The Comparison and the Reality of German and the UK Takeover Law
(Interview with German and English M&A lawyers)

Michael Burian*
James Robinson**
Hiroyuki Watanabe***

[Introduction]
This is the transcript of a discussion meeting held with German and UK M&A lawyers on takeover rules and practices. Dr. Burian, a German lawyer, and Mr. Robinson, an English lawyer, are both specialized in M&A and corporate affairs. Also, they have worked as registered foreign lawyers in Japan and have been familiar with Japanese corporate law practices. The meeting was held on June 2, 2009, in Room 305, Building I, Waseda Campus, Waseda University in Tokyo and this transcript is its updated version in September 2011. /(Watanabe)

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* German lawyer, Gleiss Lutz, Stuttgart
** English lawyer, Herbert Smith, Tokyo
***Professor, Waseda University
1. “Shareholder decision-making” and “Maximizing shareholder value”

WATANABE: Thank you very much indeed for coming all the way here to have a meeting. I would like to start the meeting. First, I'd like to ask Robinson-sensei about the takeover rules in the UK. To my understanding, the set of UK takeover rules is characterized by the principle of strong “shareholder decision making”. It's different from so-called “Maximizing shareholder value”. Do you agree with this?

ROBINSON: I think people in the UK would say that shareholder decision making means that you maximize shareholder value. So the shareholder decision making comes first. And that will in of itself maximize value. But you are right. That is the foundation in the UK; it's to let the shareholders decide.

One of the questions I was asked by people when the Bull-Dog case came up in Japan was, “How would this be decided in England?” And my answer was, “Well, it wouldn't be the management making the decision as to whether it was a hostile or abusive or greenmailing bidder. You would simply let the shareholders decide, by letting the offer be presented to the shareholders. And the shareholders would say either no (if an unacceptable bidder), or yes (if a high enough price).

That way you let the shareholders decide in the UK. So you are right in terms of the shareholder decision-making principle.

WATANABE: But, as you know, in the US the shareholder value maximization principle is very influential. If so, the principle in the UK is different from that in the US.

ROBINSON: It is slightly different, yes. The focus in the UK is very much on shareholder decisions, both in terms of restricting management’s discretion to prohibit bids. For example, poison pills: in the US they are okay; in the UK, they are not.

So in that way, it's all about providing information to the shareholders. And that's the other element of the takeover code, which is to make sure that sufficient information is given to the shareholders so that they can make an informed decision.

So yes, you are right. It is different from the US in that regard.

2. EU Takeover Directive

BURIAN: I think this is the fundamental difference between US takeover law and European takeover law, which is more UK-oriented, in the sense that the management in a company has much more power in the US, whereas in Europe it is restricted in its competences. I would say, the management in the UK is probably most restricted. But it's fairly strict in all the European Union member states, because of the EU Takeover Directive.

And a lot of the principles constituting the UK approach were adopted by the Takeover Directive.

So, while many Europeans may not like it, a lot of European legislation regarding takeovers does follow quite closely what now happens in the UK. But there is room for each member state to implement
the directive differently to some extent, and some do, certainly in terms of defensive measures. But the general principle of shareholder decisions is now not only moving in the UK because of European legislation, but moving in the other member states as well.

**WATANABE:** Is there any EU country that has not implemented the EU Directive?

**BURIAN:** All member states have taken steps to implement the Takeover Directive. But what has to be taken into consideration in this respect, is the way the law is actually applied in member states. The practice on the basis of implementing laws is not always in line with the EU Directive. And there were some famous cases, for example, in Spain recently, where the government tried to protect the Spanish energy companies and did take some influence.

3. Reality of the defensive measures in the UK

**WATANABE:** Robinson-sensei mentioned poison pill. Is there any case in the UK where a poison pill was introduced in a target company?

**ROBINSON:** No, the prohibition on poison pills is very strong in the UK, both in terms of the takeover code and of actual practically implementation of it. Most companies do not put in place a poison pill.

Regarding defensive measures, if there is a hostile bid, there are certain things a target company can do in terms of restating its accounts, of coming up with restructuring measures, of spinning-off businesses. It has to get shareholder approval for anything significant like that.

So practically, companies don’t resort to the “easy” defense of a straight poison pill. They have to come up with something meaningful. So it will be a restructuring of the business, maybe to spin off assets, to raise cash to defend against acquisitions, or to try to find a white knight, a friendly bidder to come in.

So the onus in the UK is less on the easy defensive poison pills and more on actually coming up with constructive defensive steps. But at the same time, it’s always subject to shareholder approval.

As long as management is able to persuade their shareholders that what they are proposing is better than the bid, then the shareholders will approve. But it’s still the shareholders who will decide.

**WATANABE:** It’s very surprising for the Japanese. In the UK formerly defensive measures required approval by the shareholders. But it is very rare.

**ROBINSON:** Yes.

**WATANABE:** Do you know any actual case?

**ROBINSON:** I cannot think of a case. I can check, but I cannot think of a case where they have even tried to get shareholder approval for a particular defensive poison pill measure.

