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The Mandatory Bid Rule Under China's Takeover Law: A Comparative and Empirical Perspective

ROBIN HUI HUANG* & CHARLES CHAO WANG**

I. Introduction

China's corporate takeover law has been transplanted from overseas experiences.¹ British colonization of Hong Kong led to the transplantation of English-style corporate takeover law in Hong Kong, including the mandatory bid rule (MBR), and then Mainland China (China) transplanted the MBR from Hong Kong in the 1990s.² Under the U.K. City Code on Takeovers and Mergers (City Code), an acquirer is required to make a general or full takeover bid to all target shareholders for all their remaining shares when the acquirer's shareholding reaches 30 percent in the target company.³ It is designed to offer equal treatment to all shareholders in the target company and thus to protect minority target shareholders.

Shareholder primacy has been the core principle of the U.K. takeover regulation. The focus of the U.K. takeover rules has been on safeguarding

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1. The concept of takeover in China is much broader than its counterpart in the U.S., which means to gain corporate control from dispersed shareholders. Generally, a takeover (*shougou*) in China refers to the process of gaining control of a target company by bidding under a formal process for sufficient shares. It has the purpose and effect of changing corporate control and is carried out by means of share acquisition. In China, takeover law only applies to a joint-stock company. See ROBIN HUI HUANG, SECURITIES AND CAPITAL MARKETS LAW IN CHINA 249 – 91 (2014). A corporate takeover in China can be conducted by means of private agreement (negotiated takeover), tender offer and other methods. See Zhonghua Renmin Gongheguo Zhengquanfa (中华人民共和国证券法) [Securities Law of the P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) art. 85, CLI.1.60599(EN) (Lawinfochina) (China).

2. Jurisdictions like China with less developed corporate law regimes often transplant or piggyback on the legal infrastructures in developed jurisdictions like Hong Kong. See Wei Shen, *Adapting Private Equity to Company Law or Vice Versa? Understanding Some Key Determinants of a Strong Private Equity Market in the China Context*, 8 INT'L & COMP. CORP. L.J. 44, 72 (2011).

3. The City Code on Takeovers and Mergers, Rule 9.1 (U.K.).

shareholders' interests.⁴ The goal of the MBR is to guarantee the equal treatment of all target shareholders, especially better protection of target minority shareholders from exploitation by the acquirer and the target controlling shareholder. "Undistorted choice is essential to the efficient operation of the market for corporate assets and . . . equal treatment is suggested by both efficiency and fairness considerations."⁵ When corporate control is transferred to an acquirer, the business environment and corporate policy of the target listed company may undergo significant changes, which pose a great threat to the remaining shareholders. The law should step in and grant the remaining minority shareholders an opportunity to exit the company with a fair price.

The City Code imposed restrictions on acquirers' use of partial bids in discharging the MBR duty when the acquirer's shareholding is over 30 percent.⁶ A partial bid has a coercive effect on minority shareholders, although it may relieve the acquirer of the financial burden associated with a general bid. In a two-tier partial bid, the acquirer may set different bid prices for the controlling shareholder and the minority shareholders.⁷ Minority shareholders usually lack information about the decisions of their peers and feel strongly coerced to sell their shares for fear of being locked in the target company.⁸ The accepting shareholders may be more successful than the rejecting shareholders, so it is imprudent for a shareholder to reject such a bid.⁹ Due to the difficulties of launching shareholder litigation in the U.K. and Australia, the U.S. fiduciary duty rules cannot be used to prevent the acquirers' exploitation.¹⁰

In 2006, China significantly reformed its corporate takeover law, permitting the use of a partial bid by an acquirer to discharge the MBR duty triggered by his crossing of the thirty percent shareholding

4. Jennifer Payne, *Minority Shareholder Protection in Takeovers: A UK Perspective*, 8 EUR. COMPANY & FIN. L. REV. 145, 146 (2011).

5. Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1695 (1985).

6. City Code on Takeovers and Mergers, Rule 36.1 (U.K.).

7. Tender offers using a two-tiered price structure are "front-end loaded, two-tiered tender offers." David D. Jr. Peterson, *The Front-End Loaded, Two-Tiered Tender Offer*, 78 NW. U.L. REV. 811, 812 (1983). The acquiring company offers to buy at a premium price "only enough shares to establish a controlling position in the target company." *Id.* "Once it gains control of the target, the offeror merges the target into itself or a subsidiary and freezes out the target's remaining shareholders by forcing them to accept a lower price than the original tender offer price." *Id.*

8. Bebchuk, *supra* note 5, at 1696; Sharon Hannes & Omri Yadlin, *The SEC Regulation of Takeovers: Some Doubts from a Game Theory Perspective and a Proposal for Reform*, 25 YALE J. ON REG. 35, 67 (2008).

9. Razeen Sappideen, *Takeover Bids and Target Shareholders Protection: The Regulatory Framework in the United Kingdom, United States and Australia*, 8 J. COMP. BUS. & CAP. MKT. L. 281, 298 (1986).

10. Ian Ramsay, *Balancing Law and Economics: The Case of Partial Takeovers*, J. BUS. L. 369, 386 (1992).

threshold.¹¹ This represents a profound deviation of the Chinese MBR from the U.K. MBR.¹² On the other hand, the 2006 reform indicates a new trend that China's corporate takeover rules move towards the Japanese model of mandatory partial bids, which exists in China's neighboring Asian jurisdictions like Japan, Taiwan, and South Korea.¹³ When certain conditions are met, an acquirer in Japan is obligated to launch a partial bid to acquire the number of target shares which it plans to purchase in the first place.¹⁴ There are no extra financial burdens or risks of delisting associated with launching a general bid for all the remaining target shares beyond the purchase plan. Existing literature did not satisfactorily answer some crucial questions about the Chinese MBR, such as the convergence and divergence of the Chinese MBR with the U.K. model and other models. These questions about the Chinese MBR will be answered in the comparative and empirical studies of this research. The paper is structured as follows: Part II discusses the history of the legal transplantation and reforms of the Chinese MBR; and Part III explores different tender offer regulatory models that have had a profound impact on China's transplant choice. The MBR models in the U.K. and Japan are discussed in detail to reveal the new trend of the Chinese MBR. Part IV empirically examines how general and partial bids have been used by the Chinese acquirers in a ten-year period from 2007 to 2016; Part V concludes.

II. The Chinese MBR: Legal Framework

A. THE HISTORICAL DEVELOPMENT

The U.K.-style MBR was formally transplanted into China from the U.K. through Hong Kong by the 1993 Interim Provisions on the Management of the Issuing and Trading of Stocks (ITS).¹⁵ In the early 1990s, two national stock exchanges were established in Shanghai and Shenzhen, marking a new era in the development of the Chinese securities market. At that time, Chinese state-owned enterprises (SOEs) were eager to raise funds through Hong Kong's stock market. Hence, Hong Kong had the opportunity to persuade Chinese authorities to learn from Hong Kong securities law,

11. Hui Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, 42 INT'L LAW. 153, 162 (2008).

12. Compare *id.* at 162, with City Code on Takeovers and Mergers (U.K.).

13. See Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L. J. 4, 24–25 (2018).

14. Hidetoshi Matsumura & Taisuke Ueno, *M&A in Japan for Foreign Investors Part 3: Share Purchase Regulations in Japan (2)*, AMIDAS PARTNERS (Nov. 27, 2017), <http://www.amidaspartners.com/en/column/003.html>.

15. See generally Gupiao Faxing Yu Jiaoyi Guanli Zanzing Tiaoli (股票发行与交易管理暂行条例) [Interim Provisions on the Management of the Issuing and Trading of Stocks] (promulgated by the State Council of China, Apr. 22, 1993, effective Apr. 22, 1993) CLI.1.21319(EN) (Lawinfochina) (implementing U.K.-style MBR into China); Guanghua Yu, *Takeovers in China: The Case Against Uniformity in Corporate Governance*, 34 COMM. L. WORLD REV. 169, 179 (2005).

including takeover rules. In the process of drafting its securities law, Chinese legislators also sought “suggestions and opinions” from Hong Kong experts.¹⁶ As a consequence, the influence of the Hong Kong takeover law on mainland China was so significant that the 1993 ITS, the first key regulation containing a takeover legal regime in China, faithfully transplanted the MBR from Hong Kong, which can in turn trace its origin to the U.K.¹⁷

The Chinese MBR, as stipulated under the 1993 ITS, bears close resemblance to its British counterpart: it requires an acquirer to launch a general bid, which means a full bid to all target shareholders for all remaining shares.¹⁸ Specifically, within forty-five working days of any legal person’s direct or indirect acquiring of thirty percent of the target shares, such person should make a bid to buy all target shares.¹⁹ The Chinese MBR shareholding threshold was set at thirty percent, in line with the U.K. law.²⁰ There were two price benchmarks: (1) “the highest price paid for the shares by any buyout within 12 months before the present buyout offer is made” (pre-bid price); and (2) “the average market price of such shares within 30 days before the buyout offer is made” (prevailing market price).²¹ This provision was deemed a carbon copy of the Hong Kong Code of Takeovers and Mergers and Repurchases.²² A takeover attempt will be treated as a failure when the acquirer only manages to hold less than 50 percent of the common shares of the target listed company upon the expiry of the offering period. The legal consequence is that before a new offer can be made, the acquirer is forbidden to buy more than five percent of the target shares annually.²³

16. Wei Cai, *The Mandatory Bid Rule in China*, 12 EUR. BUS. ORG. L. REV. 653, 654–55 (2011); Yu, *supra* note 15, at 179 – 80.

17. Cai, *supra* note 16, at 654–55.

18. A public bid, or a takeover by tender offer (*yaoyue shougou*) in China, means the acquirer publicly makes an offer to the unspecified shareholders of the target company asking them to sell their shares within a certain period of time and at an agreed price. See JIAN XU, ZHONGHUA RENMIN GONGHEGUO ZHENGQUAN FA SHIYI (中华人民共和国证券法释义) [INTERPRETATION OF THE SECURITIES LAW OF THE PEOPLE’S REPUBLIC OF CHINA] 78 (2006).

19. Gupiao Faxing Yu Jiaoyi Guanli Zanzing Tiaoli (股票发行与交易管理暂行条例) [Interim Provisions on the Management of the Issuing and Trading of Stocks] (promulgated by the State Council of China, Apr. 22, 1993, effective Apr. 22, 1993) art. 48, CLL.1.21319(EN) (Lawinfochina).

20. City Code on Takeovers and Mergers, Rule 9.1(b) (U.K.).

21. Gupiao Faxing Yu Jiaoyi Guanli Zanzing Tiaoli (股票发行与交易管理暂行条例) [Interim Provisions on the Management of the Issuing and Trading of Stocks] (promulgated by the State Council of China, Apr. 22, 1993, effective Apr. 22, 1993) art. 48, CLL.1.21319(EN) (Lawinfochina).

22. Yan Zheng, *Zhongguo Shangshigongsi Shougou Jianguan Moshi Pingxi* (中国上市公司收购监管模式评析) [Comments on Supervision Model of Chinese Listed Companies], 2 JINRONG YANJIU (金融研究) [FIN. RES.] 38, 48 (2003).

