研究ノート

Non-statutory takeover regulations and their changes : The Reality of the UK Takeover Panel（2）

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Ⅴ. Misunderstanding and Reality of the UK Takeover Regulations

In Japan, a lot of attention has been given to the UK takeover regulations enforced by the Takeover Panel, a body specialized in takeover issues. However, there are many misunderstandings on the basic points. The section below indicates such misunderstandings and describes the reality of the UK takeover regulations.

(a)　Does the *mandatory offer rule* basically apply in any case?

According to the *mandatory offer rule*, when a person or group acquires shares carrying 30% or more of the voting rights of a company,[(1)] they must make a cash offer to all other shareholders of the company at the highest price paid in the 12 months before the offer was announced. This is one of the core features of the UK takeover regulations. However, in reality, the mandatory offer rule has been applied to only a few cases, five to ten per year. Dispensation is granted in many cases even when the requirements for application of this rule are satisfied. It often occurs in the case of acquiring voting rights upon issue of new shares (*whitewash*)[(2)], and there are some other cases where this rule does not apply.[(3)] The Rules contained in the Code are applied flexibly in

(1)　We should note the difference from the rule for making a tender offer in Japan (holding one-third of voting rights). The Japanese rule considers the ratio of voting rights "to be acquired as a result of the offer," whereas the UK rule considers the ratio of voting rights "held at the time the offer is being made."

(2)　Whitewash refers to cases where the injector of cash or the offeror, who acquires shares carrying 30% or more of the voting rights, can avoid the mandatory offer rule by obtaining the shareholders' approval. In this case, the injector should prepare a *whitewash document* equivalent to an offer document by stating therein who the injector is and what his experience is, as well as in what business the injector is engaged and what links exist between his business and the offeree company's business, and submit the document to the Executive with a checklist via the offeree company's adviser to obtain approval, and then also obtain approval of at least half of the independent shareholders (shareholders other than the people who will acquire allotments of new shares and their concerned parties) who are present at the general meeting of shareholders.

(3)　The mandatory offer rule does not apply in the following cases: (i) *whitewash*; (ii) where shares or other securities are charged as security for a loan and such security is enforced (*enforcement of security for a loan*); (iii) where a company that is in such a serious financial position issues new shares to save the company (*rescue operations*); (iv) where a person, due to an inadver-

schemes of arrangement that aim for rehabilitation of the offeree company with the permission of the court. No specific rule exists in the Code on organization restructure by selling and buying a company's assets (except during the offer period).

Most tender offers made in the United Kingdom are not mandatory but voluntary. The offeror must make an offer to all shareholders, but if it holds shares carrying less than 30% of the voting rights at the time that the offer is being made, it can make a voluntary offer and does not have to make a cash offer at the highest price.(4) A party with no voting right can also make a voluntary offer to all shareholders. However, in the case of a voluntary offer, the offeror can state detailed acceptance conditions in an offer document,(5) whereas in the case of a mandatory offer, the offeror is allowed to state only one condition, holding more

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tent mistake, comes to hold shares carrying more than 50% of the voting rights (*inadvertent mistake*); (v) where holders of shares carrying 50% or more of the voting rights state in writing that they would not accept such an offer, or shares carrying 50% or more of the voting rights are already held by one other person (*shares carrying 50% or more of the voting rights*); and (vi) a person interested in non-voting shares becomes upon enfranchisement of those shares interested in shares carrying 30% or more of the voting rights of a company (*enfranchisement of non-voting shares*).

(4) In addition to Rule 9, the obligation to make a cash offer at the highest price also applies under Rule 6 and Rule 11.

(5) Takeover Code, Rule 10-Rule13. Typical conditions include the following: (i) a specific act should be conducted to maintain the offer; (ii) the supervisory authorities should approve control transfer when the offeror acquires a license necessary for continuing the business of the target company; (iii) the offer should be withdrawn in the event of any material adverse change occurring to the offeree company. (A Practitioner's Guide to The City Code on Takeovers and Mergers 2008/2009, at 155-159.) However, the Panel basically does not permit subjective conditions (conditions that exclusively depend on the offeror's decisions) (Rule 13).

than 50% of the voting rights, and it should make a cash offer at the highest price within the preceding 12 months.

