〔研究ノート〕

The Reality of the UK Takeover Regulations

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1．Reality of mandatory offer in the UK

According to the *mandatory offer rule in the UK*, when a person or group acquires shares carrying 30% or more of the voting rights of a company,(1) they must make a cash offer to all other shareholders of the company at the highest price paid in the 12 months before the offer was announced. This is one of the core features of the UK takeover regulations. However, in reality, the mandatory offer rule has been applied to only a few cases, five to ten per year. Dispensation is granted in many

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

cases even when the requirements for application of this rule are satisfied. It often occurs in the case of acquiring voting rights upon issue of new shares (*whitewash*)[2], and there are some other cases where this rule does not apply.

Most takeover bids made in the United Kingdom are not mandatory but voluntary. The offeror must make an offer to all shareholders, but if it holds shares carrying less than 30% of the voting rights at the time that the offer is being made, it can make a voluntary offer and does not have to make a cash offer at the highest price[3]. A party with no voting right can also make a voluntary offer to all shareholders. However, in the case of a voluntary offer, the offeror can state detailed acceptance conditions in an offer document[4], whereas in the case of a mandatory offer, the offeror is allowed to state only one condition, holding more

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

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

（4） Takeover Code, Rule 10-Rule13. Typical conditions include the following: (i) a specific act should be conducted to maintain the offer; (ii) the supervisory authorities should approve control transfer when the offeror acquires a license necessary for continuing the business of the target company; However, the Panel basically does not permit subjective conditions (conditions that exclusively depend on the offeror's decisions) (Rule 13).

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

Although it is true that the mandatory offer rule is, without a doubt, one of the cores of the UK takeover regulations, this rule is multi-structured and is applicable only in a few cases, in reality. However, this does not mean that the mandatory offer rule exists only in its framework. It could rather be said that the existence of the mandatory offer rule fully functions as a deterrent against easy transfer of control; its purport also has an influence even in cases where the rule does not apply.(5)

The vast majority of dispensation from the mandatory offer rule relates to *whitewash*, 80 to 90 cases per year according to the recent statistics. Furthermore, if the offeree company has a very small number of shareholders, dispensation may also be granted with the permission of the Panel.(6)

The substantial significance of this rule is its existence as a "strict rule that an offeror must avoid," and as a result, the rule functions as a deterrent against easy acquisition of shares carrying 30% or more of the voting rights. In practice, the mandatory offer rule usually applies these cases: (i) the offeror, due to its adviser's mistake, has acquired shares carrying 30% or more of the voting rights of the offeree com-

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

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

pany before making an offer ; or (ii) the offeror, after making an offer, is likely to be able to acquire a number of shares in bulk in the market, and decides to make a separate offer through the market pursuant to the mandatory offer rule.

2．Strong “shareholder decision-making principle” and the preconditions thereof

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

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

However, in the United Kingdom where institutional investors are said to have the strongest power in the market, an attempt to introduce a rights plan (poison pill) usually fails due to strong opposition from

such investors, who argue that they would be deprived of the opportunity to sell shares when an offer is made.(7) The same applies to other types of defensive measures. For instance, issuing multi-voting shares is not legally prohibited but the issuing company would receive a penalty in the form of a decline in the market price of its shares. It is said that among the companies listed in the United Kingdom, only ten companies or so have issued multi-voting shares as a defensive measure. Furthermore, new shares must be issued by offering them to shareholders (rights issue).

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

The precondition for making the strong "shareholders decision-making principle" work is *sufficient information disclosure to shareholders*. For instance, an *offer document* must cover a number of points including the following: information on the offeror and its strategic plan(8); the offeror's intention regarding the continued employment of

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

(8) In Japan, there is a critical view about obliging the offeror to disclose a detailed business plan. In the United Kingdom, although the offeror is obliged

employees of the offeree company[(9)]; a cash flow statement; the offeror's intention regarding the transfer of the shares to be acquired and the information on final shareholders (Code, Rule 24).

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

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

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

3. Characteristics of the Takeover Regulations by the Takeover Panel

The takeover regulations enforced by the Takeover Panel are characteristic on the following points.

(a) Composition and redeployment of members of the Panel

The term "Panel" in a broad sense refers to the organization as a whole. The "Panel" in a narrow sense is composed of up to 12 members who are designated by the Chairman, Deputy Chairmen (appointed by the Panel) and the affiliated bodies and then appointed by the Panel, as well as members appointed by said bodies. Currently, Panel members have a maximum of 34 seats. The term of office is three years, and reappointment is allowed. Those affiliated bodies that play an important role in the City are entitled to appoint and send their personnel as Panel members, who contribute to the activities of the Panel.