23. Gupiao Faxing Yu Jiaoyi Guanli Zanzing Tiaoli (股票发行与交易管理暂行条例) [Interim Provisions on the Management of the Issuing and Trading of Stocks] (promulgated by the State

In the Chinese legislative hierarchy, the 1993 ITS is at the level of administrative regulation, which is lower than national law in terms of legal force. It is thus important that the MBR regime under the 1993 ITS was carried over into the 1999 Securities Law, the first national securities law in China.²⁴ Under the 1999 Securities Law, if an investor's shareholding of the target company reached thirty percent via transactions on the stock exchange and continues to acquire more shares, it should extend a general bid to all remaining shareholders.²⁵ The general bid shall be not less than thirty days but not more than sixty days.²⁶ But the 1999 Securities Law did not expressly stipulate the MBR duty for negotiated takeovers (also known as takeovers by private agreement).²⁷ A negotiated takeover (*xieyi shougou*) in China is equivalent to a sale of control in the U.S., which refers to the acquisition of the actual corporate control power of a listed company by an acquirer through private negotiation. The acquirer makes purchasing requests to the controlling shareholder, the actual controller or specific shareholders with a large shareholding, and reaches a takeover agreement.²⁸ This was considered a glaring loophole, given that, in reality, negotiated takeovers have been the main type of takeovers in China due to various reasons such as concentrated share ownership.²⁹

In 2002, the China Securities Regulatory Commission (CSRC), which is mandated to regulate the Chinese securities market including the takeover matter, issued the Measures for Regulating Takeovers of Listed Companies (Takeover Measures), providing more practical guidance on the workings of the takeover regulation in China.³⁰ Under the 2002 Takeover Measures, it is clearly stated that the triggering event may be a takeover via exchange or a negotiated takeover.³¹ The requirement for a full or general bid under the MBR remains unchanged.

This full MBR regime brought about huge costs for the acquirers, as well as hurdles for the target controlling shareholders to transfer their shares. To be sure, a bidder could apply to the CSRC for exemption under certain circumstances. Article 49 of the 2002 Takeover Measures provides the

Council of China, Apr. 22, 1993, effective Apr. 22, 1993) art. 51, CLI.1.21319(EN) (Lawinfo china).

24. See generally Zhonghua Renmin Gongheguo Zhengquanfa (中华人民共和国证券法) [Securities Law of the P.R.C.] (promulgated by the Nat'l People's Cong., Dec. 29, 1998, effective July 1, 1999, amended in 2004, 2005, 2013, and 2014) CLI.1.21319(EN) (Lawinfochina) (China).

25. *Id.* art. 81.

26. *Id.* art. 83.

27. See Huang, *supra* note 11, at 157–58.

28. XU, *supra* note 18, at 78.

29. HUANG, *supra* note 1.

30. See generally Shangshi Gongsì Shougou Guanli Banfa (上市公司收购管理办法) [Takeover Measures] (promulgated by China Sec. Reg. Comm., Sept. 28, 2002, effective Dec. 1, 2002) ST. COUNCIL GAZ., May 20, 2003, http://english.www.gov.cn/archive/state_council_gazette/2015/06/08/content_281475123284629.htm (China).

31. *Id.* arts. 13, 14, 23, 24.

circumstances where a purchaser may apply to the CSRC for exemption.³² Article 51 of the 2002 Takeover Measures provides the circumstances where relevant parties may apply to the CSRC for exemption by summary procedures (if the CSRC fails to offer disagreement within five working days, the exemption takes effect automatically).³³

TABLE 1: Summary of MBR Exemption Conditions (the 2002 Takeover Measures)

Article 49	Article 51
(1) the transfer of shares occurs among entities who are under control of a same practical controller;	(1) a shareholder who lawfully holds or controls more than 50% shares continues to increase shares, but the shares it holds does not exceed 75%;
(2) the listed company is confronted with severe financial difficulty;	(2) the reduction of shares by the listed company makes the shares held by the purchaser exceed 30%;
(3) the listed company issues new shares, which makes the shares held or controlled by the purchaser exceed 30%;	(3) due to the normal business to underwrite shares, a securities company holds more than 30% of the shares;
(4) based on the ruling of the court, an application for transfer of shares makes the shares held or controlled by a purchaser exceed 30%;	(4) due to the normal banking business undertaken by a bank, the shares held by the bank exceed 30% of the shares;
(5) other circumstances determined by the CSRC to satisfy the needs to adapt to the development and change of the securities market and to protect the investors' lawful rights and interests.	(5) due to administrative distribution and transfer of state-owned assets, a party holds or controls more than 30%;
	(6) due to inheritance, a party holds or controls more than 30%;
	(7) other circumstances determined by the CSRC to satisfy the needs to adapt to the development and change of the securities market and to protect the investors' lawful rights and interests.

There is a catch-all clause among the exemption conditions, by which the CSRC can grant exemptions based on the needs to adapt to the development

32. *Id.* art. 49.

33. *Id.* art. 51.

of the securities market and to protect the investors' lawful interests.³⁴ The broadly worded exemption rule gave the CSRC wide discretionary power to decide whether to grant an exemption. In practice, the CSRC exempted most of the negotiated takeovers triggering the MBR duty under the 2002 Takeover Measures.³⁵

For historical and political reasons,³⁶ until 2005 Chinese listed companies had adopted the so-called "split shareholding structure," under which their shares were generally divided into three categories by reference to ownership: state shares (*guojia gu*); legal person shares (*faren gu*); and public individual shares (*shehui geren gu*).³⁷ Only public individual shares could be freely traded on the stock exchange (and therefore were called tradable shares), while state shares and legal person shares were subject to severe trading restrictions (and therefore were collectively called non-tradable shares).³⁸ In general, non-tradable shares accounted for about two-thirds of the shares in most listed companies.³⁹ Non-tradable shares carried the same shareholder rights as tradable shares, including dividend rights and voting rights, but due to the restriction on trading, the former was usually priced much lower than the latter. Hence, under the 2002 Takeover Measures, the minimum bid prices for non-tradable shares and tradable shares were different. The bid price for tradable shares shall not be lower than the higher price of the two: (1) the highest price at which a purchaser buys the target shares within six months; or (2) ninety percent of the average price of target shares within thirty trading days.⁴⁰ The bid price for non-tradable shares shall not be lower than the higher price of the two: (1) the highest price at which a purchaser buys the target shares within six months; or (2) the audited net asset value of per-target share.⁴¹

B. THE CURRENT LEGAL FRAMEWORK

In 2005, the CSRC launched an important program to solve the historical problem of the split share structure of Chinese listed companies.⁴² Under this program, the previously non-tradable shares will be made freely tradable on the stock exchange,⁴³ but in order to spread the impact of the reform on

34. *Id.* arts. 49, 51.

35. Cai, *supra* note 16, at 680.

36. Hui Huang, *China's Takeover Law: A Comparative Analysis and Proposals for Reform*, 30 DEL. J. CORP. L. 145, 150 (2005).

37. *Id.*

38. *Id.*

39. ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], OECD ECONOMIC SURVEYS: CHINA 2017 83 (2017), https://www.oecd-ilibrary.org/economics/oecd-economic-surveys-china-2017_eco_surveys-chn-2017-en.

40. Takeover Measures art. 35 (2002) (China).

41. *Id.*

42. See Huang, *supra* note 11, at 157; Wallace Wen-Yeu Wang & Jian-Lin Chen, *Bargaining for Compensation in the Shadow of Regulatory Giving: The Case of Stock Trading Rights Reform in China*, 20 COLUM. J. ASIAN L. 298, 309 (2006).

43. Wang & Chen, *supra* note 42, at 309.

the market, the program is implemented in phases. Most listed companies have now completed the reform. In keeping with this shareholding structure reform, the 1999 Securities Law and the 2002 Takeover Measures were both significantly amended in 2005 and 2006 (the two revised instruments became effective in 2006, thus called the 2006 Securities Law and the 2006 Takeover Measures).⁴⁴ The Securities Law reform has introduced many “truly bold new measures.”⁴⁵ After the reforms, China has made great achievements in setting up a takeover regulatory regime in line with international experience, which maintains a balance between shareholder protection and takeover contestability.⁴⁶

1. *The 2006 Securities Law*

Under the 2006 Securities Law, where an investor coming to hold 30 percent of target shares via transactions on the stock exchange⁴⁷ or by agreement⁴⁸ continues to increase shareholding, it should extend a takeover bid to all remaining shareholders to purchase all or part of the remaining shares. If the shares are over-subscribed by the target shareholders, the bidder should carry out the acquisition on a pro rata basis.⁴⁹ The minimum percentage of a partial bid is not stipulated in the 2006 Securities Law. To be sure, the permission of mandatory partial bids⁵⁰ in China was not a general and whole permission. The 2006 Securities Law lifted the ban on partial bids for two scenarios: takeover via exchange⁵¹ and negotiated takeover (takeover by agreement).⁵²

After the reform, the 2006 Securities Law integrated the U.K. MBR system and the U.S. voluntary bid system, with general bids and partial bids co-existing. The reform softened the rigidity of the MBR regime by allowing the use of partial bids when a bidder discharges the MBR duty.⁵³ This is a significant divergence from the U.K.-style MBR, as the U.K. model stipulates strict limitations on an acquirer’s use of a partial bid to discharge the MBR duty because partial bids are deemed as undermining the equal

44. Huang, *supra* note 11, at 158.

45. Baoshu Wang & Hui Huang, *China’s New Company Law and Securities Law: An Overview and Assessment*, 19 AUSTL. J. CORP. L. 229, 242 (2006).

46. See generally Hui Huang & Juan Chen, *Takeover Regulation in China: Striking a Balance Between Takeover Contestability and Shareholder Protection*, in *COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES* 211–40 (Umakanth Varottil & Wai Yee Wan eds., 2018).

47. Securities Law of the P.R.C. art. 88 (2006) (China).

48. *Id.* art. 96.

49. *Id.* art. 88.

50. To launch a mandatory partial bid means that the acquirer’s takeover activity triggers the MBR duty, so it launches a partial bid to discharge the duty.

51. Securities Law of the P.R.C. art. 88 (2006) (China).

52. *Id.* art. 96.

53. *Id.* art. 88; Shangshi Gongsi Shougou Guanli Banfa (上市公司收购管理办法) [Takeover Measures] (promulgated by China Sec. Reg. Comm., May 17, 2006, effective Sept. 1, 2006) arts. 23, 47, 56, CLI.4.78271(EN) (Lawinfochina) (China).

treatment of minority shareholders and controlling shareholders.⁵⁴ The reform can be explained by the fact that Chinese policymakers are “determined to maximize the desirable effects of takeovers, such as monitoring management and promoting the efficient allocation of resources,” as well as boosting productivity.⁵⁵ The partial bid reform is a crucial step in accordance with implementing the national strategy of encouraging takeovers. Takeovers of listed companies are made easier, and big companies can acquire and merge with each other to foster big corporate groups. On the state level, the Chinese government also wanted to create and foster a few powerful central SOEs. One distinctive characteristic of China’s state capitalism has been the central role of about 100 large SOEs dominating critical industries such as steel, telecom, and transportation. They have been viewed as the “national champions” representing China competing in the global market.⁵⁶

2. *The 2006 Takeover Measures*

The 2002 Takeover Measures were modified in 2006 to stipulate much more detailed and workable rules on the new MBR.⁵⁷ They have greatly enhanced China’s corporate takeover law “both in terms of form and substance,” thus bringing it more closely into line with its counterparts in developed economies.⁵⁸ The 2006 Takeover Measures provide further guidance on how a partial bid can be used for the MBR duty triggered by a takeover via exchange: if an acquirer’s purchasing shares on the stock exchange makes its shareholding cross the thirty percent threshold, the acquirer can launch a partial bid to discharge the MBR duty.⁵⁹ The minimum percentage of a partial bid is five percent.⁶⁰ The permission has the effect of encouraging takeovers via exchange. Compared with a mandatory general bid,⁶¹ a mandatory partial bid would be less of a burden for a hostile bidder.