Although it is true that the mandatory offer rule is, without a doubt, one of the cores of the UK takeover regulations, this rule is multi-structured and is applicable only in a few cases, in reality. UK specialists do not stress this fact or may not know it well. However, this does not mean that the mandatory offer rule exists only in its framework. It could rather be said that the existence of the mandatory offer rule fully functions as a deterrent against easy transfer of control ; its purport also has an influence even in cases where the rule does not apply.(6)

(b)　Are *partial acqusitions* prohibited?

In the United Kingdom, not all tender offers are whole offers. A partial offer can also be made to acquire part of the shares of the offeree company. However, in order to make a partial offer, the offeror should obtain permission from the Panel and must not acquire shares of the offeree company within 12 months before and after making the offer. If the offeror acquires control of the offeree company as a result of the partial offer, it should obtain approval of shareholders carrying more than 50% of the voting rights who are independent of the offeror (Rule 36.5). Due to this restriction, partial offers are rarely made in the United Kingdom.

On the other hand, the vast majority of dispensation from the mandatory offer rule relates to *whitewash* or "an offer resulting in a

(6)　For instance, the Code provides that a person who satisfies certain requirements may acquire shares carrying more than 30% of the voting rights of the offeree company before making an offer (Rule 5.2). However, because of the existence of the mandatory offer rule, a shareholder who intends to make a voluntary offer is made to give up the idea of acquiring shares carrying more than 30% of the voting rights before making an offer.

partial acquisition," 80 to 90 cases per year according to the recent statistics. Furthermore, if the offeree company has a very small number of shareholders, dispensation may also be granted with the permission of the Panel.(7)

(c) Are tender offers coercive?

It has been argued that tender offers could be coercive depending on the conditions or method of the offer, putting pressure on the shareholders who cannot decide whether or not to accept the offer and force them to sell off shares. From this viewpoint, some people are cautious about expanding the scope of tender offers. This issue of a coercive offer would not arise if the offer is made on condition that the offeror purchase shares from all shareholders who wish to accept the offer, and if it fails to acquire shares carrying 50% of the voting rights, the offer should be void. If this condition is proposed in advance, takeover defense would be basically unnecessary. This rule is actually in practice under the current tender offer system in the United Kingdom.(8)

(d) Are takeover-defensive measures prohibited?

In fact, it is also possible in the United Kingdom to introduce rights plans and other takeover-defensive measures based on a resolution of the general meeting of shareholders. However, this rarely occurs because there is a strong principle that shareholders, mostly institutional investors, have the right to make a decision.

(e) What are the major reasons for such misunderstandings?

A major reason for such misunderstandings on the basic points concerning the UK takeover regulations is that although the rules

(7) The Takeover Panel, Note to Advisers in relation to Code Waivers (Last revised 20 May 2006).

(8) Takeover Code, RuLE 9.3 (a).

relating to takeovers are clear, the reality as to how they are implemented (e. g., relationships between various types of offers and exceptions) are not clear to people other than those working on the Panel or at M & A markets (e. g., people in charge of M & A cases at investment banks and law firms). This situation arises from the fact that most takeover cases in the United Kingdom do not involve courts but are settled through negotiations between the Panel and the parties, and the detailed information on specific cases does not come out of the Panel, which has an obligation to confidentiality[9] (in recent years, the Panel at least releases summary statistics).

In the United Kingdom, a voluntary offer is often called a *mandatory offer* in the sense that it should also be made to all shareholders. We should note that people in this country are apt to overemphasize the philosophy and significance of the mandatory offer rule. The substantial significance of this rule is its existence as a "strict rule that an offeror must avoid," and as a result, the rule functions as a deterrent against easy acquisition of shares carrying 30% or more of the voting rights. In practice, the mandatory offer rule usually applies these cases : (i) the offeror, due to its adviser's mistake, has acquired shares carrying 30% or more of the voting rights of the offeree company before making an offer ; or (ii) the offeror, after making an offer, is likely to be able to acquire a number of shares in bulk in the market, and decides to make a separate offer through the market pursuant to the manda-

(9) It seems that the Panel, in principle, does not disclose the precedent cases (excluding appeal cases), for fear that the parties might assert the precedent cases while interpreting these cases in their favor despite the difference in facts and situations of individual cases, and this would prevent the Panel from carrying out prompt and flexible responses, as it currently does.

tory offer rule.