As I say, what management tends to do is come up with something more constructive rather than purely defensive, because in order to implement something purely defensive they need shareholder approval. And shareholders will want to know why. So shareholders will more likely vote against something that is purely defensive, that is only designed to stop a bid, because in the UK the principle would be “It’s up to us as shareholders to decide if this bid is abusive, not management. So we will not approve a defensive pill. But if management comes up with an alternate bidder, a white knight, or a restructuring of the business, then if we think, as shareholders, that maximizes value for us, then we will vote in favor of that.” But it’s not a defensive measure as much as an alternative to the bid.

**BURIAN:** What is quite popular is if you have several business areas and you know that the bidder or the
company most likely to make a bid will only be interested in one or two of them, you try to enter into a strategic joint venture involving this particular business area with a competitor of this potential bidder. This would then make it less interesting for the bidder to actually try to acquire the business, because it would eventually be tied up with another company.

And I think this is the sort of strategic decisions you can propose as a board. It’s also the same under German law and the laws of other European countries. This is to try to push back the bidder without officially implementing something you would call a poison pill. If this is a measure just designed to deter the bidder from making the bid or the bid from becoming successful, it is not permissible as such. There must be added value to the measure.

4. Reality of the defensive measures in Germany

WATANABE: What about the reality of the defensive measures in Germany, Burian-sensei?

BURIAN: It’s a similar situation. It’s all quite similar due to the EU Directive.

WATANABE: So, is it generally strictly prohibited?

BURIAN: As James mentioned, we have the EU Directive, which sets out as a general rule the board neutrality rule and therefore poison pills and similar frustrating measures are prohibited. Differences to the rules in other member states are due to certain opt-in and opt-out rules of the EU Directive resulting in a variety of legislation in the member states to implement the Directive, for example as to the reciprocity clause.

But as regards defensive measures, possible deviations in the law of the member states are fairly narrow.

Also in Germany the board generally has to stay neutral and leave it up to the shareholders to decide whether they would want to accept the offer or not. But there is room left for defensive measures. Not only can the board take measures upon approval by the general shareholders’ meeting, but the management can also take measures that, even though they are probably capable of scaring off the bidder, have been already decided upon before the takeover bid was launched, and other measures that make business sense for the company, but not defensive measures as such.

But in reality, boards of listed German companies would not do this, because they would be afraid to face liability.

Usually they state that the offer price is too low because the intrinsic value of the share is much higher, which is quite interesting, because usually the offer price is a lot higher than the current trading price. But it is the only uncomplicated way for the board to indicate that they would not recommend the shareholders to accept the offer.

WATANABE: To my understanding, in Germany the board-neutrality rule is not so strict. Some people say that implementation of the EU Takeover Directive makes it more difficult than before to have a successful takeover bid. Do you agree?

BURIAN: More difficult than before the implementation?

WATANABE: Yes.

BURIAN: Let’s put it this way: James would agree, probably, that Germany’s having implemented the EU Directive gives the board more means to try to defend themselves and the company against a hostile
takeover than in other jurisdictions when a bid is made, in particular given the fact that with supervisory board approval you can take certain measures. I think this goes beyond what you can do in the UK. So in Germany the neutrality rule is in the first place a mere non-frustration rule. This is due to the fact that Germany has not opted-in in a stricter set of rules of the EU directive and instead leaves it to the companies to opt-in voluntarily, what they are probably reluctant to do.

At the same time, in reality I don’t think you would see German companies or the boards of German companies taking such defensive measures, not as a rule. As already mentioned, you usually hear them say that the offer price is too low.

So I don’t think it really has a major impact on how difficult it is to launch a hostile takeover bid in Germany. It’s usually more a matter of price really, which means that it is ultimately the shareholders and not the board making the decision.

**WATANABE:** I suppose there are exceptions where the supervisory board allows defensive measures.

**BURIAN:** Yes, that’s correct. There are few exceptions to the non-frustration rule, but one is that with approval from the supervisory board the management can take certain defensive measures. That means that you have to persuade your supervisory board that this is a good idea, which is not easy, even in theory. And in practice, I haven’t seen companies really taking any such measures or relying on such measures.

If all your shareholders are actually in favor of this bid, you would be in a very difficult position as management to try to prevent this bid from being successful. And you would know that the shareholders would be unhappy at the next shareholders’ meeting. They might try to put more pressure on you in terms of financial liability for an unsuccessful bid. I think this is the reason why it does not happen.

**ROBINSON:** In terms of the way Europe is now compared with where Japan is, I think that’s an important point. Even where the Takeover Directive allows some room to management for defensive measures - which some European countries have allowed themselves and the UK hasn’t - even in that situation management is aware practically that shareholders need to be happy. And if the shareholders are not happy, then management shouldn’t be doing it.

I think in Japan we are not yet at that stage, because management thinks that they know what is in the best interest of shareholders. Therefore, they make the decision rather than letting the shareholders make the decision.

That’s my perception.

**BURIAN:** I think that in Japan many companies are not making use of an advanced warning system now, even though they would be permitted to do so. So I think they are slightly backing down.