Interestingly, the 2006 Takeover Measures reestablished the partial bid ban on the MBR duty triggered by a negotiated takeover.⁶² If an acquirer comes to hold more than thirty percent by a negotiated takeover, the part of shares that exceeds thirty percent shall be acquired by means of a mandatory

54. For more discussion on partial bids, see Ramsay, *supra* note 10, at 376.

55. Huang, *supra* note 36, at 147; see generally Huang & Chen, *supra* note 46.

56. Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 699 (2013).

57. Huang, *supra* note 11, at 158.

58. *Id.* at 174.

59. Takeover Measures art. 24 (2006) (China).

60. *Id.* art. 25.

61. To launch a mandatory general bid means the acquirer launches a general bid to discharge the MBR duty. See *id.* art. 47.

62. See Xiaofan Wang, *Takeover Law in the UK, US and China: A Comparative Analysis and Recommendations for Chinese Takeover Law Reform*, at 238 (July 2013) (unpublished Ph.D. thesis, Salford Law School), http://usir.salford.ac.uk/id/eprint/30240/1/Thesis_%28Xiaofan_Wang%29.pdf.

general bid.⁶³ The same ban applies to an indirect takeover, which is similar to a negotiated takeover.⁶⁴ The acquirer usually obtains the corporate control of the controlling shareholder of the target company through an investment relationship.⁶⁵ This ban in the 2006 Takeover Measures has been criticized as violating the 2006 Securities Law (an upper law)⁶⁶ because the former is supposed to be supplementary and subsidiary to the latter.⁶⁷ The path-dependence theory suggests that a jurisdiction's corporate laws are "conditioned by its cultural, social, economic, and political past."⁶⁸ It is difficult to "suddenly shift direction by introducing an altogether novel set of institutions."⁶⁹ Negotiated takeovers and indirect takeovers have long been a mainstream form of takeover triggering the MBR duty. If the ban was lifted, most acquirers would rely less on the CSRC's exemptions, and this would deeply hurt the CSRC's discretionary powers over takeover activities.

The bid price rule was also improved in the 2006 Takeover Measures. The bid price offered to the minority shareholders should be no less than that offered to the controlling shareholder. All of the shareholders of a target company should be treated equally when a takeover bid is launched.⁷⁰ The 2002 Takeover Measures stipulated different rules on the bid price for tradable and non-tradable shares.⁷¹ In contrast, while the 2005 share split reform was implemented to convert previously non-tradable shares to tradable shares, the 2006 Takeover Measures do not make a distinction between tradable and non-tradable shares.⁷² There are two benchmarks for determining the minimum bid price. The first benchmark is the highest price at which a purchaser buys the target shares within six months.⁷³ The second benchmark is the arithmetic average value of the daily weighted average prices of the shares within thirty trading days prior to the bid date.⁷⁴ It should be noted that the bid price can be set lower than the average

63. Takeover Measures art. 47 (2006) (China).

64. See Wang, *supra* note 62, at 189–90.

65. Takeover Measures art. 56 (2006) (China); see Huang, *supra* note 11, at 169 (an indirect takeover is "equivalent to the concept of relevant interests in securities in Australia, or the notion of beneficial ownership of shares in the U.S.").

66. Securities Law of the P.R.C. art. 96 (2006) (China).

67. Yu Zheng, *Shangshigongsi Shougou Falvzhibu De Shangfa Jiedu* (上市公司收购法律制度的上法解读) [*The Commercial Legal Interpretation of Takeover Law of Listed Companies*], 5 HUANQIU FALV PINGLUN (环球法律评论) [GLOBAL L. REV.] 71, 83 (2013).

68. David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 114 (2015).

69. *Id.*; BRIAN CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 55 – 56 (2008).

70. Takeover Measures art. 26 (2006) (China).

71. *Id.* art. 35.

72. *Id.*

73. *Id.*

74. *Id.*

market price if the financial consultant hired by the acquirer explains the rationality.⁷⁵

The MBR exemption rule was also improved by the reform. A bidder can apply to the CSRC for MBR exemption under certain circumstances. Article 62 provides the circumstances where a purchaser may apply to the CSRC for exemption.⁷⁶ Article 63 provides the circumstances where any party concerned may apply to the CSRC for exemption by summary procedures (if the CSRC fails to offer disagreement within five working days, the exemption takes effect automatically).⁷⁷

The catch-all clause in the exemption conditions has been kept by the CSRC to grant exemptions. The broadly worded exemption rule gave the CSRC wide discretionary power.⁷⁸ In practice, the CSRC has exempted most of the takeovers triggering the MBR duty under the 2006 Takeover Measures.⁷⁹

III. Comparative Analyses of the Chinese MBR

A. THE U.K. MODEL

In contrast to the U.S. director-centric takeover regulation or “the market rule,”⁸⁰ shareholder primacy and the “equal opportunity rule” has been the core principle of takeover regulation in the U.K.⁸¹ The mandatory takeover bid rule provided in the City Code mandates a person who obtains or consolidates corporate control to make a general bid to all the remaining shareholders.⁸² The acquirer is forbidden to use a partial bid to discharge the MBR duty unless certain conditions are met.⁸³

First, there are lock-up requirements during the partial bid period, as well as twelve months before and after the partial bid period.⁸⁴ The consent for partial bids will not normally be granted by the Takeover Panel (Panel) if the offeror has acquired shares in the offeree company “during the 12 months preceding the application for consent” or if shares have been acquired “at

75. *Id.*

76. *Id.* art. 62.

77. *Id.* art. 63.

78. *Id.* arts. 62(4), 63(7).

79. Cai, *supra* note 16, at 670.

80. See Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1563 (2007) (there has been “a shift to shareholder value as the primary corporate objective” in the U.S., which commits the firm to a shareholder wealth maximizing strategy as best measured by stock price performance).

81. For more about the divergence between U.K. and U.S. law, see generally Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q. J. ECON. 957 (1994). See also John Armour & David A. Jr. Skeel, *The Divergence of U.S. and UK Takeover Regulation*, 30 REGULATION 50, 59 (2007).

82. City Code on Takeovers and Mergers, Rule 9.1 (U.K.).

83. *Id.*

84. *Id.* r. 36.2 – 36.3.

TABLE 2: MBR Exemption Conditions (the 2006 Takeover Measures)

Article 62	Article 63
(1) the transfer has not caused the alteration of the actual controller of the listed company;	(1) the gratuitous transfer, alteration and combination of state-owned assets upon the approval of the government;
(2) the listed company is confronted with serious financial difficulty;	(2) the purchaser's shareholding reaches or exceeds 30%, the shares as increased during each 12 months shall not exceed 2% of the issued shares of the company within one year;
(3) the purchaser obtains the new shares issued to it by the listed company upon the approval of the non-related shareholders of the general assembly of shareholders;	(3) the shares held by the investor in a listed company reach or exceed 50%;
(4) other circumstance as recognized by the CSRC for adapting to the development and alteration of the securities market or the requirements for protecting the lawful rights and interests of investors.	(4) the capital stock is reduced because the listed company repurchases shares from specific shareholders, which makes the shares held by the party exceed 30%;
	(5) the engagement in brokerage or loans, etc. of a securities company, bank or any other financial institution within its business scope results in its holding more than 30%;
	(6) due to inheritance, a party holds or controls more than 30%;
	(7) other circumstances determined by the CSRC for adapting to the development and alteration of the securities market or the requirements for protecting the lawful rights and interests of investors.

any time after the partial offer was reasonably in contemplation.”⁸⁵ The offeror “may not acquire any shares in the offeree company during the offer period.”⁸⁶ In the case of a successful partial offer, the offeror may not acquire any interest in such shares “during a period of 12 months after the end of the offer period” except with the consent of the Panel.⁸⁷

Second, partial bids must be conditional as to acceptances if they result in a shareholding between thirty percent and fifty percent:

When an offer is made which could result in the offeror being interested in shares carrying not less than 30% but not more than 50% of the voting rights of a company, the precise number of shares offered for must be stated and the offer may not be declared unconditional as to acceptances unless acceptances are received for not less than that number.⁸⁸

Third, a whitewash procedure by the independent shareholders is required for the acquirer’s discharging the MBR duty via a partial bid.⁸⁹ “Any offer which could result in the offeror being interested in shares carrying 30% or more of the voting rights must be conditional” on approval of the offer, “normally signified by means of a separate box on the form of acceptance, being given in respect of over 50% of the voting rights held by shareholders who are independent of the offeror.”⁹⁰ This requirement may be waived “if over 50% of the voting rights . . . are held by one shareholder.”⁹¹

Fourth, there should be a warning about the acquirer’s possible absolute control position (fifty percent) after the partial bid.

In the case of a partial offer which could result in the offeror . . . holding shares carrying over 50% of the voting rights, the offer document must contain specific and prominent reference to this and to the fact that, if the offer succeeds, the offeror . . . will be free . . . to acquire further shares without incurring any obligation . . . to make a general offer.⁹²

Hong Kong and Singapore transplanted the U.K. model. In Hong Kong, any person acquiring thirty percent or more of the voting rights of a company shall launch a mandatory general bid.⁹³ Like in the U.K., partial bids are strictly restricted for the acquirers to discharge the MBR duty in

85. *Id.* r. 36.2.

86. *Id.* r. 36.3.

87. *Id.*

88. *Id.* r. 36.4.

89. *Id.* r. 36.5.

90. *Id.*

91. *Id.*

92. *Id.* r. 36.6.

93. SEC. AND FUTURES COMMISSION, THE CODES ON TAKEOVERS AND MERGERS AND SHARE BUY-BACKS (July 13, 2018) (H.K.), <https://www.sfc.hk/web/EN/assets/components/>

Hong Kong.⁹⁴ There are lock-up requirements during the partial bids, as well as six months before and twelve months after the partial bids.⁹⁵ The mandatory partial offer must normally be conditioned on the specified number of acceptances being received, as well as on approval of the offer given by over fifty percent of the voting rights of independent shareholders.⁹⁶ The Singaporean law stipulates that any person who acquires shares carrying thirty percent or more of the voting rights must make a mandatory general bid.⁹⁷ Partial bids are much more rigidly restricted in Singapore. Singapore bans the mandatory partial bids used for discharging the MBR duty. The consent will not be granted to any partial offer used by the acquirer to discharge the MBR duty.⁹⁸

B. THE JAPANESE MODEL

Contrary to the U.K. model, the U.S. doesn't have an MBR. Acquirers can voluntarily make a takeover bid as long as the beneficial ownership of more than five percent shares is disclosed. Japan generally adopted the U.S. model of voluntary bids in the takeover regulation, but also imported some elements of the U.K. MBR model. When certain conditions are met, an acquirer in Japan is obligated to launch a partial bid to acquire the number of target shares which it plans to purchase. Unlike the U.K. MBR model, there is no extra financial burden or risk of delisting because the acquirer is not obliged to launch a general bid for all the remaining shares beyond its purchase plan.