Some people express concern that since most members come from the financial industry, the regulations enforced by the Panel would be somewhat inclined in favor of the industry. However, as far as I myself have surveyed, no particular problem has occurred thus far. The Panel enjoys a high status in the financial industry (the City). Any wrongdoing by someone serving as Panel member would later cause significant problems to the member's business. Therefore, Panel members, while in office, engage in regulatory activities independently from the entities to which they belong. Almost all leading investment banks, law firms and accounting firms have executives who have served as Panel members, and they provide the Panel with talented employees who have

potential to be their executive staff in the future. These secondees to the Executive concentrate on takeover regulations for two years, and then go back to their banks or firms once they have developed their understanding of the advantages and disadvantages of the regulations. Thus, this recruitment system is greatly beneficial to all parties involved : those who can develop their careers, the entities to which they return after acquiring experience, as well as the Panel itself, which can secure high quality staff.

(b) Prompt and flexible application of rules, and consultation by the Executive

The Executive carries out the Panel's day-to-day work. It is currently staffed by about 30 people. Upon receiving an inquiry by telephone, it gives an answer usually on the same day. In principle, two members (a junior member and a senior member) take charge of one case, and if any difficulties occur, they can ask for advice from other members. In order to ensure consistency of decisions by the Executive, telephone conversations are recorded and imparted to other members as feedback. The records of cases that the Executive has handled are compiled into a database, which is not available to the public.

The Code contains a number of phrases that recognize the Panel's discretionary power, such as "except with the consent of the Panel," "with the consent of the Panel," "unless otherwise agreed with the Panel," "should consult the Panel," and so forth. The Executive has the power to hand down rulings. An appeal may be filed against an Executive's ruling, but it is very rare for its rulings to be reversed through appeal proceedings.

(c) Cooperation with and sanctions upon the major bodies in the City (before establishing the FSA)

The Panel has enforced regulations in cooperation with the major bodies in the City. In the past, the Panel required these bodies—including securities exchanges, the Bank of England, the former DTI—to report offenders or take measures that the Panel considers appropriate. At the time when the Panel was established, its enforcement was insufficient, and some people did not mind breaching the Code. The Panel even took tough measures against such breach by asking the exchange to suspend the offender's transactions and prohibit its use of the facilities of the exchange.(10)

(d) Relationship with the FSA

After the Financial Services and Markets Act 2000 was entered into force and the Financial Services Authority (FSA) was established, the Panel carried out regulatory activities backed up by "indirect regulations" by the FSA. Upon request by the Panel, the FSA may impose sanctions on financial service firms that have breached the Code.(11) The *cold-shoulder rule* is also applied to prohibit financial service firms from conducting any acts in relation to takeovers on behalf of those who breached the Code.(12)

(10) This is called the Saint Piran Case. It was the beginning of the *cold-shoulder rule*, i. e., *the people in the City do not work for those who do not follow the Code in the City*. It is said that the successful implementation of this rule resulted in firmly establishing the authority of the regulations by the Panel. The Takeover Panel, Statements, Suspension of offeree company shares pending statement by the Panel following a Panel hearing (Saint Piran Limited, 1980/4).

(11) Section 134 of the Financial Services and Markets Act 2000 (FSMA), and 4.2.1R of FSA Handbook, Market Conduct (MAR).

Since the FSA has become the only regulatory authority and acquired a broad power, a conflict of powers has occurred between the FSA and the Panel. To cope with this problem, the FSA has developed guidelines, which provide the following : the FSA shall not exercise its power during the offer period ; and even when the FSA exercises its power in exceptional cases, it shall consult the Panel in advance if its exercise of power is likely to affect the timetable or outcome of the offer.[13]

(e) Appeal proceedings

The Executive holds a hearing and hands down a ruling on the case under the following circumstances : the Panel finds any act that is in breach of the Code and should be subject to disciplinary action; the party is dissatisfied with the Panel's decision ; a difficult issue occurs and the Executive is unable to decide on it.[14] An appeal may further be filed against the Executive's ruling based on the results of the hearing.[15] The availability of such due process is an important reason for the courts to basically respect the Panel's decisions. It is difficult for the parties to a takeover to go to the court without first going through appeal proceedings.