### 5. “Cold shouldering” and “self regulation under the shadow of statutory rules” in the UK

**WATANABE:** Thank you. To my understanding, the regulations in the UK have a strict cold shouldering rule that the people in a city do not work for those who do not follow the takeover rules in the city.

**ROBINSON:** Cold shoulder.

**WATANABE:** Yes, cold shoulder. And losing the advisory support is fatal in the UK? And both parties must have advisors from investment banks, etc. To my understanding, it could be said that the cold shoul-
dering allows enforcement even among those who are not within the city. Is it right?

**ROBINSON:** I think that’s fair. That’s a fair statement. I think the concept of cold shouldering has come about because the takeover panel and the takeover code always used to be self-regulation, with no statutory basis. Therefore, in terms of powers, there was not much they could do about an abusive bidder or somebody who did not follow the standards expected in the City of London.

So the only way historically that they could punish or try to restrict was to stop the advisors via this cold-shoulder concept, where you put shame on the advisors. And that worked, because that was the only thing they could do. They had no statutory power to fine or to take people to court. So this was the only actually effective mechanism.

The takeover panel is now on a statutory basis. But actually, it operates still very much as a self-regulation style body. There is no government minister appointed. There are no bureaucrats. It is purely created from market participants. So you will have bankers, lawyers, and accountants on the panel.

And we have lawyers at Herbert Smith who go on to the panel on secondment for one or two or three years. So you have up-to-date, practical practitioners making up the panel.

So even though we are now on a statutory basis, all that really has changed is that you have one line in a statute that states that the takeover panel is our regulator. That is it.

So it still operates using the cold-shouldering principle, even though they also now have a statutory basis. They can fine and can take people to court. And the rules are now codified and part of the statutory framework. So if you breach the code, you can be taken to a tribunal. But it still operates very much on a self-regulating mentality, with a cold-shouldering process.

But I think you are right. Historically that is how it has developed. And it does mean that if you restrict or shame the advisors, they will not act for people outside of the city who want to take part in unfair practices.

**WATANABE:** To my understanding, now the cold-shouldering rule is substituted with the FSA rule.

**ROBINSON:** We still have that. But it’s the cold-shouldering. The kind of reputation issue for being found to be in breach means that the investment advisors and the bankers will not want to be any part of a bid that is not in accordance with the rules.

**WATANABE:** And I suppose that after establishing FSA in the UK, there was self-regulation under the shadow of statutory rules. Is that right?

**ROBINSON:** That’s right. In the UK instead of creating a new regulator, they simply said, “The takeover panel does a good job. So why change it?” If it’s not broken, don’t fix it.

So they let the takeover panel assume the statutory role. But other than that, it is still very much a self-regulating style of regulation.

### 6. Role of the financial adviser and cash confirmation in Germany

**WATANABE:** Thank you. And, Burian-sensei, I would like to ask you about the role of the financial advisor in Germany. In Germany must the bidder or the target have a financial advisor?

**BURIAN:** You need a financial advisor not as an advisor as such. So in theory you could proceed with a public takeover bid without hiring an investment bank to guide you through the process. But you do need a bank for technical purposes. When it comes to settling the takeover bid and for providing a bank confir-
mation for your public takeover bid, you need a bank.

Again, this could be just a bank providing services. But usually the bank would like to get involved as an advisor as well, because of the fees. But it's not strictly required to have a financial advisor as sort of an additional advisor.

It is the same as with legal advisors. You don't need a lawyer to advise you, but you have to comply with the law. And without a good law firm, it's impossible to comply. And I think the same applies to financial advisors. Without a financial advisor, you don't do it, because without, the risk of mistakes and omissions is too high.

But in terms of legal duty, you need a bank to offer a bank confirmation for your cash offer, which you have to submit.

WATANABE: Do you mean cash confirmation by that?

BURIAN: Yes. You have to submit a cash confirmation from a bank to the regulator when you file your takeover bid. And you need a bank, which is the same bank normally, to settle, to pay the shareholders in exchange for their shares when the takeover bid is successful.

ROBINSON: In some of the European jurisdictions, and I'm not sure it's the same in Germany, the rules require that target to have an opinion from a bank as to the fair value of the offer. And that is part of the process. So in the Netherlands you will often find that the executive board, as well as the supervisory board, each will get a separate financial advisor to make an assessment of the bid. And that then satisfies or helps them to satisfy their own obligations to decide that this is a good bid.

So practically, you will get financial advisors involved, even in the kind of management and supervisory-board decision-making process. They will want to be able to tell their shareholders that a reputable firm gave an opinion regarding the offer.

BURIAN: Usually, in Germany, it's one of the Big Four giving an opinion on the offer. And you are right. Basically, the management board and the supervisory board have to give their own opinion. Often they do use, actually, the same financial advisor, which is a valuation company, to confirm whether the offer is fair or not.

WATANABE: Is there statutory requirement for cash confirmation in the UK and Germany?

BURIAN: Yes. That is one of the principles in terms of making sure that you have a legitimate and fair bid. It's that if you make a bid or say you are going to make a bid and the bid provides for a consideration in cash or with a cash element, you need to have the cash to back it up or according financing.