The Financial Instruments and Exchange Act sets out the circumstances where an obligation to launch a partial bid will arise, namely the one third rule and the five percent rule. Any purchase of share certificates of a listed company by a person other than the issuer that falls under any of the following categories must be effected by means of a tender offer⁹⁹: (i) a purchase of share certificates outside a financial instruments exchange market, if after that purchase the ownership ratio of share certificates exceeds five percent; (ii) a purchase of share certificates made from an extremely small number of persons, if after that purchase the ownership

codes/files-current/web/codes/the-codes-on-takeovers-and-mergers-and-share-buy-backs/the-codes-on-takeovers-and-mergers-and-share-buy-backs.pdf (specifically looking at Rule 26.1).

94. *Id.* r. 28.2 – .3, .5.

95. *Id.* r. 28.2 – .3.

96. *Id.* r. 28.5.

97. MONETARY AUTHORITY OF SINGAPORE, THE SINGAPORE CODE ON TAKE-OVERS AND MERGERS (Jan. 24, 2019) (Sing.), https://www.mas.gov.sg/-/media/MAS/resource/sic/The_Singapore_Code_on_Take_Overs_and_Merger_24-January-2019.pdf?la=en&hash=8DCB4A29BF6DDA17527EC7E54A8CB5CFEDDAEE7D (specifically looking at Rule 14.1).

98. *Id.* r. 16.3.

99. Kin'yū shōhin torihiki-hō [Financial Instruments and Exchange Act], Act No. 25 of 1948, art. 27-2(1) (Japan). See also Hideaki Roy Umetsu & Mikio Sonoda, *Comparative Analysis of Turkish and Japanese Tender Offer Regulations: Protection of Minority Shareholders*, 2 *TURK. COM. L. REV.* 157, 166 (2016).

ratio of share certificates exceeds one third; (iii) a purchase of share certificates through a purchase and sale of securities on a financial instruments exchange market, if after that purchase the ownership ratio of share certificates exceeds one third; (iv) a purchase of share certificates, if share certificates in excess of the proportion specified by cabinet order are acquired during the period of not more than six months through that purchase of share certificates or through the acquisition of a new issue, and if after the purchase or acquisition, the ownership ratio of share certificates exceeds one third; (v) a purchase of share certificates, if a tender offer is underway for those share certificates and a person other than the issuer of the share certificates effects a purchase of them in excess of the proportion specified by cabinet order during the period of not more than six months (but only if the ownership ratio of share certificates exceeds one third); and (vi) any other purchase of share certificates specified by cabinet order as being equivalent to a purchase of share certificates set forth in any of the preceding items.

During the offer period a tender offeror must not purchase shares other than through the tender offer method,¹⁰⁰ otherwise the offeror will be liable for damages sustained by the tendering shareholders.¹⁰¹ As for the offer price, the Japanese law requires a third-party evaluator and allows the minority shareholder to launch lawsuits for a higher offer price.¹⁰² The tender offer purchase price must be based on a single set of conditions.¹⁰³

Taiwan and South Korea adopted the Japanese model. In Taiwan, if any person has a certain proportion of the securities of the public issuing company, the tender offer method shall be adopted with several exceptions.¹⁰⁴ The Regulations Governing Tender Offers for Purchase of the Securities of a Public Company (Tender Offer Regulations) further clarifies that the acquirer obtaining more than twenty percent of the total shares issued by the public company within fifty days shall make a tender offer.¹⁰⁵ In South Korea, a person who intends to make a purchase of stocks

100. Kin'yū shōhin torihiki-hō [Financial Instruments and Exchange Act], Act No. 25 of 1948, art. 27-5 (Japan).

101. *Id.* art. 27-17(1).

102. See Timothy A. Kruse & Kazunori Suzuki, *Two Decades of Development of Tender Offer Market in Japan: An Analysis of Regulatory Changes, Offer Premiums and Share Price Reactions* 2 – 4, 14 – 15 (U. Sri Jayewardenepura, Occasional Paper No. 10-11, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1572117.

103. Kin'yū shōhin torihiki-hō [Financial Instruments and Exchange Act], Act No. 25 of 1948, art. 27-2(2) (Japan).

104. Táiwān zhèngquàn jiāoyì fǎ (臺灣證券交易法) [Securities and Exchange Act] (promulgated by Presidential Order Apr. 30, 1968; last amended June 21, 2019), art. 43-1 (2019) (Taiwan), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400001>.

105. Gōngkāi shōugòu gōngkāi fāxíng gōngsī yǒujià zhèngquàn guǎnlǐ bànfǎ (公開收購公開發行公司有價證券管理辦法) [Regulations Governing Public Tender Offers for Securities of Public Companies] (promulgated by the Sec. & Futures Comm'n, Ministry of Fin. Jan. 19, 2001; last amended July 5, 2012), art. 11 (2016) (Taiwan), <https://law.fsc.gov.tw/Law/EngLawContent.aspx?lan=E&id=1393>.

outside the securities market from persons above a certain number shall make a tender offer if the shareholding of the person after the purchase is not less than five percent of the total number of the stocks.¹⁰⁶

C. DIVERGENCE AND CONVERGENCE

Although evolutionary trends point towards legal convergence in the long term, the local legal systems in China are likely to persist in the short term.¹⁰⁷ In the Chinese MBR, there is both divergence from the U.K. model in the general bids and convergence with the Japanese model in the partial bids. Interestingly, China initially learned from the U.K. experience, but it ended with the likeness of the Japanese model.¹⁰⁸

1. *Divergence from the U.K. Model*

From a comparative perspective, China has adhered to the U.K. model with respect to negotiated takeovers (and indirect takeovers). After 2006, the U.K. model of the mandatory general bid was kept in the Chinese MBR duty triggered by negotiated takeovers. On the other hand, the Chinese MBR gradually diverges from the U.K. model due to the importation of U.S. elements. The Chinese takeover law's seeming consistency with international norms is proven to be deceptive because there are significant differences lying in details.¹⁰⁹ The following table summarizes the divergences between China's and the U.K.'s full MBR models.

TABLE 3: Comparison of the Full MBR Regimes Between China and the U.K.

Jurisdiction	Scope of MBR Duty in General Bids	Bid Price Benchmark	MBR Exemption	Market Regulator
China	30% – 50%	Pre-bid Price (6 months) & Prevailing Market Price (30 days)	Yes	CSRC
The U.K.	30% – 50%	Pre-bid Price (12 months)	Yes	Takeover Panel

106. Financial Investment Services and Capital Markets Act, Act No. 8635, Aug. 3, 2007, amended by Act No. 15549, Mar. 27, 2018, art. 133(3) (S. Kor.), translated in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/main.do. The number of persons is prescribed by the Presidential Decree.

107. Hui Huang, *The Regulation of Foreign Investment in Post-WTO China: A Political Economy Analysis*, 23 COLUM. J. ASIAN L. 187, 218 (2009).

108. There is an old Chinese Idiom that reads: "Hua Hu Bu Cheng Fan Lei Mao" ("he tried to draw a tiger, but it ended with the likeness of a cat").

109. Juan Chen, *De Facto Takeover Provisions in China: Convergence, Divergence and Discussions*, 7 MACQUARIE J. BUS. L. 66, 86 (2010).

The application of MBR in China is divided by different triggering events, namely the acquirer's takeover methods. The duty to launch a general bid only applies to the MBR duty triggered by a negotiated takeover and an indirect takeover. There is no similar division in the U.K. .

Besides, the restriction of mandatory partial bids is different in China. China restricted the applicable scope of mandatory partial bids, which only applies to the MBR duty triggered by a takeover via exchange or a voluntary bid. The U.K. law generally bans a partial bid to be used by an acquirer to discharge the MBR duty except with the Takeover Panel's consent. When an acquirer applies for the Panel's consent for using a partial bid to discharge the MBR duty, strict conditions need to be satisfied. The following table summarizes the differences between the Chinese model and the U.K. model in regulating partial bids.

TABLE 4: Comparison of the Mandatory Partial Bid Regimes Between China and the U.K.

Jurisdiction	Conditions for a Partial Bid Used for Discharging the MBR Duty
China	Only applied for the MBR duty triggered by takeovers via exchange or voluntary bids
The U.K.	The Panel's consent; Approval by independent shareholders; Conditional; Lock-up requirement.

The bid price rule is different in China. The bid price must be higher than the pre-bid price struck between acquirers and target shareholders six months before the bids. In addition, China designed another local benchmark, that is, the average market price of the target shares. With the financial consultant's explanation, the acquirer can set the bid price lower than the average market price. This is a big loophole for the acquirer to take advantage of to circumvent the MBR duty. China doesn't grant the regulator the power to adjust the benchmark price, so the self-defeating general bids cannot be prevented by the CSRC.

The MBR exemption rule is also an important feature of the Chinese MBR that diverges from the U.K. model.¹¹⁰ There are MBR exemption conditions with the Chinese characteristics, such as the gratuitous transfer, alteration, and combination of state-owned assets upon the approval of the government.

110. Xin Zhang, *Shagsbigongsi shougou de Lifa he Jianguan: Women Weishenme Buneng Caiqu Meiguo Moshi? [Legislation and Supervision of the Takeover of Listed Companies: Why Can't We Adopt the American Model?]*, 8 ZHENGQUAN SHICHANG DAobao (证券市场导报) [SECURITIES MARKET HERALD] 12, 17 (2003).

2. *Convergence with the Japanese Model*

TABLE 5: Comparison of the Mandatory Partial Bid Regimes Between China and Japan

Jurisdiction	Scope of Mandatory Partial Bids	Bid Price Benchmark	Market Regulator
China	An acquirer crosses the MBR threshold (30%) by takeovers via exchange or voluntary bids	Pre-bid Price (6 months) & Prevailing Market Price (30 days)	CSRC
Japan	An investor plans to acquire one third / 5% of all shares	Single Price	FSA

The table above compares the Chinese and Japanese models. From a comparative perspective, the reform in 2006 brought the Chinese MBR, especially the mandatory partial bids, closer to the Japanese model. If a Chinese acquirer comes to hold more than thirty percent of the shares via exchange, it can launch a partial bid to discharge the MBR duty. This is similar to the Japanese model in function, which requires the purchaser to acquire the shares by means of tender offer. When attempting a takeover via exchange, the Chinese acquirer is usually cautious in the securities trading activities in not crossing the thirty percent line. When the acquirer crosses the 30 percent line, it usually has planned to acquire more shares than 30 percent. The practical significance of the 2006 reform is to ensure that the acquirer's purchase plan is to be carried out through tender offers, the most fair and transparent way of takeover, to improve the protection of minority shareholders.

IV. Empirical Studies of the Chinese MBR

A. GENERAL STATISTICS

The Takeover Measures stipulate the exemption conditions for the MBR duty. Furthermore, if the acquirer complies with the summary procedure, the MBR duty can be exempted automatically.¹¹¹ If the CSRC does not raise any objection within five working days from the date of receiving the exemption application, the acquirer is exempted. An empirical study shows that most of the acquirers who triggered the MBR duty were exempted by the CSRC, as shown in the table below. The high exemption rate reflects the strategic intention of the state to lighten the financial burden of the acquirers and to promote the takeovers of enterprises, but it also weakens the authority of the MBR regime.

