研究ノート

Non-statutory takeover regulations and their changes
: The Reality of the UK Takeover Panel (1)

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Please note that what is stated in this report is ultimately based on my understanding and viewpoint, and any possible error must be attributed to me alone.

What is more, regarding my more detailed view on reforming Japanese Takeover Law, please refer to this article "Hiroyuki Watanabe, Designing a New Takeover Regime for Japan ～Suggestions from the European Takeover Rules, Zeitschrift für Japanishes Recht, Nr. 30 (Max-Planck- Institute für Privatrecht, 2010)".

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Ⅰ. Increasing Attention to UK-style takeover regulations

Compared to the US-style regulations—where companies are basically allowed to introduce defensive measures (countermeasures) against takeovers and courts have the last word in settling disputes,(1) we should pay more attention to the UK-style regulations—under the detailed rules on control transfer, a specialized organization for takeover regulations, which consists of M&A specialists, deals with takeover cases promptly and flexibly, while companies basically do not introduce defensive measures. We should seriously discuss the idea of importing these UK rules. The creation of a specialized organization

(1) Another big problem is that it takes too much time to obtain a court's decision. Although it is difficult to simply compare the number of days required for individual suits, in the United States where about one-third of takeover cases are brought to courts, it is said that even the Delaware State courts, which have established a reputation for handling cases promptly, need at least several weeks on average, or even as much as several months, to reach a conclusion on a takeover dispute.

for takeover regulations will be significantly beneficial not only for improving efficiency in takeover regulations but also for reducing costs incurred by companies for taking defense against hostile takeovers.(2)

In Japan, it often becomes an issue in courts whether the offeror is a "green-mailer" or an "abusive acquirer." In addition to such framework for judging the attribute of the offeror, it is also necessary to establish concrete rules by which an abusive acquirer can be selected and excluded automatically. Furthermore, in the phase to acquire control over a company, the acquirer must disclose real beneficiaries who will gain real benefit from the control transfer, not merely disclosing registered shareholders.

It seems to me that there is a widespread notion in Japan that any conduct not prohibited by statutory law can be construed as legal and can therefore be done without problem. Many rules included in the UK Takeover Code provide adequate implications about how to close the *loopholes* that currently exist in the Japanese law, and it may be possible to adopt these rules in Japan. Under said Code, when there is no direct Rule, decisions are made by going back to the "Principles."(3)

In the United Kingdom, the *Takeover Panel* has existed since 1968 as an organization specialized in takeover regulations. Based on the Rules in the City Code (the current Takeover Code), specialists in the Panel have enforced market-oriented regulations of takeovers promptly and flexibly. In view of such a situation in the United Kingdom, I believe

(2) This is separate from the idea of integrating members of the independent committees for takeover issues in individual companies nationwide, into one organization.

(3) Recently, since the Code has developed to include further detailed provisions with more Rules and Notes, the need to go back to the Principles to make decisions does not frequently occur.

that Japan should now seriously consider creating a Japanese version of the Takeover Code or Takeover Panel.

II. Structure and subject of the Takeover Code (City Code)

Since its establishment in 1969, the City Code on Takeovers and Mergers has gone through several revisions. Today, the Panel calls it "Takeover Code" or simply "Code," rather than "City Code." This report follows suit.

The Code applies to the companies which have their registered offices in the United Kingdom[4], if any of their securities are admitted to trading on a regulated market in the United Kingdom[5]; it also applies to other companies that satisfy certain requirements[6].

The Code has four parts, namely, *Introduction, General Principles, Definitions,* and *Rules*. *Introduction* is divided into the following sections: (1) *Overview ;* (2) *The Code :* (3) *Companies, Transactions and Persons Subject to the Code ;* (4) *The Panel and its Committees ;* (5) *The Executive ;* (6) *Interpreting the Code ;* (7) *Hearing Committee ;* (8) *Takeover Appeal Board ;* (9) *Providing Information and Assistance to the Panel and the Panel's Power to Require Documents and Information ;* (10) *Enforcing the Code ;* (11) *Disciplinary Powers ;* (12) *Co-operation and Information Sharing ; and* (13) *Fees and Charges*.

The second part provides for *General Principles* : (1) fair treatment

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(4)　Including the Channel Islands (the Jersey and the Guernsey) and the Isle of Man.

(5)　Including Societas Europaea.