VI. "Moderate mandatory offer rule" as a basic type and Additional "Strict mandatory offer rule"

"Mandatory offer rule" adopted through Europe is basically applied when more than a certain amount of shareholdings of the target company (basically, 30% or one third of voting rights) is acquired (it is different from Japan where "compulsory tender offer" is based on "the ratio which the offeror is about to acquire".) The basic type of this rule seems to be very strict. However, if you understand "the balance" which arises over the rule, it is not so strict after all and could be "a soft cushion" as a deterrent against easy acquisition of control.

In applying mandatory offer rule, inhibitory effectiveness against transfer of control is often pointed out. Mandatory offer rule could not be an obstacle to M & A if an offer is generally made without applying the rule (voluntary offer).

In addition, the ratio of mandatory offer is generally small in transfer of control. In TOB practices in Europe, the offeror generally makes a voluntary offer by holding the buying in the market below threshold of mandatory offer rule (the initial requirement is 30%). In voluntary offer, there is also an "obligation of whole solicitation". It's possible to realize "whole solicitation and partial acquisition" by determining the price strategically through voluntary offer (and surplus selling after the buying)[(10)]. If these measures are used, mandatory offer rule or obligation

(10) In the US and other countries, attempts at partial acquisition of the voting rights of the target company through a takeover bid have been criticized as an abusive *two-tier bid*. In Europe, however, such attempts are effectively turned

of whole solicitation will not be an obstacle basically to business restructuring or hostile takeover. The "obligation of whole solicitation" is not considered as strict among M & A practitioners in the UK and also in whole Europe.

Further, the UK rule "is 'misunderstood' as a typical example putting everything on TOB". However, the reality is totally different. In most cases, British companies transfer control by allocation of new shares to third parties using "whitewash" as an "exemption of the TOB rule" (independent shareholders pass the resolution of general meeting by applying mutatis mutandis only the disclosure regulation in the TOB rule). Principles and exceptions are reversed between the formal rule and the reality.(11) In the UK, most TOB cases are voluntary offers.(12) This does not mean that mandatory offer rule is toothless. Because the rule itself is strict, the offeror would not easily acquire more than 30% of sharing in the market. We have to understand the mandatory offer rule functions as a deterrent against easy acquisition of control in that meaning.

On the other hand, it is necessary to consider unique social norms and accompanied structures of shareholding in each country from other perspectives. In the UK, it is not preferable to remain as a minority shareholder in a company which has block holders. It is preferable to acquire 100% as closely as possible if the ratio of shareholding is more than 30%. Therefore, there is little case of acquiring 30% to 50% voting rights (large volume holding without acquiring control) "as a result of

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down under the regulations on the consideration to be offered when *squeezing out* minority shareholders.

(11) See, Takeover Panel, Annual Report.

(12) *Id*.

the offer".

Moreover, in the UK, the mandatory offer rule is also applied to slight adding by more than 30% but less than 50% (Takeover Code, Rule9. 1). Adopting the "strict additional mandatory offer rule" as such will be an effective deterrent against transfer of control in the legal jurisdictions where the ratio of block holders is high.

Ⅶ. Strong "shareholder decision-making principle" and the preconditions thereof

A typical attitude seen within the framework of UK companies law and capital market law, especially in the phase of control transfer by way of takeovers, is a strong "shareholder decision-making principle." This principle is completely different from the "principle of maximizing the shareholder value," which is common among US companies. It is well known that, in the United States, the management is under very strong pressure to maximize the stock price or shareholder value. Decisions on important matters of a company are made by the management and the shareholders, equally.(13)

Also in the United Kingdom, a company can introduce a rights plan (poison pill) based on a resolution of the general meeting of shareholders. The introduction of defensive measures before an offer period is excluded from the Panel's regulations, and it is also not restricted under the Companies Act. Furthermore, even after the management of the target company becomes aware that an authorized offer is going to be made in the near future, they can introduce defensive measures if

(13) Professor Paul Davies (Oxford University) describes this situation in the United States as "managerialistic."

adopted at the general meeting of shareholders.