111. Takeover Measures art. 63 (2006) (China).

TABLE 6: The MBR Exemption Rate by the CSRC

Year	The Number of Takeovers Triggering the Mandatory Bid Obligation	Total Number of Exemptions	Number of Bids Made According to Decisions of the CSRC
2004*	42	38	4
2005	78	73	5
2006	164	157	7
2007	139	134	5
2008	58	57	1
2009	129	125	4
2010	123	122	1
Total:	733	706 (96.32%)	27 (3.68%)

* 21/07/2004 onwards.

Existing empirical studies have not examined the acquirers' implementation of the MBR duty that were not exempted by the CSRC. 3.68 percent of the acquirers who triggered the MBR duty eventually launched a general or partial bid in accordance with the legal requirement. Although the proportion is low, it is of great academic and practical significance to study the actual effect of the MBR for the protection of minority shareholders. This empirical study endeavors to provide insight into how China's new MBR has been applied in practice after 2006. To this end, it examined all the MBR cases across the country over about a ten-year period, from January 1, 2007, through December 31, 2016. The 2006 Takeover Measures became effective on September 1, 2006. But there was no mandatory partial bid case as of the end of 2006. The Chinese market might need a period to be familiar with the new rule. The ten-year period of this research begins with January 1, 2007.

This research was conducted employing widely used commercial Chinese law databases,¹¹² as well as the CSRC official website.¹¹³ More information was obtained to supplement the above through other means such as the Internet. A data set of forty-three cases was compiled. As most MBR duties have been exempted by the CSRC,¹¹⁴ the number of MBR cases, including general bids and partial bids, is not very high. As with any empirical study of cases, the selection of the dataset is inevitably imperfect. The CSRC stopped the practice of issuing official notice on the permission of acquirers'

112. BEIDA FABAO, <http://chinalawinfo.com/> (last visited Apr. 22, 2019).

113. CHINA SEC. REG. COMMISSION, <http://www.csrc.gov.cn> (last visited Apr. 22, 2019).

114. Cai, *supra* note 16, at 680.

tender offer report after 2015.¹¹⁵ These MBR cases cannot be found on the CSRC websites. Only on information disclosure platforms can the disclosure documents of relevant listed companies be found. Some cases may not be included due to information disclosure malpractice. Besides, although the databases used for this research are the best available, they may be incomplete and inaccurate sometimes.

The CSRC permitted forty-three tender offer applications from 2007 to 2016. There were 4.3 cases per year—not a high number, especially compared with the number of the MBR exemptions per year.¹¹⁶ The empirical findings suggest that the regime still has a lot of development space in China.

TABLE 7: Ratio of General Bids v. Partial Bids

Bid Type	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
General Bids	3	1	3	1	1	2	3	0	4	6	24
Partial Bids	2	0	1	0	0	3	6	4	2	1	19
Total	5	1	4	1	1	5	9	4	6	7	43

The 2006 Takeover Measures allowed partial bids to be used in acquirers' assuming of the MBR duty.¹¹⁷ From the table above we can see the number of partial bids was nearly the same as that of general bids from 2007 to 2016. From 2007 to 2011, a partial bid was seldom used by acquirers in their takeover of listed companies. From 2012 to 2014, the number of partial bids exceeded that of general bids. Especially in 2014, all the MBR cases were partial bids without general bids being used. General bids were used in a more stable and consistent manner. In 2016, only one partial bid case was found with the other six cases involving general bids.

B. STATISTICS OF GENERAL BIDS

Through the careful examination of all the general bids in the ten-year period, this research summarized the basic information of all the general bids in the table below.

115. See *Securities Market Monthly Data*, CHINA SEC. REG. COMMISSION, http://www.csrc.gov.cn/pub/csrc_en/marketdata/security/ (last visited Jan. 11, 2020).

116. Cai, *supra* note 16, at 680.

117. Takeover Measures art. 23 (2006) (China).

TABLE 8: Statistics of General Bids

Target Listed Company	Triggering Event	Acquirers' Shareholding Before Bid	Premium (Yuan)	Acceptances	Non-Enforcement (Circumvention and Violation)
Henan Shuanghui Investment Development Co., Ltd. (2007)	Indirect Takeover	60.72%	13.17	0.00%	Yes
Wuhan Boiler Co., Ltd. (2007)	Negotiated Takeover	51%	0	0	Yes
Dongfang Boiler (Group) Co., Ltd. (2007)	Privatization & Delisting	68.05%	6.39	99.67%	No
Southern Building Materials Co., Ltd. (2008)	Negotiated Takeover	50.50%	5.88	0	Yes
CNPC Jilin Chemical Engineering Co., Ltd. (2009)	Negotiated Takeover	39.75%	0.02	200/ 180733985	Yes
Shanghai Synica Co Ltd (2009)	Indirect Takeover	34.24%	0.04	2300	Yes
Nanjing Central Market (Group) Co., Ltd. (2009)	Negotiated Takeover	47.43%	0	0	Yes
Fangda Special Steel Technology Co., Ltd. (2010)	Indirect Takeover	68.48%	0	0	Yes
Henan Shuanghui Investment Development Co., Ltd. (2011)	Indirect Takeover	51.46%	2.62	0	Yes
Chengdu Tianxing Instrument Co., Ltd. (2012)	Indirect Takeover	58.86%	0	0	Yes
Sichuan Shuijingfang Co., Ltd. (2012)	Indirect Takeover	39.71%	0.0035	3154/ 294549254	Yes
Ningbo Shipping Co., Ltd. (2013)	Indirect Takeover	41.90%	0.0086	0	Yes
Guangdong Jinma Tourism Group Co., Ltd. (2013)	Privatization & Delisting	78.97%	4.17	94.23%	No
Baotou Huazi Industrial Co., Ltd. (2013)	Indirect Takeover	31.49%	0.0033	2	Yes

Target Listed Company	Triggering Event	Acquirers' Shareholding Before Bid	Premium (Yuan)	Acceptances	Non-Enforcement (Circumvention and Violation)
Huarun Wandong Medical Equipment Co., Ltd. (2015)	Negotiated Takeover	51.51%	-0.0422	0	Yes
Erzhong Group (Deyang) Heavy Equipment Co., Ltd. 2015	Privatization & Delisting	71.47%	0.24	112596748/401340000	No
Sichuan Shuangma Cement Co., Ltd. (2015)	Indirect Takeover	75.26%	-4.901	0	Yes
Jiangxi Zhongjiang Real Estate Co., Ltd. (2015)	Indirect Takeover	72.37%	2.79	0	Yes
Jiakaicheng Group Co., Ltd. (2016)	Negotiated Takeover	52.78%	0.0044	300/851899298	Yes
Huangshi Dongbei Electrical Appliance Co., Ltd. (2016)	Indirect Takeover	50.04%	0.001HKD	0	Yes
Sichuan Shuangma Cement Co., Ltd. (2016)	Negotiated Takeover	50.93%	0.00565	100/240697388	Yes
Beijing Wantong Real Estate Co., Ltd. (2016)	Indirect Takeover	35.66%	0.0037	3000/594336780	Yes
Shenzhen Huaqiang Industrial Co., Ltd. (2016)	Indirect Takeover	70.76%	0.0008	100/166691133	Yes
Zibo Qixiang Tengda Chemical Co., Ltd. (2016)	Indirect Takeover	52.37%	0.0019	0	Yes

There are three categories of general bids that were used in the takeover of target listed companies. The first two categories can be described as mandatory general bids. The third category, privatization, means that the acquirer aims at acquiring all the remaining shares of the target company in order to delist the target company. It is a voluntary act by the acquirers, usually the existing controlling shareholders.

TABLE 9: Classification of Mandatory General Bids by Triggering Event

Triggering Event	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Indirect Takeover	1	0	1	1	1	2	2	0	2	4	14
Negotiated Takeover	1	1	2	0	0	0	0	0	1	2	7
Privatization & Delisting	1	0	0	0	0	0	1*	0	1	0	3
Total	3	1	3	1	1	2	3	0	4	6	24

This is the case of Guangdong Jinma Tourism Group in 2013. The acquirer Shenhua Guoneng Group Co., Ltd. (controlled by the SASAC, namely State-Owned Assets Supervision and Administration Commission of the State Council) came to hold 78.97 percent of the listed company Guangdong Jinma Tourism Group through indirect takeover and then issued a general bid aimed for privatization. Because the indirect takeover is only the first step of privatization, this case is classified as a case of privatization.

1. *Mandatory General Bids*

Negotiated takeover has seven cases, and indirect takeover has fourteen cases. The scarcity of mandatory general bids can be explained by an empirical finding showing that most MBR duties that were triggered by negotiated takeovers were also exempted by the CSRC for the sake of encouraging takeovers.¹¹⁸ Acquirers failing to get an exemption have two choices: launch a mandatory bid or cancel the takeover scheme.

According to the 2006 Takeover Measures, if the MBR duty is triggered by a negotiated takeover or an indirect takeover, acquirers must launch a mandatory general bid.¹¹⁹ Except in the Supor Case in 2007, the acquirers in all the negotiated takeover and indirect takeover cases complied with the 2006 Takeover Measures and launched a general bid. For instance, in order to make industrial investment and obtain returns, Rotterkes acquired 100 percent of the shares of Shuanghui Group from the SASAC of the Luohe government in 2007, thus indirectly holding 35.715 percent of Shuanghui Development (a listed subsidiary of Shuanghui Group). Then Rotterkes signed the Share Transfer Contract with Luohe Haiyu Investment and acquired twenty-five percent of Shuanghui Development shares held by the latter. Eventually, Rotterkes jointly controlled 60.715 percent of the shares of Shuanghui Development, which triggered the MBR duty to launch a

118. Cai, *supra* note 16, at 680.

119. Takeover Measures art. 56 (2006) (China).

general bid. In order to satisfy the legal obligation, Rotterkes made a general bid in 2007.

2. *Privatization & Delisting*

This category has three cases. In one case, the acquirer used the stock as bid consideration.¹²⁰ Even when the acquirers were not compelled by the MBR duty, they still launched the general bids to fulfill their strategies of delisting the company. For instance, in the takeover of listed company Dongfang Guolu in 2007, the parent company Dongfang Electric Corporation (having a shareholding of 68.05 percent) offered high premiums to the minority shareholders and successfully received tremendous tendering of their shares and delisted the company.

C. STATISTICS OF PARTIAL BIDS

Through the careful examination of all the partial bids in the study period, this research summarized all the relevant basic information of the partial bids below.