So the formal requirement to confirm that you have the cash makes sure that the bids are legitimate, that these aren't simply frivolous or hostile bid situations. People have to have the cash to back it up.

So I think that's an important aspect. And it's similar in Japan, in terms of financing the bid.

WATANABE: To what extent does a financial advisor investigate the cash confirmation in Germany?

BURIAN: The cash confirmation has to be given by an independent securities services company, usually a bank, situated in a country of the European Economic Area. And the bank is fully liable for giving this confirmation. So if you have a separate advisor, that advisor doesn't really have to investigate, because the liability lies with the bank. It is more that the bank issuing the cash confirmation will want to make sure that they get the money back from the bidder if it is held liable because of the confirmation. So they either take security or take it as part of the overall financing arrangements, which is something you have to do
in advance, or you get other portfolio banks joining in, which means that they will all be jointly liable for the entire amount.

Although the confirmation cannot be the basis for strict liability but only for fault-based liability, it basically serves as a kind of guarantee. So it’s something you don’t get for free from your own bank. They will want to make sure they have some security. And they will charge you for the bank confirmation.

7. Change of control clause

WATANABE: By the way, I suppose a change-of-control clause is frequently inserted in the lending contract. Is such a clause allowed to be described in an offer document in the UK or Germany?

ROBINSON: As a commercial practice, most financing documentation will have a change-of-control or a takeover bid event as being a trigger, which could trigger repayment.

In practice, it depends on what the bidder wants to do. If the bidder wants to keep the existing target’s financing in place, then they will have discussions with the lender and have confirmation from them that they will keep such financing in place.

Sometimes part of the reason for a bid is, for example, that if they are going to acquire a target, they are going refinance it on a conditional basis, because that will provide efficiencies and therefore maximize value in the target, then the lenders are happy, to trigger a repayment, because that is the whole point. They want to acquire it, repay the loans, and finance it on a conditional basis.

So the triggers are commercially common in lending arrangements. In practice, the way it is dealt with is that once you have a bidder make an announcement they will also talk to the lenders and work out what will happen should the bid be successful.

Usually lenders will not demand repayment unless the bid is successful. They will want to have discussions to understand what the bidder wants to do. But there is no benefit for them in triggering repayment on the announcement of the bid. It will always be practically, commercially resolved upon completion of the bid.

BURIAN: I think we had this discussion in Germany as well. I mentioned this Schaeffler/Continental case, where actually the financing was one of the major issues. Just for recollection purposes, Schaeffler, a privately held automotive or industrial group made a public takeover bid for Continental Tire AG, which is one of the largest tire makers in the world and a much larger company than Schaeffler.

This was seen as a quite audacious move. But it was made right before the collapse of Lehman Brothers, which meant that at the time they made their takeover bid the offer price was okay, but they were not quite sure it would be accepted by many of the shareholders. So they put an acceptance threshold on it, I think at 30%, not very high. And they basically tried to limit it to 50%, by saying, “If we get more shares, we will sell them again.”

Because of the financial crisis, the offer became extremely attractive, as the share price of Continental Tire had dropped in the meantime. So more than 80% of the shareholders accepted the bid, which put Schaeffler in a very difficult position, because they did not have the funds to finance the full bid, plus they had this commitment and agreement with the target’s board to divest or pass on any shares exceeding 50%. And it triggered all the change-of-control clauses in the financing arrangements of Continental Tire AG.
Since both companies were in financial difficulties, it was not one of the situations where the banks just needed more explanation. The banks were seriously worried. There was a risk that the banks might have Continental Tire take over Schaeffler, meaning the target taking over the bidder, because the bidder was in financial difficulties due to its takeover bid. But in the end, the banks supported Schaeffler with loans and by taking over more than 40% of the shares.

So I agree that in normal times it is just a way of being involved early on and getting enough information and making sure that your position does not deteriorate. In times of financial crisis, it might actually have a very significant effect. You can have unforeseen consequences.

8. Equity derivatives and “hidden ownership”

WATANABE: And concerning the Schaeffler/Continental case in Germany, to my understanding the party concerned made use of cash liquidity swap, which is one of the liquidity directives.

BURIAN: They did this before the takeover bid, yes. It’s a means of stake building. They used cash-settled equity swaps to circumvent the publication requirements, the announcement requirements for building up the stake, while at the same time making sure that their public takeover bid would be successful, because they would already have more or less control of a large number of shares.

Schaeffler had bought up more than 36% of the shares by these cash-settled equity swaps. And at the time they went public, this was actually a major means of putting pressure on the target’s board to get them to sit together with Schaeffler and discuss an investor contract and for the board to recommend to the shareholders to accept the offer.

WATANABE: As you know, equity directive, for example liquidity swap over a cash-settled equity swap or CFD(contract for differences) can make the ownership stake smaller. But if the arrangement is correctly cash-settled, it’s not a problem. But practically, the holder of the long position will be allowed work with the holder of the short position.

So I suppose it’s a very critical problem.