(6)　Takeover Code, Introduction, 3 (a), (I)・(II). The Code applies to almost all public companies; it may apply to other companies if they have are public in nature.

of shareholders; (2) arrangement to enable shareholders to reach a proper decision; (3) the board of directors' duty of royalty; (4) prohibition of stock price manipulation; (5) offeror's duty of careful consideration; and (6) prohibition of hindering the offeree company (target company) from conducting its business affairs. These Principles are applied in accordance with their spirit. The *Definitions* part specifies the definitions of the terms and phrases used in the Code, and the *Rules* part stipulates specific Rules. Unlike the provisions of statutory law, legal terms are not frequently used in the Rules. The Rules are to be interpreted to achieve their underlying purpose; therefore, their spirit must be observed as well as their letter.(7)

The Code is designed principally to ensure that shareholders are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.(8)

The Code is not concerned with the financial or commercial advantages or disadvantages of a takeover. These are matters for the com-

(7) Takeover Code, Introduction, 2 (b). The extent to which the Code applies sometimes cannot be fully estimated, because the Code provides for General Principles, and the Rules must also be observed in terms of their spirit as well as their letters. However, the parties and their advisers can avoid committing any act that may be in breach of the Code by making inquires to the Executive of the Panel beforehand. Since they can get answers to their inquiries quickly, this step of consulting the Executive cannot be an obstacle to the process for carrying out takeovers.

(8) Takeover Code, Introduction, 2 (a).

pany and its shareholders. Nor is the Code concerned with those issues, such as competition policy, which are the responsibility of government and other bodies.

The Panel's role is not to hinder takeovers. The Panel is not concerned with the very issue of whether a takeover will be successful or not, and the number of offers is not a matter with which the Panel is concerned. The Panel makes decisions not by considering which party to a takeover is good or bad but by referring to the facts in accordance with the Code.

The formal name of the Panel is the *Panel on Takeovers and Mergers*. In addition to takeovers, the Code also applies to mergers and allotments of new shares to third parties.[(9)] In the case of an offer for a company which has its registered office in another member state of European Economic Area（EEA）whose securities are admitted to trading only on a regulated market in the United Kingdom（shared jurisdiction）, the state where the company's registered office is located shall be in charge of the matters concerning company law, whereas the state where the transaction actually takes place shall be in charge of the matters concerning the trading of the securities and the offer.[(10)]

III. 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

（9） Including schemes of arrangement（Code, Appendix 7）.

(10) Takeover Code, Introduction, 3 (a), (III).

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[11] 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

(11) At present, the following bodies may appoint members : the Association of British Insurers ; the Association of Investment Companies ; the Association of Private Client Investment Managers and Stockbrokers ; the British Bankers' Association ; the Confederation of British Industry ; the Institute of Chartered Accountants in England and Wales ; Investment Management Association ; the London Investment Banking Association ; the National Association of Pension Funds. 〔Takeover Code, Introduction, 4 (a)〕.

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

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 (current

BEER) —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.(12)

(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.(13) 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.(14)

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

(12) 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 (S14 4. 3. 1R of FSA Handbook, Market Conduct (MAR). aint Piran Limited, 1980/4).

(13) Section 134 of the Financial Services and Markets Act 2000 (FSMA), and 4. 2. 1R of FSA Handbook, Market Conduct (MAR).

(14) 4. 3. 1R of FSA Handbook, Market Conduct (MAR).

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.(15)

(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.(16) An appeal may further be filed against the Executive's ruling based on the results of the hearing.(17) 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.

(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.(18)

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(15) 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.

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

(17) 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.

(18) 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

(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[19], and (iii) *as 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

[1992] BCLC 938.

(19) 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.

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.[20]

IV. National Legislation Transposing the EU Takeover Directives and the Takeover Panel[21]

The Panel regulations, which had been carried out in effect without relying on statutory law[22], have changed as a result of the national legislation transposing the EU Takeover Directives and the enactment

(20) This viewpoint was kindly suggested by Mr. Noel Hinton (former member of the Executive of the Takeover Panel), Mr. Takumi Shibata (Deputy President of Nomura Holdings), and M & A specialists from the City.

(21) For more detailed discussion on the relationship between the national legislation transposing the EU Takeover Directive (UK Companies Act 2006) and the Takeover Panel, see Watanabe, op. cit., "Seiteihō ni Motozukanai Kigyō Baishū Kisei to sono Henyō" (Non-statutory takeover regulations and their changes).