However, in the United Kingdom where institutional investors are said to have the strongest power in the market, an attempt to introduce a rights plan (poison pill) usually fails due to strong opposition from such investors, who argue that they would be deprived of the opportunity to sell shares when an offer is made.(14) The same applies to other types of defensive measures. For instance, issuing multi-voting shares is not legally prohibited but the issuing company would receive a penalty in the form of a decline in the market price of its shares. It is said that among the companies listed in the United Kingdom, only ten companies or so have issued multi-voting shares as a defensive measure. Furthermore, new shares must be issued by offering them to shareholders (rights issue).

Thus, there may be no doubt that such strong institutional investors exist behind the UK shareholders' decision-making principle. However, the UK takeover regulations establish a framework wherein not only institutional investors gain benefits but each and individual shareholder can make a decision independently. The Code provides for fair treatment of shareholders (Principles), and embodies the purport of this principle in Rules 6, 9, 11, 16, and so forth. Rule 6, which addresses a mandatory offer, is a typical provision of fair treatment of shareholders under which shareholders may, once an offer is made, receive a premium and exit from the company.

The precondition for making the strong "shareholders decision-making principle" work is *sufficient information disclosure to shareholders*. For instance, an *offer document* must cover a number of points

(14) Another large factor is the existence of the investment guidelines for institutional investors (e. g., Preemption Group Guideline).

including the following: information on the offeror and its strategic plan[15]; the offeror's intention regarding the continued employment of employees of the offeree company[16]; a cash flow statement; the offeror's intention regarding the transfer of the shares to be acquired and the information on final shareholders (Code, Rule 24).

The *offer timetable* is elaborately designed for shareholders. There is a time when they are not in an offer period, a time when they are in an offer period without a price, and a time when they are in receipt of an offer at a very clear price. At each stage, shareholders know precisely what is going on (Rules 30 to 34). There is also a provision on the period during which the potential offeror should announce and publish its intention to make an offer, called *put up or shut up* (Rule 2.5). This provision effectively prevents the offeror from announcing a vague

(15) In Japan, there is a critical view about obliging the offeror to disclose a detailed business plan. In the United Kingdom, although the offeror is obliged to give an explanation about a business plan and its reasonableness, it is not required to disclose the details of the plan (particularly when making a cash offer for all shareholders). It is also rare in this country for the offeree company to repeatedly ask detailed questions to the offeror about its business strategy. The offeror does not have to disclose more information than required under the Code (Rule 24.1). However, when the offeree company suggests any incorrect or unclear statements in the document, the offeror corrects such statements as advised by the Panel.

(16) The offeror should state its "employment policy" in an offer document. The employees (or their representative) have the opportunity to state their opinions on the employment policy but do not have the right to have the offer withdrawn. In Japan, the necessity to disclose an employment policy is sometimes questioned on the grounds that it will be irrelevant to shareholders after they sell off shares. On the other hand, in the United Kingdom, this requirement is established based on the concept that shareholders must be appropriately informed, before making the decision of whether or not to sell off shares, about what kind of company the offeror is as well as its strategy and experience.

intention to make an offer or from withdrawing the intention, thereby confusing the management of the offeree company or manipulating stock price.

Ⅷ. Regulation for the advisers and “internal sanction”

In the Takeover Code, there is a paragraph in the Introduction which specifically says that advisors, and especially financial advisors, have responsibility for ensuring compliance with the Code. So if a client doesn't, there's the ability for the Takeover Panel to discipline the advisor. It helps to give the Panel technical jurisdiction over financial advisors and other advisors.

The threat of disciplinary action, because, if a client which is neither or a target company, if it fails to comply with the Code or something that the Panel says, the Panel is likely to be angry with or take some action against both the company and also its financial advisor, and possibly its other advisors.

