corporate de-merger or business transfer must be filed with the FTC and clearance must be obtained before the completion of the transaction.
- An approval or a licence in relation to mergers, corporate de-mergers or business transfers must be obtained (see question 1.4).

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

### Merger / Stock-for-stock exchange / Corporate de-merger / Business transfer

In principle, at the shareholders' meetings of both parties, an affirmative vote from shareholders comprising two-thirds or more

of the shareholders with voting rights present at the shareholders' meeting is required.

In the case where the total price of the equity value of shares and/or the book value of the other consideration offered to the shareholders of an absorbed company or a wholly-owned company, or offered to a company effecting a de-merger or a business transfer does not exceed 20% of the net assets of a surviving company, an absolute parent company, a successor company or a business transferee, approval at a shareholders' meeting of the surviving company, absolute parent company, successor company or business transferee, in principle, is not required (summary merger etc. (*Kani-Soshikisaihen*)).

With respect to merger, corporate de-merger and stock-for-stock exchange, if either party, together with its wholly-owned entity(ies), if any, holds 90% or more of the aggregate number of voting rights of another party, approval at a shareholders' meeting of such another party, in principle, is not required (short form merger etc. (*Ryakushiki-Soshikisaihen*)). Also, with respect to business transfers, if a business transferee, together with its wholly-owned entity(ies), if any, holds 90% or more of the aggregate number of voting rights of a business transferor, approval at a shareholders' meeting of business transferor, in principle, is not required.

#### Issuance of new stock

The issuance of new stock, in principle, requires only a resolution of the target board of directors. However, if the issue price is especially favourable to the subscriber, or classified stock is issued accompanied with an amendment to the issuer's articles of incorporation, it is necessary for the issuer to obtain approval at its shareholders' meeting, generally comprising two-thirds or more of the shareholders with voting rights present at the shareholders' meeting.

#### 2.14 When is the consideration settled?

The consideration for a merger, stock-for-stock exchange, corporate de-merger or business transfer is settled upon the conclusion of the agreement providing the consideration.

The consideration for a tender offer is settled upon conclusion of a tender offer agreement, into which the bidder and the major shareholder(s) often enter.

The consideration for the issuance of new shares is settled upon the conclusion of a share subscription agreement.

### 3 Friendly or Hostile

#### 3.1 Is there a choice?

It is possible to engage in a hostile acquisition with respect to a stock purchase and a tender offer.

In relation to the other acquisition transactions, in the case of a hostile transaction, an acquirer may exercise its shareholder's right to make a proposal, and propose the election of certain directors of the target company, and launch a proxy fight.

#### 3.2 How relevant is the target board?

##### Stock purchase / Tender offer

Under the FIEL, with respect to a tender offer, the target company must file a position statement report, and its position is generally decided by a board resolution; however, stock purchases and tender

offers can be made without the approval of the target board. There are some companies that institute guidelines against hostile takeovers ("Takeover Guidelines"), and such guidelines generally stipulate that if a target board receives a proposal, the target board will decide whether such proposal will maximise shareholder value, and announce the terms of the offer and the position of the target board.

#### Other acquisition transactions

A board resolution is required in merger, corporate de-merger, stock-for-stock exchange, issuance of new stock and business transfer transactions in order to conclude the agreement for the transaction.

#### 3.3 Does the choice affect process?

See question 3.1.

### 4 Information

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

##### Commercial register

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

##### Annual and semi-annual securities report

Listed companies, over-the-counter companies and other companies as prescribed in the SEL/FIEL must file these. These reports must contain the following information:

- (i) outline of the company;
- (ii) conditions of the business;
- (iii) conditions of facilities; and
- (iv) accounting conditions and other information.

They can be accessed free of charge over the Internet on EDINET (<https://info.edinet.go.jp/EdiHtml/main.htm>).

##### Timely disclosure and extraordinary reports

Disclosure regulations of the stock exchange require that listed companies timely disclose information to investors that may affect their investment decisions. Timely disclosures for the past five (5) years are available over the Internet on TDnet (<http://www.dbs.tdnet.info/tlbs/index.html>) with a paid subscription to the Tokyo Stock Exchange ("TSE"). All disclosures are also available at the reference room of the TSE.