ROBINSON: It is. And certainly in the UK there have been moves in terms of disclosure. And this is where it is used in this case, in terms of not the takeover itself but in stake building prior to a takeover.

In that situation, people can build hidden stakes through various instruments. And just as a market defines its rules and thinks that it has sorted out the situation, clever bankers come up with new techniques and new products to allow you to build a stake. And these contracts for differences are one way of doing that.

But the regulators move a lot more quickly now. And in the UK there are new regulations in terms of disclosure requirements for the contracts for differences. The difficulty is that, as clever as the bankers are, the regulators have to try to think of a clever way of revealing what is the underlying instrument.

So the rules are quite complicated. And they are in the process of changing, certainly in the UK. And new rules have come into force.

BURIAN: It’s the same in Germany, actually. In the context of Schaeffler/Continental, the German Federal Financial Supervisory Authority did not raise objection against the transaction as these cash-settled derivative instruments were not found to trigger a disclosure requirement. Another case of “sneaking up” to the target, this time by using cash-settled share warrants, was Porsche/Volkswagen. Both cases were
regarded as being unsatisfying, resulting in amendments to the German Takeover law in 2011 that will come into effect in February 2012. With these amendments the financial instruments in question are taken into account for triggering publication requirements.

So the rules, as James said, change. I think the regulators and lawmakers have to react to such challenges, and they have already reacted in many European countries. And it will continue to change. So this way of building up a stake is or will no longer be possible. And nobody knows what other solutions bankers and companies will come up with and what else will change.

ROBINSON: But the reaction of regulators in Europe has been very quick. Usually, legislators take a long time in any country. But the way in which the regulators in Europe have reacted to these mechanisms of building stakes, the secret building of stakes, has been very quick. So it has been quite impressive.

9. Recent movement on the case of Schaeffler/Continental and the case of Porsche/Volkswagen in Germany

WATANABE: By the way, recently, has there been any movement on Schaeffler/Continental case in Germany?

BURIAN: In economic terms, a lot of movement. In technical terms, the takeover bid was successful. As already mentioned, Schaeffler acquired more than 80% and finally held about 90% of the shares in Continental. Under the investor agreement they had entered into with the board of the target, they had to sell or pass on to the banks any shares exceeding 50%, as, according to the agreement, Schaeffler was not allowed to take control by acquiring a majority of the voting rights for a period of three years after the takeover bid, which is what they did. So shares were transferred to financial institutions, resulting in Schaeffler directly holding 49.9% of the shares in Continental.

Schaeffler was in huge financial difficulties, because the acceptance level was much higher than expected, due to the financial crisis. The volume of financing required was much higher than they had planned on and were actually able to get.

So the banks of Schaeffler and of Continental Tire were basically in charge of driving the discussions. And as Continental Tire themselves bought the VDO business of Siemens, in an equal amount, more than 11 billion Euros, they had the same issues, in terms of refinancing the transaction.

It’s like many other cases now, where companies are in financial difficulties or at least have problems getting refinancing in place, where the banks are the ones making all the important decisions, and who actually even decide which assets will be sold and how the companies will be combined or not combined.

In 2011, two financial institutions placed shares held on Schaeffler’s behalf, reducing the stake controlled by Schaeffler to 60.3% (from 75.1%), to reduce debt significantly.

Another example for the bank’s influence on a takeover due to financing issues is the case Porsche/Volkswagen. I think everybody was watching the stories on the news, how Porsche as a much smaller company set to take over Volkswagen and acquired a majority stake. Porsche had the same problem in terms of financing, plus there was a law in Germany that protected a minority interest of 20% held by one of the German states where Volkswagen is located. This was declared invalid by the European Union as a violation of European bid rules.
Then, instead of just giving up the law, the German government rephrased the law, still offering the same kind of protection to the 20% shareholder, which is something Porsche obviously had not expected. And their plan was to actually increase their stake to more than 75%, to enter into what you call a domination agreement with Volkswagen. And then they would get access to the surplus cash of Volkswagen, which was something like 7-8 billion Euros. So they would have been easily able to finance the acquisition.

With Porsche having the same kind of financial difficulties, the banks decided, together with Volkswagen, that Porsche was going to become part of Volkswagen rather than the other way round; the completion of that transaction is still pending - if it works out at all.

10. Threshold for a mandatory offer

WATANABE: Thank you for reporting on the latest cases. I’d like to move on to the next question about the threshold for a mandatory offer. Both in the UK and Germany, the threshold is 30%. Do you think it is appropriate?

ROBINSON: I know the concept of a mandatory bid for the entire issued share capital is unusual for Japan, where you can set your threshold.

As a practice, it has worked well. The 30% gives you effective control, certainly in terms of veto over what the company wants to do. So 30% is an appropriate level, I think. And certainly in terms of whether it’s 30% or 33% across Europe, that is what the Takeover Directive now stipulates.

The concept of the mandatory bid does mean that if people are making takeover offers they are going to have to be legitimate bidders, that it’s not simply a tactical ploy to disrupt the business. You actually have to be prepared to acquire the whole company if 100% tender their shares.