And so the financial advisor has a very great incentive to make sure that its client does what it should do. So financial advisors help the Panel to enforce the Code in practice, or at least help the Panel to make sure that their clients comply with the Code.

And advisors worry hugely. A lot of situations don't reach the public domain, because banks will press the Panel very hard for there to be a private censure rather than a public one. If there's a public censure, often the bank will get rid of the lead investment banker on the team. Moreover, for many years, if a bank was publicly censured, then the investment banker who was the lead man on the job would leave the bank. Banks don't like getting criticism of mistakes or poor behavior,

because it affects their standing in the market, and it's a very competitive market.

And they will push very hard with the Panel to have a private censure. And often, a number of advisors, where the Panel has said, "OK, we will give you a private censure, but you have to put your bankers through mandatory training in these areas to reinforce how important it is." It's something M & A practitioners in the UK end up doing on a reasonably regular basis.(17)

IX. Core of the problem in relation to the establishment of a specialized body for takeover regulations

Examining individual rules contained in the UK Takeover Code, we can find that many of these rules seem to be conducive to dealing with various problems that have already occurred or are likely to occur in Japan. It follows that if we introduce these rules one by one, we will finally be able to introduce something close to the Code. However, when inquiring into the possibility of introducing and implementing some rules, such as the mandatory offer rule, we should carefully design the content of the rules while bearing in mind the difference in terms of the shareholding structure between the United Kingdom and Japan, and other European countries.

Suggestions from the UK Takeover rules include not only the mandatory offer rule and the tradition of self-regulation, but also the issues like *sufficient and reasonable information disclosure or speedy and flexible regulation by experts with support of statutory laws*. Those

(17) This view and information was heard in interviews with the M & A Practitioners in the City.

are also very important factors to remember. We should discuss, sincerely and seriously, what rules we should or should not introduce into the Japanese law system and whether they should be introduced with or without modification, after fully understanding what the UK Takeover rules are, in a real sense.

The UK Takeover Panel is now a statutory body and it has powers conferred under the Companies Act. At the same time, it has maintained the power to make and use rules, which enables it to retain the advantages in supervision by a self-regulating body. The FSA is a purely statutory supervisory body, but it still has aspects of self-regulation by an industry organization. When considering the introduction of the UK-type takeover regulations into Japan, it is important to ensure that the supervisory body will be given the power to implement takeover rules promptly and flexibly as well as the capability of achieving personnel recruitment and rotation through exchanges with the private sector, rather than making it exist as a self-regulating (non-statutory) body.[18]

For predictability of the related parties, we need to have a detailed rule concerning TOB which causes transfer of control. However, it is "difficult to write down everything in the detailed rule" including exceptions and considering the characteristics of M & A, it is necessary to have speedy and flexible regulations by specialists.[19]

(18)　For instance, in Switzerland which has takeover rules and a specialized takeover supervisory body (Übernahmekommission), both similar to the UK counterparts, the financial supervisory body has the power to enforce the rules.

(19)　Since the Financial Instruments and Exchange Act contains a number of provisions that are so technical and complicated that it is difficult to understand their meaning after reading them only once, it is often the case that it is possible to attempt a construction that is contrary to the legislative purpose

Under the existing surcharge system of Japan, even an offeror who has violated the TOB rules shall be subject to a surcharge levied automatically, without room for discretionary judgment, and the amount of the surcharge tends to be huge.(20) If consultation-based TOB regulations are made possible, there will be almost no unintentional violation of the TOB rules, and even when a dispute occurs regarding the illegality of an offeror's action, the offeror will be able to choose a scheme or action that will not be deemed to be against the rules, by consulting with the supervisory body in advance.

When making rules mainly targeting M & A practitioners, it is more desirable to entrust this task to a supervisory body that consists mainly of M & A practitioners and whose organization and powers are specified by statutory law, rather than to rely on defensive measures in the form of a rights plan whose legal validity is unstable.(21)

Assuming that a Japanese version of the Takeover Panel should be established in Japan, what kind of body can it be? It can be established as a new division of the current supervisory body, or established as a completely new organization under joint jurisdiction of several minis-

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only based on the language of the Act. This is one of the reasons for calling for consultation-based regulations.