(22) The Financial Services Act Order 1987 designates the Panel as one of the regulatory bodies. The Panel already had its basis in statutory law in this respect, but this was merely a matter of categorization. In practice, until the Companies Act 2006 entered into force, the Panel had not enforced any regulations based on statutory law.

of the Companies Act 2006. What has and has not changed in the regulations through this legislative process?

Under the EU Takeover Directive adopted in 2004, it was provided that Member States shall effect national legislation transposing the Directive no later than May 20, 2006.[23] The Directive aims to incorporate supervision and regulation of takeovers into the framework of statutory law in all EU Member States. The Panel initially did not agree to such framework designed by the Directive, arguing that it would impair the good points of self-regulation.[24] The UK government, the Panel, and many other parties concerned hoped that the transposition of the Directive into national law would have the minimum impact on the Panel's activities, and they discussed the content of the Directive again and again. As a result of such repeated discussions, they reached the conclusion that it would be possible to implement the national version of the Directive while causing little or no substantial change to the Panel's function. The Panel itself finally approved the content of the Directive.[25]

After the national legislation transposing the Directive was completed, the Panel has continued to act as a regulatory body for takeover activities. While acquiring additional powers, such as the powers to require documents and information and order compensation, it has maintained its broad discretion, without almost no substantial change

(23) Although most Member States failed to enact national laws by the due date, they subsequently fulfilled the obligation of national legislation one by one.

(24) The Takeover Panel Report on the year ended (31 March 2001), at 9, Chairman's Statement (Peter Scott QC).

(25) The Takeover Panel Report and Accounts for the year ended (31 March 2005), at 13, Report by the Director General.

to its existing powers. Each Member State was obliged to establish national rules corresponding to the provisions of the Directive, including the following : general principles (Article 3. 1) ; jurisdiction (Article 4. 2), protection of minority shareholders, the mandatory bid and the equitable price (Article 5) ; content of bid documents (Article 6. 1-6. 3, Article 7, Article 8) ; and obligations of the board of the offeree company (Article 9). To fulfill this obligation, the United Kingdom incorporated the relevant provisions in the Companies Act 2006. Along with the national legislation, the ten initial General Principles under the City Code[(26)] were replaced with six new principles, but there was no special modification of the content of the Code.

Article 942 of the Companies Act 2006 explicitly stipulates that the Panel has its basis in this Act. With this provision, the Panel is now a body under this Act. It has been given the powers to do the following : hand down rulings concerning the Rules (Article 945, Article 946) ; grant exemption from application of the Rules and revise the Rules (Article 944) ; require documents and information (Article 947) ; impose sanctions (Article 952) ; order compensation for the breach of the Code (Article 954) ; and apply to the court for enforcement (Article 955). On the other hand, the duty to cooperate with the FSA has been imposed upon the Panel (Article 950). In addition, the Act also provides for the proceedings for hearings and appeals (Article 951), as well as the

(26)　1. Fair treatment of shareholders ; 2. uniform information disclosure to shareholders ; 3. offeror's duty of prudence ; 4. arrangement to enable shareholders to reach a proper decision ; 5. accuracy of documents and advertisement ; 6. prohibition of stock price manipulation ; 7. duty of neutrality of the offeree company's board of directors ; 8. duty to exercise the company's control in good faith and prohibition of oppression of minority shareholders ; 9. director's duty of royalty ; 10. mandatory offer

restriction on the disclosure of information provided for the Panel in the course of enforcement of regulations (Article 948 and Article 949).

Now that the Panel is a statutory body, there is concern that *tactical litigation*, which means an action to seek judicial review on the Panel's ruling, could be used as a means to stop the other party to a takeover from carrying through with the takeover procedure. However, the EU Takeover Directive has vested the governments and courts of the Member States with a broad power to decide how to deal with litigation against the takeover supervisory authorities (Article 4, paragraph 6 of the Directive). The UK Companies Act 2006 also provides that the parties to a takeover may not file an action against the Panel's decision (Article 956).

Upon the national legislation transposing the EU Takeover Directive, the Panel has been given many statutory powers. This is not because the Panel itself particularly asked for such powers, but because the Directive requires the supervisory authorities of the Member States to have those powers. However, obtaining powers as a result of legislation is different from actually exercising the powers. There has been basically no change in the actual regulatory activities carried out by the Panel, and neither the Panel itself nor the professionals engaging in this field desire the Panel to change.[27]

(27) This view was heard in interviews with the Takeover Panel, practitioners working in the City, the FSA and scholars.