BURIAN: I agree. This is, again, with varying thresholds, the same principle in all EU member states, because it’s part of the Directive. And it does change the dynamics. For example, compared with the situation in Japan, because once you cross this threshold you really have to think, “What am I going to do?”

Again taking the Schaeffler case, I think they would have loved to say, “We’ll only acquire 40%. We’ll only make a public bid for 40%” or “45%” or “49%.” But they could not, because of this mandatory bid rule, where once you cross the 30% you just have to bid for everything.

At the same time, I think this is really designed to protect the minority shareholders, by giving them the option to sell their shares at the same price as any other shareholder does if it comes to a public takeover bid and not to be stuck as a minority shareholder in a company that is completely different because of a change in ownership, a change of control, and change in the shareholder structure from the one they had invested in originally.

WATANABE: To my recollection, now the threshold for a mandatory offer in Austria is 25%. And recently, I heard that the French government was considering to lower the threshold. What do you think about that? Is it too low? Too strict?

ROBINSON: To try to take a practical viewpoint about how listed companies operate, obviously in terms of a two-thirds voting majority, which means that you can basically run the company, the third technique is a good blocking threshold. In practice, a lot of shareholders don’t turn up for the shareholders’ meetings. Therefore, if you look, for example, at competition law, they wouldn’t simply say, “Control is x per-
cent.” They would say that it depends upon the voting patterns. If not many people turn up for the AGM, then 20% or 25% could give you a lot of control.

So in terms of certain member states looking at reducing it, I think they are probably trying to reflect the practical operation of a listed company, that 33% or 30% technically is a control stake but that in practice you could have control by having a lower percentage, because shareholders don’t actively exercise their votes.

Whether countries need to do that I guess is debatable. As somebody from the UK, I can say that we seem to be happy with our 30%. I’m probably comfortable with that.

I guess different member states may have different companies that they are looking to protect, and that may be what is driving it.

**BURIAN:** I agree. As James said, it really depends on how shareholders’ meetings are being held and what the shareholder structure is to say whether 30% gives you control or 20% is already enough.

And if protection of minority shareholders is regarded essential, then I can understand why there is a tendency toward lowering the threshold. Because if you happen to invest in a company where 20% already gives you a controlling stake, i.e. the ability to influence the management, due to low presence of voting shares at shareholders’ meetings, then, of course, you would actually kind of circumvent the system designed to protect minority shareholders by taking de facto control over the company by acquiring 20% or 25% of the shares without having to offer the minority shareholders to buy their shares.

At the same time, I think there is probably a limit to lowering the threshold without giving the acquirer a flexibility in his investment, even if it’s just in a sizable minority stake, without wanting to exercise control.

And any further restrictions make it less attractive, of course, to invest in shares. So I think that’s always a tradeoff.

**11. Principle of whole solicitation and the strategy for adjusting the ratio of acquiring target shares**

**WATANABE:** Do you think it is appropriate to offer to buy all the shares at the time of exceeding the threshold?

**ROBINSON:** Yes. The concept of the mandatory offer is to protect minority shareholders. I know in Japan there is the concept of fairness to all shareholders equally, in that all can tender their share, that they will be pro rata down, except if you make a takeover bid for over two-thirds, in which case you have to buy the shares of whoever accepts.

So you have the same kind of principle in Japan of equality of shareholders. But in Japan there is a possibility if you make a bid for less than two-thirds that you have your shares tendered, pro rata accepted, but you are still left holding shares in a company in which there is a majority dominant controlling shareholder.

The point of the mandatory offer is that you are able to fully exit. So if you pro rata down, you will always be left with some shares that are non-liquid. And this is why I think the concept of the mandatory bid is fair: As a minority shareholder, if somebody wants to acquire the company, they are free to do so, as long as I am able to exit. I don’t want to be still bound as a shareholder in a company over which I have no
control, where the shares become non-liquid. I would lose the value of my investment then.

So the mandatory bid makes sense to me.

WATANABE: You referred to two key concepts concerning the mandatory offer. One is protection of minority shareholders. The other is equality of shareholders. Which is more important principle in the UK for mandatory offers?

ROBINSON: I think it’s the equality principle that is the stronger principle, because once you have the equality, that, by definition, gives you minority protection.

If you have to treat everybody the same, then everybody has the opportunity to then sell their shares. And this is their form of protection.

You do have minority shareholder protection in other forms, like the squeeze-out mechanism, for example. It gives you the ability if you are a minority shareholder to be properly protected.

But before you get to the squeeze-out stage, the equality principle is the stronger principle, I would say.

WATANABE: In Germany is it to usual to offer to all the shares of the target company?