120. The case of Dongfang Guolu Co. in 2007.

TABLE 10: Statistics of Partial Bids

Target Listed Company	Acquirers' Shareholding Before Bid	Partial Bid Percentage	Bid Purpose	Premium (Yuan)	Acceptances	Non-Enforcement (Circumvention or Violation)
Chongqing Huabang Pharmaceutical Co., Ltd. (2007)	46.22%	5%	Consolidate	Not disclosed	4.16%	No
Zhejiang Supor Co., Ltd. (2007)	30.24%	22.74%	Acquire	29	Over-subscribed	No
Shanxi Top Energy Co., Ltd. (2009)	48.38%	5%	Consolidate	0.45	0	
Nanjing Central Market (Group) Co., Ltd. (2012)	47.43%	9.70%	Consolidate	13.73%	Over-subscribed	No
Wuhan Department Store Group Co., Ltd. (2012)	18.42%	5%	Voluntary	0.05	Over-subscribed	No
Kunming Yunnei Power Co., Ltd. (2012)	38.14%	11.86%	Consolidate	0.25	105/807400	
Shuangliang Energy Saving System Co., Ltd. (2013)	1.20%	14.20%	Voluntary	0.004	Over-subscribed	No
Yinzuo Group Co., Ltd. (2013)	29.82%	5%	Acquire	0.18	Over-subscribed	No
Shenzhen Tiandi (Group) Co., Ltd. (2013)	29.99%	7.21%	Acquire	0.008	192.901/10000	
Hubei Sanonda Co., Ltd (B shares) (2013)	0%	25% (B share)	Voluntary	2.1 HK Dollars	6295/14848	No
Chongqing Beer Co., Ltd. (2013)	29.71%	30.29%	Acquire	4.13	Over-subscribed	No
Guangdong Hydropower Second Bureau Co., Ltd. (2013)	29.45%	5%	Acquire	0.47	Over-subscribed	No

Target Listed Company	Acquirers' Shareholding Before Bid	Partial Bid Percentage	Bid Purpose	Premium (Yuan)	Acceptances	Non-Enforcement (Circumvention or Violation)
Shanghai Hyron Software Co., Ltd. (2014)	26.82%	43.18%	Acquire	0.33	47.70%	No
Wuhan Nanguo Real Estate Co., Ltd. (2014)	29.55%	11.39%	Acquire	16.17%	Over-subscribed	No
Wuxi Little Swan Co., Ltd. (2014)	40.08%	20%	Consolidate	1.1	79,639,774/ 126,497,553	No
Sichuan Tianyi Science and Technology Co., Ltd. (2014)	29.14%	5.86%	Acquire	0.094	8,423,543/ 17,419,447	No
Beingmate Infant Food Co., Ltd. (2015)	0%	20%	Voluntary	4.54	192427112/ 204504000	No
Shanghai Jahwa United Co., Ltd. (2015)	27.87%	31.00%	Acquire	3.62	10226588/ 208949954	No
China Tian Ying Inc. (2016)	34.95%	12.19%	Consolidate	0.0098	150741192/ 151000000	No

None of the partial bids were triggered by the acquirers' prior purchasing activities. This means all the partial bids were the voluntary act of the acquirers. The table below classifies the partial bids by the acquirer's purpose to launch a bid.

TABLE 11: Classification of Partial Bids by Acquirers' Purpose

Acquirers' Purpose	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Acquire Control	1	0	0	0	0	0	4	3	1	0	9
Consolidate Control	1	0	1	0	0	2	0	1	0	1	6
Voluntary Partial Bids Below 30%	0	0	0	0	0	1	2	0	1	0	4
Total	2	0	1	0	0	3	6	4	2	1	19

There were three categories of partial bids that were launched. Based on the motivation of the acquirers, partial bids can be used to acquire control by raising the shareholding from below thirty percent to above thirty percent, to consolidate control by raising the shareholding from above thirty percent to more, and to increase the shareholding from below thirty percent to more but still less than thirty percent. The Takeover Measures adopt a formalistic standard of corporate control, namely the thirty percent threshold.¹²¹ Acquiring control means that the acquirer has already had a shareholding of less than thirty percent of the target company before it wants to raise the shareholding above thirty percent by launching a partial bid. Consolidating control means the acquirer has already had a shareholding of more than 30 percent of the target company before it continues to acquire more shares by launching a partial bid. The first two categories can be described as mandatory partial bids. A voluntary bid means that the acquirer, having a shareholding of less than thirty percent of the target company, wants to acquire more shares below a shareholding of thirty percent by means of a partial bid.

1. *Mandatory Partial Bids*

Acquiring control has nine cases, the highest of the three categories.¹²² According to the 2006 Takeover Measures, acquirers are free to launch a partial bid from below thirty percent shareholding to above thirty percent.¹²³ Partial bids can save a lot of financial resources for the bidder and prevent the risk of delisting the target company. Consolidating control accounted for the second highest. An acquirer can raise its shareholding from above 30 percent to higher. According to the 2006 Takeover Measures, consolidating control can be conducted by extending a partial bid to all remaining shareholders of the target.¹²⁴ A partial bid is better than a general bid for the purpose of consolidating control without the risk of losing the listing status of the target company at a high cost.

2. *Voluntary Partial Bids*

According to the 2006 Takeover Measures, the acquirer below thirty percent is free to launch a partial bid as long as it does not cross the thirty percent MBR threshold.¹²⁵ This category does not belong to the use of partial bids in undertaking the MBR duty.¹²⁶ To launch a voluntary partial bid is sometimes better than purchasing shares via exchange, because the

121. Takeover Measures art. 56 (2006) (China).

122. Acquiring control has nine cases, the highest of the three. Some acquirers had motivations of consolidating control. They had a shareholding of about 29 percent before they launched the partial bid to consolidate their control in the target company.

123. Takeover Measures art. 23 (2006) (China).

124. *Id.*

125. *Id.*

126. Voluntary partial bids are included in the empirical research to show a fuller picture of the tender offer regime in China.

acquirer can acquire the target shares quickly without making the share market price rise rapidly.

D. NON-ENFORCEMENT RATE¹²⁷

This empirical study specifically examines whether the non-enforcement phenomenon of MBR has been widespread in China. Non-enforcement includes legal circumvention as well as illegal violation of the MBR provisions. Whether non-enforcement exists in a case is determined not only by calculating the control premium level, but also by counting the number of acceptances by the minority shareholders. The control premium is calculated by the difference between the bid price and the benchmark price (mostly the average share market price).

TABLE 12: Non-Enforcement Rate of General Bids and Partial Bids

Bid Type	Sub-Type	No. of Cases with No/Little Premium (Non-Enforcement Cases)	No. of Total Cases
General Bids	Indirect Takeover	14	14
	Negotiated Takeover	7	7
	Privatization & Delisting	0	3
Partial Bids	Acquire Control	1	9
	Consolidate Control	2	6
	Voluntary Bid	0	4

1. *Widespread Non-Enforcement in Mandatory General Bids*

This study found that there was widespread non-enforcement related to mandatory general bids in China. There was non-enforcement in all the mandatory general bid cases triggered by indirect takeovers and negotiated takeovers. The acquirers deliberately took advantage of the loopholes of the bid price mechanism in both legal and illegal ways, making their non-enforcement rate 100 percent. The obvious reason is that the mandatory general bids cost acquirers a lot of financial resources and also bring the risk of delisting the target company. As a logical consequence, Chinese acquirers don't like using general bids unless they have no choice. For instance, in the takeover of Shuanghui Development in 2007, the acquirer Rotterkes stated clearly in the tender offer report that the general bid was made in order to satisfy the legal obligation without the purpose of terminating the listing status of the target listed company.

127. The methods of circumventions and violations in the self-defeating general bids are analyzed in Part V of this article.

2. *No Non-Enforcement in General Bids for Privatization & Delisting*

In the privatization & delisting cases, there was no legal circumvention or illegal violation of the MBR. The acquirers all have a state-owned controlling shareholder. This indicates that the privatization initiatives were pushed by the SASACs of the government, which emphasize the governmental strategies over the listing status of the listed companies. Backed by the SASAC, the acquirer, usually the parent company of the subsidiary listed company, can offer high premiums to the minority shareholders and receive tremendous acceptances. Two acquirers succeeded, and one acquirer was unsuccessful (in the takeover of Erzhong Group, the acceptances were not enough for satisfying the bidder's attached condition of delisting, so the general bid did not take effect).

3. *No Non-Enforcement in Partial Bids*

In the 2007 Supor case, minority shareholders were well protected by the acquirer's partial bid offering significant premiums. One may view the Supor Case as rare and exceptional.¹²⁸ However, the empirical study shows the Supor Case was not unique in China. The acquirers offered high premiums in the partial bids.¹²⁹ Most of the partial bids were launched for the purpose of consolidating control and acquiring control to realize the acquirers' strategies, such as gaining corporate control or synergy effects. That's why most of them offered very attractive premiums to the target minority shareholders. In most cases, acquirers provided considerable premiums to target minority shareholders and thus received enough acceptances by the latter. In nine of the cases, the partial bids were over-subscribed, and the acquirers bought the tendered shares on a pro rata basis.

The MBR non-enforcement phenomenon found in many general bid cases was non-existent in the partial bid cases, although the acquirers had the ability to successfully circumvent the MBR duty. One may wonder whether circumvention occurred in the three partial bid cases where the acquirers offered little premium, namely the Shanxi Top Energy Case in 2009, the Kunming Yunnei Power case in 2012, and the Shenzhen Tiandi Group Case in 2013. This research asserts that the absence of enough premium may be caused by the acquirers' plan change or fund shortage instead of circumvention intentions. As mentioned, all the partial bids launched were the acquirers' voluntary act. There was no triggering event prior to these partial bids. The acquirers launched these bids not to discharge the legal duty of MBR, but to realize their own business goals.

In summation, partial bids accounted for nearly half of all takeover bids that were launched in the ten-year period. The eager embracing of partial bids by acquirers can be explained by the acquirers' motivations to realize their business strategies. Partial bids were launched to acquire and

128. Cai, *supra* note 16, at 665.

129. *Id.*

consolidate corporate control for synergy gains and other benefits. This research has shown that acquirers are incentivized to offer relatively high control premiums to minority shareholders and refutes the view that high premiums in the 2007 Supor case was rare and exceptional.¹³⁰ Most partial bids offered high premiums and a high percentage of them were over-subscribed.

V. Explanations and Normative Analyses

A. THE ROUTINE CHOICE OF LEGAL TRANSPLANT

As analyzed in the comparative study, there is both divergence from the U.K. model in the Chinese general bid rule and convergence with the Japanese model in the Chinese partial bid rule. To be sure, the vested interests, concentrated shareholding structure and state asset management in China, make the U.K.-style full MBR persistent in Chinese negotiated takeovers. There have always been interactions between the national policy and the interests of powerful groups in China. In 2006, the national securities law's lift on the partial bid ban in negotiated takeovers was to realize the national policy of encouraging takeovers and mergers.¹³¹ Later the CSRC's restoration of the partial bid ban in the Takeover Measures reflects the triumph of its own vested interests in keeping the MBR exemption power. The interaction diluted the effects of the legal reform.

The divergence from the U.K. model may be explained by the shareholding concentration in China, which makes negotiated takeovers extremely important for enforcing the MBR.¹³² With the MBR, the regulator can better monitor most control transactions. That's probably why Chinese legislators chose the U.K. model over the U.S. model in the first place. Besides, shares acquired through negotiations are usually held by the state agencies where the MBR can function as a tool for the government to monitor state assets. When more than thirty percent of the state-owned shares in a listed company are to be sold, consent must be achieved not only from the SASAC¹³³ but also from the CSRC. The government focuses on invigorating large enterprises while relaxing control over small ones.