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(12)　4.3.1R of FSA Handbook, Market Conduct (MAR).

(13)　Operating Guidelines between the Financial Services Authority and the Panel on Takeovers and Mergers on Market Misconduct (6 April 2007). Formulated in 2001, and partially revised in 2006 and 2007.

(14)　Hearings were previously held by the Full Panel, and they are currently held by the Hearings Committee.

(15)　In the past, the second appeal was examined by the Appeal Committee within the Panel. After the national legislation transposing the EU Takeover Directive (the entry into force of the Companies Act 2006), the Takeover Appeal Board was established as an independent body from the Panel, and skilled legal professionals of the board deal with the appeal cases.

(f) Restrained attitude of courts in judicial review

The court does not interfere with the Panel during the offer period, and even when it makes a judicial review, it does not directly involve itself in the case. In the past few cases filed for judicial review, the courts showed restraint.(16)

(g) Others

There are other reasons why the Panel has been successful, as a self-regulating body, in carrying out takeover regulations effectively. (i) The first factor is the Panel's *prompt response to offers*. In the United Kingdom, when a tender offer is made, the board of directors of the offeree company swiftly decides whether or not to recommend the offer and notifies shareholders of its decision. They do not hold its decision or gain time without good reasons, which often occurs in Japan. The offeror's attribute or nationality rarely matters as long as the offeror observes the UK takeover rules and principles.

(ii) Secondly, the *professionalism of the people working in the financial industry* in the City, which was originally authorized as self-government under the Magna Carta, is unimaginably stronger than that in Japan. They place great importance on maintaining the *industry* where they belong and their *own profession*.

From the perspective of enforcement, there is a significantly important fact that in the United Kingdom, it has become a de facto obligation for both the offeror and the offeree to have advisers,(17) and (iii) *as*

(16) Regina v Panel on Take-overs, ex parte Datafin plc [1987] QB815 ; Regina v Panel on Take-overs and Mergers, Ex Parte Guinness Plc. [1989] 2 W. L. R. 863 ; Regina v Panel on Take-overs and Mergers, ex parte Fayed and others [1992] BCLC 938.

a result, takeover rules have been enforced by way of not only the parties to a takeover but also such advisers from investment banks, etc. As mentioned above, the customary rule（*cold-shoulder rule*）---*the people in the City do not work for those who do not follow the Code in the City*---has been established as a norm. It seems that this norm has served as a very powerful norm to the people both in and outside the City because it would be difficult to be a party to a takeover without an adviser.

Both the offeror and the offeree have their own advisers, and the rival offeror will also have its own adviser. It depends on the case for which party each investment bank, etc. is to serve as an adviser. Under such circumstances, it could be said that（iv）*the Panel's decisions have not been inclined in favor of any one of the parties due to structural reasons*, because the industry itself has continued to provide Panel members. Thus,（v）in the City, the regulating party and the regulated party have the same nature, and this may also be a big factor that has made the Panel's *self-regulation* effective.

※ *This note is a part of my article on UK takeover regulations* and was prepared for the meetings with the specialists in Takeovers in the UK. Further, "Notice to Advisers in Contested Bids" which was added at the end of this note is the notice put up on the wall of the waiting room of the UK Takeover Panel.

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（17）An offeror who makes a cash offer must submit a financing statement prepared by its adviser, whereas the offeree company must obtain competent and independent advice on the offer from a third party, such as its adviser.

Notice to Advisers in Contested Bids

To save time please accept that we understand your position is as follows:—

1 *"Self-regulation as we know it"* will end if the Executive rules against you.

2 Everything done or said by *"the other side"* is tactics whereas everything done or said by your side is in the interests of shareholders generally.

3 You are astounded that a bank of the standing of *"the other side's"* advisers should permit itself to be acting in such a case.

4 Adverse press comments represent flagrant breaches of the Code by *"the other side"* whereas favourable press comments, even if they involve direct quotations containing errors, are nothing to do with you.

5 Either your PR man has played a very minor role and could not possibly be responsible for what has occurred or you are afraid that your PR man is new and *"has been on a frolic of his own"*.

6 You and your client have the greatest respect for the Panel and support the system; however, your position is becoming impossible because *"one side is playing by the rules and the other is not"*.

7 Everyone who is not of your view is acting in concert with *"the other side"*.

On that basis shall we proceed with the meeting?

May 1989

（追記）

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