BURIAN: Yes, if it is a mandatory bid, you have to offer to buy all the shares once you cross the threshold. But in reality, if you are pursuing a strategic goal by acquiring a majority stake or a controlling stake in a company, you would not buy shares on the market until you cross the 30% threshold and then be forced by law to make a mandatory bid. What you would rather do is make a voluntary bid, before actually crossing the 30% threshold so that you can define the terms of the bid, and then cross the 30% threshold only in the course of this voluntary bid. You would not have to make a mandatory bid, because you are already giving the shareholders the opportunity to tender their shares on an equal basis. In case you plan the acquisition of control and not only a major part of the shares, this voluntary bid would be qualified as a takeover offer and you would underlie certain restrictions that also apply to a mandatory bid – inter alia as to the obligation to cover 100% of the shares with your offer - but would not be restricted with regard to other aspects of the offer; not only would you not be obliged to make an offer at all, but you would be allowed to make the offer under certain conditions like an acceptance threshold.

So mandatory bids as such, in a technical sense, are rare, because most companies want to be in control of when and how to make a public takeover offer, unless you are in a situation where you actually don’t really want to buy shares.

I have cited the Porsche example. Porsche built up a stake and then held on to their stake for a while, and they crossed the 30% threshold at a fairly low price, where the market speculation had driven the price already beyond that. So when they actually made the mandatory bid, hardly anyone accepted it. And this was exactly what they had planned.

There was a similar situation under Swedish takeover law. Porsche had acquired control over Volkswagen when they crossed the 50% threshold and Volkswagen held a voting stake of over 70% in the Swedish truck company Scania. Porsche had also already acquired control of MAN, the truck maker, which held a voting stake of over 17% in Scania. As a result of the indirect holdings, Porsche exceeded easily the 30% threshold for mandatory bids and had to make a public mandatory bid in Sweden.

Again, they had to make the mandatory bid although they did not want to control the Swedish company and although they did not want to spend additional cash for buying the company.

Unfortunately, again because of the financial crisis, their mandatory bid turned out to be quite at-
tractive. So they got more acceptances than they had hoped for. In the end they passed these shares on to Volkswagen as sort of part of the refinancing.

But, as you can see, if you are not in a situation like the financial crisis, which is unforeseeable, then you can use the mechanism of a mandatory bid or a voluntary bid to control what you are doing and to control the acceptance threshold. But you need your financial advisors to help you, I think.

ROBINSON: But I think that an important point to know is that the actual occurrences of mandatory bids is very low, because one of the exemptions from having to make a mandatory bid when you are crossing the 30% threshold is that you cross the 30% threshold in the course of a voluntary bid.

So the majority of people will take control of the process by doing a voluntary bid. So I think that is one important point. It’s very rare for a mandatory bid to actually occur.

And the second important point, as Michael said, is that by pricing you don’t have to make an effective offer for 100%. If you price it appropriately, you have to offer on an equal-treatment basis to all shareholders. But actually, the number that will accept at that offered price will be low. Therefore, you can acquire less than 100%, either through a voluntary bid or through a mandatory bid.

I have had clients in Japan who said to me, “That means we cannot acquire 40% or 50%.” The answer is “Well, you can. But you need to price it appropriately, understand how the rules work, and structure it properly.” It doesn’t mean you can only acquire 29% or 100%. You can acquire between the two.

BURIAN: Usually banks would run all their models to understand at which price in which market circumstances how many shareholders would accept. So if you are looking at acquiring 40% of a company, you offer a price that is slightly higher than the current market price and set your acceptance threshold at a lower threshold, like 35% or 30%. And then, a few weeks into the offer period, you will see how many shareholders accept and what the overall situation is like.

Then you either increase your offer price slightly to get a few more people to accept your offer so you reach your 40%, or you impose a few more conditions on your offer to reduce acceptance and avoid acceptance of more than 40%.

To study the shareholder structure and to speak to the major shareholders will give you additional information.

If, in the end, too many shareholders tender because you overpriced it, you can sell down in the market, which works when the markets are relatively stable. It’s when the markets drop, as it happened in the Continental case, when you get into financial trouble with the follow-up problems already described.

12. Schemes of arrangements in the UK

WATANABE: To my understanding, in the UK the usual type of public takeover is through a voluntary offer. Is that right? You said mandatory was very rare in the UK.

ROBINSON: Correct. In the UK, mandatory offers are very rare. Then, in terms of the voluntary offer, there are two forms. There is the contractual offer, and then there is the scheme of arrangements.

And actually, it changes from year to year as to which is more popular. At the moment schemes of arrangements are more popular. And a bid can start off as a scheme and switch to a contractual offer. And then they can switch back to a scheme.
So during the course of a bid the actual nature of the bid (the contractual, legal mechanism) can change. But at the moment people tend to go for schemes of arrangements. The reason is the 75% approval threshold. If you have 75% shareholder control, then you can go to court and basically acquire complete control (100% control) by way of a scheme of arrangements.

In a contractual situation, you need to rely upon squeeze-outs. So you need to get up to 95%.

But with schemes of arrangements and contractual offers, non-mandatory-bid offers are definitely in the majority.

WATANABE: Are offers using schemes of arrangements included in the voluntary offers?
ROBINSON: Yes. But a voluntary offer can be by way of a contractual offer, or it can be by way of a scheme of arrangements.

WATANABE: Is it a special type of voluntary offer?
ROBINSON: Exactly. And in fact, over the last year the majority have been by way of schemes of arrangements.