130. This research has shown that acquirers are incentivized to offer relatively high control premiums to minority shareholders and refutes the view that high premiums in the 2007 Supor case was rare and exceptional. *Id.* Zhejiang Supor case in 2007 is a typical partial bid case. Zhejiang Supor Cookware Co. Ltd (Stock number 002032) was acquired by SEB International S.A.S. (SEB), a French company. In 2007 SEB made a 22.74 percent partial bid with significant premiums offered after it crossed the 30 percent threshold, triggered by negotiated takeover and private placement of target shares. More shares than scheduled were tendered, so SEB purchased the shares on a proportional basis.

131. *Id.* at 658 – 59.

132. The divergence is mainly reflected in the massive exemption of acquirers' MBR duty by the CSRC and the acquirers' non-enforcement of the MBR duty in general bids.

133. The SASAC is short for the State-Owned Assets Supervision and Administration Commission of the State Council.

Negotiated takeovers have a much bigger influence than takeovers via exchange. The CSRC needs to keep control on the more important issue.

When explaining the Chinese MBR's convergence with the Japanese model on partial bids, legal origin factors should be considered.¹³⁴ China shares a similar legal origin with Japan, while the U.K.-style law is not deeply rooted in Chinese society. China lacks the preconditions for a full MBR as exists in the U.K., such as the powerful institutional investors that favor shareholder primacy. The Japanese model exists in many East Asian jurisdictions that share similar legal and cultural heritages with China.

A properly designed legal framework is a necessary component to growth and development.¹³⁵ It is very important for China to choose a suitable regulatory model. From a normative perspective, this research suggest that the Chinese law should encourage acquirers to adopt the method of voluntary tender offer. In most cases, tender offer is a fair and transparent form of takeover. Due to the scarcity of hostile takeover cases, the coercive nature of partial bids is not obvious in China. On the other hand, the full MBR regime based on the U.K. model is incompatible with the Chinese context, which may inhibit the development of the Chinese takeover market. It has produced harmful effects in the recipient country due to ignorance of the interdependence and compatibility of legal rules embedded in the home legal system and the adaptation process operated by the local law operators.¹³⁶ Therefore, China should emphasize the function of voluntary bids.

B. THE SELF-DEFEATING GENERAL BIDS

Denying target shareholders' ability to obtain an above-market price would constrain the process by which assets move to more efficient users.¹³⁷ People may be interested in how and why the Chinese bidders succeeded in circumventing the MBR duty in general bids. An empirical study found a few methods of acquirers to circumvent the MBR duty, namely taking advantage of the discounted price or launching a bid when the market is booming.¹³⁸ The most famous case is the Nanjing Gangtie Lianhe Ltd. (NGL) Case in 2003. In March 2003, four promoters including Nanjing Iron & Steel Group (NISG) established NGL. NISG transferred 70.95 percent shares of Nanjing Iron & Steel Co. Ltd. (NIS) as part of contribution to NGL's registered capital, which triggered the MBR duty under the 2002 Takeover Measures. NGL as the acquirer made a general

134. The convergence is mainly reflected in the fact that the Chinese partial bid rule shares the same function with the Japanese model in practice.

135. See Bryan Mercurio, *Growth and Development: Economic and Legal Conditions*, 30 U. NEW SOUTH WALES L.J. 437, 474 (2007).

136. Katharina Pistor, *Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 129 – 30 (2002).

137. John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1192 (1984).

138. Cai, *supra* note 16, at 668 – 70.

bid to purchase the remaining shares of NIS at a bid price below the prevailing market price. As a result, no target shareholder was willing to tender its shares to the acquirer. Due to the imperfect bid price rule, acquirers could easily circumvent the MBR duty.¹³⁹ The non-enforcement phenomenon (legal circumvention or illegal violation) widely takes place in Chinese general bids. Through empirical study, this research found and systematically summarized the most important causes of non-enforcement.

First, the defective bid price benchmark rule leads to rent seeking.¹⁴⁰ This research examined the acquirers' circumventions of the bid price mechanism. Circumventions of the prevailing market price mechanism were facilitated by financial intermediaries. The acquirers offered little or even zero premiums¹⁴¹ to target minority shareholders in the general bids. To be sure, sometimes the bid price was set even lower than the prevailing market price, backed by the opinion of the financial consultant hired by the acquirer. For instance, in the case of Huarun Wandong, the bid price (11.34 Yuan) was lower than the prevailing market price (11.38 Yuan), and the financial consultant issued no objection opinion. Financial intermediaries can seek rent from the flexible bid price rule. The Takeover Measures permits the acquirers to set the bid price below the prevailing market price, so long as the financial intermediaries issue no objection opinion.¹⁴²

At the same time, this research also examined the acquirers' illegal violations of the bid price mechanism. Most bidders ignored another bid price benchmark of the MBR, namely the pre-bid price. The negotiated price between the acquirer and the controlling shareholder in their sale of control agreement is the most important pre-bid price for reference. Among the general bids, there were very few bids that recognized the negotiated takeover price as a benchmark. This can be explained by the acquirer and the controlling shareholder's unwillingness to let minority shareholders freeride on their sale of control deal.¹⁴³

Second, the circumventions and violations have not been punished in practice. Article 51 of the 1993 ITS, which stipulates sanctions for a failed

139. *Id.*

140. For more on rent seeking in the MBR, see generally Luca Enriques, *The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation*, 1 EUR. COMPANY & FIN. L. REV. 440 (2004).

141. The premiums were calculated by the differences between the bid price and the benchmark prices.

142. Takeover Measures art. 35 (2006) (China).

143. Before the split shareholding structure reform in 2005, the pre-bid price benchmark could not function even if it was enforced. The value of non-tradable shares was lower than that of tradable shares. Even if the negotiated share price between the acquirer and the controlling shareholder was observed as a bid price benchmark, the acquirer still could set the bid price below the prevailing market price (price of tradable shares). The tradable (minority) shareholders could not freeride on the bargaining power of the non-tradable (controlling) shareholders, so the pre-bid price benchmark was a toothless tiger. After the 2005 reform, the pre-bid price benchmark in theory can function well if enforced because the minority shareholders can freeride on the bargaining power of the controlling shareholders.

takeover attempt, has proven to be a toothless tiger.¹⁴⁴ The provision is expected to restrict the acquirer's ability to acquire more shares annually.¹⁴⁵ The non-enforcement by circumventions and violations is a deliberate failure caused by the acquirer's own arrangement, which has never been punished by the CSRC according to Article 51 in practice. The CSRC has never criticized the acquirers for ignoring the benchmark of the negotiated price between the acquirer and the controlling shareholder in the sale of control agreement. Neither did the CSRC adjust the bid price when the acquirers violated another benchmark to set a bid price lower than the prevailing share market price.

Third, the defective directors' fiduciary duty in China makes the minority shareholders vulnerable to the acquirer's tactics. Delaware law requires the target's board to discharge the duty to protect target shareholders from being harmed by inadequate bid prices.¹⁴⁶ The board should maximize the company's value and get the best price for their stockholders at a sale of the company.¹⁴⁷ The Chinese law requires the target management to protect the interests of minority shareholders. For instance, the Takeover Measures requires the directors, supervisors and senior managers of a target company to assume the obligation of fidelity and diligence.¹⁴⁸ The decisions made and the measures taken by the board of directors for the takeover shall be good for maintaining the rights of the company and its shareholders.¹⁴⁹ The board of directors shall investigate the capacity, credit status, and purpose of the acquirer, analyze the bid conditions, put forward suggestions on whether the shareholders should accept the bid, hire an independent financial consultant to issue professional opinions, and submit a report to the CSRC.¹⁵⁰ In practice, directors' duties have been hard to enforce due to the difficulty of launching shareholder litigation in listed companies, and the majority of the companies involved in the fiduciary duty cases are limited liability companies and foreign-invested enterprises.¹⁵¹

144. Gupiao Faxing Yu Jiaoyi Guanli Zanzheng Tiaoli (股票发行与交易管理暂行条例) [Interim Provisions on the Management of the Issuing and Trading of Stocks] (promulgated by the State Council of China, April 22, 1993, effective April 22, 1993), art. 51, CLI.2.6224(EN) (Lawinfo china) (China).

145. *Id.*

146. See generally William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PA. ST. L. REV. 837, 849 – 856 (2012).

147. Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 196 (1988).

148. Takeover Measures art. 8 (2006) (China).

149. *Id.*

150. *Id.* art. 32.

151. For more information on the Chinese directors' fiduciary duty and shareholder litigation, see generally Hui Huang, *Shareholder Derivative Litigation in China: Empirical Findings and Comparative Analysis*, 27 BANKING & FIN. L. REV. 619 (2012); Jun Wang, *On Cases Against Corporate Managers for Breaching Their Duty of Loyalty and/or Duty of Diligence in China*, 10 FRONTIERS L. CHINA 77 (2015); Shaowei Lin, *Derivative Actions in China: Case Analysis*, 44 H.K.L.J. 621 (2014).

Last but not least is the illegal performance of the sale of control agreement. The 2006 Takeover Measures stipulate that the part of shares above thirty percent in a negotiated takeover must be bought by means of launching a general bid.¹⁵² For instance, if the acquirer wants to acquire fifty-one percent of shares from the incumbent controlling shareholder by agreement, the two parties can only fulfil the takeover agreement for the thirty percent part of shares. The remaining part of twenty-one percent shares shall be bought by the acquirer by means of a general bid, together with the remaining forty-nine percent part of shares held by the minority shareholders. The MBR is meant to combine the interests of the controlling shareholder with the minority shareholders. It incentivizes the controlling shareholder to diligently and responsibly investigate the acquirer and fight for the best interests of all shareholders because, if the controlling shareholder sells its shares to a looter, his twenty-one percent shares would be locked into the company. But this empirical study shows the opposite: in all cases the twenty-one percent part of the negotiated shares was successfully transferred from the original controlling shareholder to the acquirer according to their private sale of control agreement. Later the acquirer launched a self-defeating mandatory general bid for the remaining part of the forty-nine percent shares held by minority shareholders. The collusion of the acquirer and the controlling shareholder can be explained by their own interests. They both want to completely perform their sale of control agreement. The acquirer wants to circumvent the general bid duty. The controlling shareholder doesn't want to be locked in the listed company after the deal.

In the general bid cases where the acquirers aimed for privatizing and delisting the listed companies, the acquirers were incentivized to offer sufficiently attractive premiums because they had a true intention to delist the target company. Interestingly, the acquirers were the controlling shareholder of the target company, already having a shareholding of more than thirty percent.

A decentralized political economy is the critical precondition to enable an active securities market to arise in a transitional economy.¹⁵³ From a normative point of view, this paper argues that the centralized mandatory approach towards general bids is not suitable for the Chinese takeover regulatory environment. The MBR for general bids should be turned into a default rule¹⁵⁴ to at least allow the shareholders to have an opt-in right.¹⁵⁵

152. Takeover Measures art. 47 (2006) (China).

153. John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 *YALE L.J.* 1, 81 (2001).

154. Scholars argue that the MBR in the EU should become a default rule that individual companies can opt out of. See generally Luca Enriques, Ronald J. Gilson & Alessio M. Paces, *The Case for an Unbiased Takeover Law (with an Application to the European Union)*, 4 *HARV. BUS. L. REV.* 85 (2014).