(20) In the JCOM case, the point in dispute was whether KDDI evaded the TOB rule (Article 27-2, paragraph (1), item (ii) of the Financial Instruments and Exchange Act, generally known as the *one-third ownership rule*) by attempting to acquire about 37. 8% of JCOM's shares through an intermediate holding company. The Financial Services Agency could have levied a surcharge of about 90 billion yen on KDDI.

(21) As for the legal instability of rights plans, see Hiroyuki Watanabe, "Nihonban teikuōbā paneru no kōsō" (Designing Japanese version of takeover panel), *Kigyō hōsei no genjō to kadai* (Current status and problems on corporate law system), edited by Tatsuo Uemura (Nippon Hyoron Sha, 2009), p. 21-22.

tries and agencies. In both cases, the personnel recruitment and rotation will be particularly important. In Japan, personnel exchanges between the public and private sectors have recently become popular in a manner that talented people move from the private companies to government offices on a short-term basis and then go back after being successful in their achievements. The UK Takeover Panel seems to carry out such personnel exchanges and assignments systematically.

Some people propose methods other than creating a specialized body, such as appointing lawyers who are well versed in market practices as judges (on a temporary basis) or creating a new judicial division specialized in dealing with company law cases.(22) However, takeover regulations must be enforced promptly and flexibly by experts before disputes occur, and it would be difficult to achieve this by enhancing the judicial functions. In view of this, it is not that we can choose only one out of two options, *enhancing the judicial functions or creating a specialized organization for takeover regulations*, but we should explore both possibilities.

What must be done now is to create, as soon as possible, an environment in which company executives can sincerely believe that improving business efficiency is the most powerful defense against takeovers, and to prevent inappropriate takeovers by reforming the tender offer system to the globally acceptable level.(23) When in the City, even US

(22)　For instance, Naohiko Matsuo, "Baishū Bōeisaku to Kōkai Kaitsuke Kisei no arikata (Kinyū Shōji no Me)" (Takeover defensive measures and desirable takeover rules (Eye of financial commerce)), *Kinyu Shoji Hanrei* No. 1299 (2008), p. 1.

(23)　Kenichi Fujinawa, "Kenshō : Nihon no Kigyō Baishū Rūru —Raitsu Puran -gata Bōeisaku no Dōnyū ha Tadashikattaka" (Study on Japan's takeover rules : Was it the right choice to introduce rights plans as takeover-defensive

compann the Takeover Code itselfs of the City and do not demand that the rules be changed to the US style. Taking, as a model, the UK rules that form part of the international takeover rules, we will be able to show a sufficient basis for argument against the one-sided criticism of the closed nature of the Japanese market.[24]

Even after incorporating into statutory law, the UK Takeover Panel retains its own regulatory methods. I believe that by fully understanding the conditions that support its regulatory structure and enforcement, we will see a light guiding us in the direction to which the Japanese takeover regulations must proceed.

※ [correction] Vol. 86, No. 2, p. 296, Note (21)
(wrong) Watanabe, op. cit., "Seiteihō ni Motozukanai Kigyō Baishū Kisei to sono Henyō" ((Non-statutory takeover regulations and changes).

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(right) Watanabe, "Seiteihō ni Motozukanai Kigyō Baishū Kisei to sono Henyō : Eu kigyō baishū shirei no kokunai hō-ka to eikoku teiku ōbā paneru" [Non-statutory takeover rules and their metamorphoses : Transportation of the EU Takeover Directive into national law and the UK Takeover Panel] ; H. Kanda (ed.), Shijō torihiki to sofutorō [Market transactions and soft law (Tokyo 2009), p. 74-82.]

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measures?), *Shojihomu* No. 1818 (2007), pp. 22-23.

(24) Tatsuo Uemura, Hiroyuki Watanabe, "Kigyō Baishū Rūru no arikata : Eikoku Sankō ni Hōkatsuan Tsukure" (Desirable takeover rules : Make a draft following the UK rules), *The Nikkei*, March 12, 2008 [Keizai Kyōshitsu (Economic lesson)]