WATANABE: And in Germany what type of public offer is most frequently used?
BURIAN: It’s almost always the voluntary offer, at least they are intended to be voluntary offers. Sometimes they are legally classified as mandatory offers against the bidder's intention.

Unfortunately, we don’t have a scheme of arrangement. So if you want to take entire control of a company, you have to rely on an attractive bid and maybe subsequent share acquisitions; under certain circumstances a simplified squeeze-out is possible.

But it never really happens by mistake that a company crosses the 30% threshold and is then forced to do a mandatory bid. So unless you don’t want to acquire shares through a mandatory bid, you would always opt for a voluntary bid. And this is what happens in practice.

13. Effect of the mandatory offer rule under the situation where the ratio of block holding is high

WATANABE: With a shareholding structure with mandatory offer, to my understanding if we apply the mandatory offer rule under the self-regulating structure that has a high block-holder ratio, the rule will work very effectively to restrain the transfer of control. Do you agree with that? As you know, in the UK there are few block holders. But in Japan or in some Continental countries, the ratio of block holders is rather high.

BURIAN: I find it difficult to see what exactly the relationship is between a mandatory offer and the existence of major shareholders as I understand it.

If you want to successfully acquire a company, you would always try to speak to the block holders before you launch your voluntary offer. And they would say, “Okay, if you offer a share price of 50, I will accept.” So you will make sure that your voluntary offer reflects what they would be willing to accept. By this you get all the major shareholders to accept your takeover bid or maybe to even give you, for example, an option right to acquire the shares.

As it is ultimately the shareholders deciding and the shareholders will decide according to the principle of maximizing shareholder value, the driving aspect is the price. In case of a mandatory bid, you can only take influence on the process by pricing and the price of a mandatory bid is influenced by the...
price at which you acquired the last shares before you cross the 30% threshold.

And then again, you can do the math. You can understand in advance whether these major block shareholders will accept a mandatory bid with the consideration determined that way or not.

Obviously, a similar reaction applies to other shareholders.

The way a bidder structures the price is that actually the offered price is below the market price during the offer period. So obviously, neither the major block shareholders nor the normal shareholders would accept the offer.

Amazingly, there are always people who accept them. So there are actually people selling their shares at a price that is below the market price during the offer period. But I think these must just be the people who sign everything they get.

But I think in this respect there is no major difference between block shareholders and normal shareholders in the context of a mandatory bid. But maybe I didn’t quite understand your question.

**WATANABE:** Another question: In Germany is it possible for some target shareholders to get a special premium from someone making an offer?

**BURIAN:** No, you have to treat all shareholders equally. If you offer a higher price to, let’s say a block shareholder, the same price would have to be offered to all the other shareholders.

**ROBINSON:** That’s the same across Europe. In terms of equality of treatment, the price paid has to be appropriate in terms of what you previously paid.

And I think it’s the same as in Japan. It’s the highest price. So if during the offer period or half a year after your successful offer all of a sudden you start paying 55 to somebody, then you have to offer 55 to everybody, even to those who have already accepted at a price of 50, so they will always benefit from the highest price.

### 14. Demand for the reform of Japanese takeover law and practice

**WATANABE:** To conclude, I would like to ask you the frank opinions as foreign attorneys, “What kind of demand do you have for takeover rules and practices in Japan?”

**ROBINSON:** I think the one thing I would like to see is more weight being given to shareholders’ views, not necessarily in terms of moving all the way to a UK model but certainly in terms of giving the shareholders a greater voice in the running of the company.

As I say, whether you move completely to a “shareholders’ decision” mechanism, with no poison pills and no defensive measures, that is probably too extreme for Japan. But in terms of a dialog between management and shareholders I think it is something that is warranted in Japan and I think should be the case, where the management talks to the major shareholders, that the management discloses what is going on, what their intentions are, what their plans are for the company.

I think in the past few years management has tended not to want to talk to shareholders. I think it’s a good thing to talk to shareholders and to understand what shareholders want. I think that is what I would like to see.

**BURIAN:** I would also like to see Japanese law and practice change in a way that shareholders do get to decide more. I am actually hoping that the Japanese, as it often happens, combine solutions chosen in the U.S., in continental Europe and in the UK and come up with an innovative new solution that will take into
account the interests of the shareholders but also the legitimate interests of the company and other stakeholders and that will also consider that circumstances in Japan are different from those in the UK or Europe, where, I think, there are stronger ties between the employees and the company.

At the same time, I agree with James. I think the decision of Aderans to terminate its anti-takeover plans showed us that you should give shareholders a voice and actually force management to take into account other interests as well in order to avoid a situation where the company’s business is deteriorating and everybody is unhappy in the end.

But I am very hopeful that the Japanese will find an innovative new system.

WATANABE: Thank you very much indeed for your excellent lectures and comments. It was a very good discussion meeting.

ROBINSON: Thank you so much for providing such an opportunity, Watanabe-sensei. It was very good.

BURIAN: Thank you very much, Watanabe-sensei.

Endnotes:

1 “Sensei” means a teacher in Japanese.