Extraordinary reports disclose information similar to information that must be timely disclosed, and are available over the Internet on EDINET.

#### 4.2 Is negotiation confidential?

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

#### 4.3 What will become public?

##### Tender offer

In the public notice of the commencement of a tender offer and the registration statement for a tender offer, the following information must be made public at the start of the tender offer:

- (i) purpose of the tender offer;
- (ii) purchase price and number of share certificates to be purchased;
- (iii) period of purchase;
- (iv) terms and conditions attached to the purchase by the tender offeror;
- (v) outline of information regarding the tender offeror; and
- (vi) trades or agreements with the target company or target director.

##### Merger / Stock-for-stock exchange / Corporate de-merger / Business transfer

If a target company decides to execute an M&A transaction, the following information must be timely disclosed:

- (i) purpose and terms of the transaction;
- (ii) schedule for the transaction; and
- (iii) status after the transaction.

##### Issuance of new stock

If a target company decides to issue new stock, the following information must be timely disclosed:

- (i) number of the new shares;
- (ii) issue price of new shares and total issue price of new shares;
- (iii) reason for the increase in capital;
- (iv) basis of calculation of the issue price; and
- (v) outline of the entity to whom the shares were allotted.

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

If the information changes or events occur making it necessary to correct such information, the target company must promptly disclose such change.

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

## 5 Stakebuilding

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

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

#### 5.2 What are the disclosure triggers?

Large Holders must file a large shareholding report within five (5) days of becoming a Large Holder, disclosing, among other things, the purpose of its shareholding.

#### 5.3 What are the limitations?

See questions 1.4, 1.5 and 2.5.

## 6 Deal Protection

#### 6.1 Are break fees available?

Yes, so long as the directors of the target board do not violate their fiduciary duty or offend public order and morals. However, the tender offeror cannot obtain break fees from the target shareholders.

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

Yes, so long as the directors of the target board do not violate their fiduciary duty.

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

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

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

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

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

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

## 7 Bidder Protection

#### 7.1 What deal conditions are permitted?

The bidder can withdraw a tender offer in the following cases:

- (a) if any important change takes place regarding the business or property of the target company or any other situation prescribed in the Cabinet Order arises that seriously hinders the accomplishment of the purpose of the bidder; or
- (b) if the bidder becomes bankrupt, or another important change prescribed in the Cabinet Order takes place in relation to the bidder.

However, if a bidder intends to withdraw in the event of (a) above, it is necessary for the bidder to stipulate this in a public notice of the

commencement of a tender offer and the registration statement for a tender offer.

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

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

However, under the new FIEL, the bidder can reduce the purchase price if the bidder stipulates that the bidder may reduce the purchase price if the target company conducts a stock split etc. during the tender offer.

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

Control of the target company will pass to the bidder when the target board is majority-controlled by the bidder.

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

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

- (a) stock-for-stock exchange with the target company; or
- (b) cash-out-merger/cash-out-stock-for-stock exchange under the IRL. Please note that, under the Corporate Law, cash-out-mergers, etc. can be executed beginning in 2007.

## 8 Target Defences

### 8.1 Does the board of the target have to tell its shareholders if it gets an offer?

Generally no. See questions 4.2 and 3.2.

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

The target company can, subject to directors' fiduciary duty, take the following actions under the Corporate Law:

- Institute a rights plan using share purchase warrants with discriminatory conditions, such that only certain shareholders can execute the warrants.
- Amend its articles of incorporation to alter the necessary requirements for resolutions of the removal of directors or approvals of mergers, etc.
- Grant an issue of shares or share purchase warrants with a call option exercisable by the company and/or a put option exercisable by the shareholder with discriminatory conditions.
- Issue new shares or classified shares with veto rights concerning certain transactions to an amicable third party.
- Merger, stock-for-stock exchange or formation of a joint holding company by stock-transfer with an amicable company.

### 8.3 Is it a fair fight?

Generally, the target board, with the opinion of an outside adviser, decides whether a proposal will maximise shareholder value (see question 3.2).

## 9 Other Useful Facts

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

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

### 9.2 What happens if it fails?

The bidder decides whether to dispose of the shares, acquired in the interim, at a minority discount price. Upon such disposition, if the bidder holds one-third of the voting rights of the target company, a purchaser must make a tender offer (see question 2.5).

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