155. Just like the federal mandatory say on pay legislation in the U.S., Gordon suggest that there should be a provision for a shareholder opt-in right at publicly traded firms. See generally

The mandatory approach leads to self-defeating general bids, which are unfair to target shareholders. Mandatory bids in the transplanted MBR were self-defeating and twisted because the mandatory intervention hurts the interests of the acquirers as well as the market mechanism. Scholars argue that the heavy intervention of the government in the operation of the Chinese financial system has a series of adverse impacts.¹⁵⁶

Specifically, the defective bid price rule should be revised either by regulators or by the courts at the request of the investors. The case of *Wellman v. Dickinson* in 1979 indicates that the control premium is one of the defining features of a takeover bid.¹⁵⁷ Without control premiums, a bid can be self-defeating and non-existent. There should be sanctions for deliberate self-defeating takeover bids, which are a waste of social resources. To enforce the fiduciary duty of the directors, the Chinese courts should elaborate on more detailed rules on the adjudication of shareholder lawsuits.

C. THE PREMIUM PARTIAL BIDS

After 2006, when the acquirer's takeover via exchange triggers the MBR duty, it can choose to launch a partial bid.¹⁵⁸ This paper argues that partial bids in China offers better protection to minority shareholders. The price the bidders pay to acquire corporate control of the target company is related to the protection offered to minority shareholders in a country.¹⁵⁹ Higher premiums means minority shareholders can receive considerable consideration for leaving the company. On the other hand, this research argues that the reform has not relieved the acquirers' burden in takeovers via exchange as expected, but it has indeed encouraged the use of partial bids by acquirers, making the Chinese partial bid rule a de facto Japanese model.

1. *The reform has not relieved the acquirers' burden in takeovers via exchange.*

In practice, the acquirer can always easily dispose of their shares to avoid crossing the line of thirty percent when it attempts to conduct takeovers via exchange. If the acquirer directly launches a partial bid, it is not because the acquirer is forced by the MBR duty, but because it wants to increase the shareholding in the first place. If the acquirer doesn't plan to increase its shareholding, a mandatory partial bid is still a burden that it will try to avoid.

Jeffrey N. Gordon, *Say on Pay: Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-In*, 46 HARV. J. ON LEGIS. 323 (2009). The mandatory approach will create efficiency concerns for individual firms. *Id.*

156. Li Guo & Daile Xia, *Rethinking State Control over the PRC Financial System: The Black Box of Proactive Intervention*, in THE POLITICAL ECONOMY OF FINANCIAL REGULATION 443 - 44 (Emilios Avgouleas & David Donald eds., 2019).

157. *Wellman v. Dickinson*, 682 F.2d 355, 367 - 68 (2d Cir. 1982).

158. Takeover Measures art. 24 (2006) (China).

159. See generally Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537 (2004).

Even if the acquirer is unlucky to accidentally cross the line of thirty percent, it can just sell out the shares above thirty percent to avoid the MBR duty. This argument can be proved by two empirical findings.

First, most of the bids that offer control premium, or that have a price higher than the market price, were partial bids. The bidders launched these partial bids on a voluntary basis because the bids were to realize their strategic goals. The parts of shares bought were within the acquirers' plan. Second, no MBR duty was triggered by a takeover via exchange or a voluntary bid. In other words, none of the bids were triggered by a prior purchase act of the bidders. The bidders directly launched the partial bids when they needed to increase their shareholding.

2. *The reform has encouraged acquirers to use partial bids, making the Chinese partial bid rule a de facto Japanese model.*

As mentioned, partial bids in practice were voluntarily launched by the Chinese acquirers to realize their strategic business goal. The additional part of shares bought through partial bids was within the acquirers' original business plan. If the acquirers can successfully get exempted by the CSRC, they may prefer to choose other methods of takeover, most importantly negotiated takeovers. If the acquirers cannot get exempted by the CSRC, they have no choice but to launch a partial bid. The biggest influence of the partial bid reform was to force the acquirers not exempted to choose the method of partial bids in realizing their business goal. This legal effect undertakes the same function of the mandatory partial bid of the Japanese model, where acquirers are required to offer better protection to minority shareholders through a mandatory partial bid.¹⁶⁰

From a normative perspective, this research suggests that partial bids should be encouraged and extended to the MBR duties triggered by all kinds of securities trading, especially negotiated takeovers.

D. THE "EXCEPTIONAL" SUPOR CASE

In 2007, Zhejiang Supor Cookware Co., Ltd. was acquired by the SEB International Limited (SEB) of France. The SEB acquired the target shares by means of negotiated takeover and private placement, which triggered the MBR threshold of thirty percent. The SEB launched a partial bid to acquire 22.74 percent of the Supor shares. The offer provided a high premium, which was oversubscribed by the Supor minority shareholders. The SEB bought the shares proportionately. Minority shareholders were well protected because the partial bid provided a considerable premium. One may argue that the high premium offered in the Supor case is rare and

160. The Japanese law stipulates that an acquirer is obligated to launch a partial bid when he plans to hold more than one third of all voting rights, or more than five percent of all voting rights if he aims to acquire the shares from more than ten persons within a certain period of time. *Kin'yū shōhin torihiki-hō* [Financial Instruments and Exchange Act], Act No. 25 of 1948, art. 27-2(1)(i - vi) (Japan).

exceptional.¹⁶¹ Is the Supor case a solo case, or is it common practice of partial bids in China?

Through empirical research, this paper found that the Supor case is both ordinary and exceptional. The common point is that, in the Supor case, the acquirer provided a considerable control premium to minority shareholders like in most other partial bids; the unique point is the acquirer's use of the partial bid method. The 2006 Takeover Measures prohibit an acquirer from using a partial bid to discharge the MBR duty triggered by a negotiated takeover.¹⁶² All partial bid cases followed this rule except the Supor case. When the SEB acquired thirty percent of the Supor shares by agreement, it did not continue to increase its shareholding, but skillfully stayed along the line of 30 percent. Under the current takeover rules, the buyer can avoid the mandatory general bid duty. After a period of time, the SEB made a partial bid to increase its shareholding in Supor. The phased takeover strategy in the Supor case provides an important reference for acquirers to use partial bids to discharge the MBR duty triggered by a negotiated takeover.

E. THE RARENESS OF STOCK CONSIDERATION

This research found that only in one general bid did the acquirer use stock as bid consideration for target minority shareholders. This case was also a privatization case. The acquirer had the intention to delist the target company for various strategic reasons. The 2006 Takeover Measures stipulate that when a purchaser sends out a general bid for the purpose of delisting the target company, it shall pay by cash; if it pays by transferable securities, there should be a cash option for target shareholders.¹⁶³ In the case of Dongfang Guolu Group, Dongfang Electric as the controller of the Dongfang Guolu launched a general bid to the minority shareholders. The consideration was stock or cash. The stock price was much higher and attractive than the cash option, leading to most minority shareholders choosing the former option. The acquirer successfully delisted and restructured the target company.

This finding shows that cash was a more common payment method, which can be explained by the burdensome merits-review regime for share offerings in China.¹⁶⁴ The process of issuing stock has been complex and difficult compared with raising money. Only those acquirers who have a strong incentive of restructuring and merging the target company will be willing to spare more resources on the stock consideration. Another reason for the rare use of stock is the difficult evaluation of the stock consideration that is crucial for protecting the interests of the investors. As mentioned, the

161. Cai, *supra* note 16, at 664 – 65.

162. Takeover Measures art. 56 (2006) (China).

163. *Id.* art. 27.

164. See generally Robin Hui Huang, *The Regulation of Securities Offerings in China: Reconsidering the Merit Review Element in Light of the Global Financial Crisis*, 41 H.K.L.J. 261 (2011).

financial consultant hired by the acquirer may seek renting in the takeover process.

This research suggests that the Chinese regime for share offerings and stock evaluation should be modernized to facilitate the acquirers' process of issuing stock as consideration for target shares. The business of financial consultants and other third parties should be regulated in a more responsible manner.

VI. Conclusion

China transplanted the full-fledged MBR from the U.K. to offer protection to target minority shareholders. The Chinese MBR experienced a sharp turn in the 2006 MBR reform, which permitted the acquirers' use of partial bids in discharging the MBR duty. The new MBR in China diverges from the original U.K.-style full MBR. This research found an interesting phenomenon: China initially learned from the U.K. experience but ended with the likeness of the Japanese model.¹⁶⁵ In terms of law in the books, China still adheres to the U.K.-style full MBR regime with certain divergences in regulating mandatory general bids triggered by negotiated takeovers and indirect takeovers. On the other hand, the Chinese law started to move closer to the Japanese model in regulating mandatory partial bids triggered by takeovers via exchange. The transplanted Chinese takeover law's divergence from the U.K. and convergence with Japan can be explained by a few factors, such as China's national strategy, vested interests of the CSRC, concentrated shareholding in most Chinese listed companies, and different legal origins between China and the U.K.

This research also empirically examined all forty-three takeover bids launched by acquirers from 2007 to 2016 in China, including twenty-four general bids and nineteen partial bids. It found that general bids were used by acquirers mostly for discharging the MBR duties triggered by indirect takeovers and negotiated takeovers. There has been widespread non-enforcement in the area of mandatory general bids, including legal circumventions and illegal violations. The self-defeating general bids were mainly caused by the defective bid price benchmark rule. A small proportion of general bids were launched by the acquirers for privatizing and delisting the target company, in which they offered a considerable premium with no intention of circumvention or violation. On the other hand, acquirers actively used partial bids to acquire or consolidate the corporate control position in the target companies, with a considerable control premium offered to minority shareholders. All the partial bids were not triggered by a pre-bid purchase activity of the bidders, which indicates the partial bid reform has not relieved the acquirers' burden in takeovers via exchange. The biggest influence of the reform has been encouraging acquirers to use partial bids, making the Chinese partial bid rule a *de facto*

165. The old Chinese Idiom illustrates this phenomenon vividly: "Hua Hu Bu Cheng Fan Lei Mao" ["he tried to draw a tiger, but it ended with the likeness of a cat"].

Japanese model in function. Compared with stocks, cash is a more common form of offer consideration, which can be explained by China's rigorous securities offering approval system.

Based on these analyses, this research has several reform suggestions. First, the Chinese law should encourage acquirers to adopt the method of voluntary tender offer because the MBR regime based on the U.K. model may inhibit the development of the Chinese takeover market. Second, the centralized and mandatory regulatory approach towards general bids leads to self-defeating general bids and is not suitable for the Chinese takeover regulatory environment. The MBR for general bids should be turned into a default rule, at least allowing the shareholders to have an opt-in right. The defective bid price rule should be revised, and sanctions should be imposed on the deliberate failed attempt of tender offer and self-defeating general bidders. To enforce the directors' duty, the Chinese courts should elaborate on more detailed rules of derivative lawsuits. Third, partial bids should be encouraged to offer better protection to minority shareholders. China should extend the scope of partial bids to all kinds of securities trading, especially negotiated takeovers. Fourth, acquirers can learn from the phased takeover strategy in the Supor case as an important reference to use partial bids to discharge the MBR duty triggered by a negotiated takeover. Lastly, the Chinese merits-review regime for share offerings and the stock evaluation regime should be reformed to promote the use of securities as offer consideration. The business of financial consultants and other third parties should be regulated in a more responsible manner.

