

## Beyond Anglo-American Models

### Japan's Unique Approach to M&A and Its Impact on Shareholder Activism and Sustainability

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#### I. INTRODUCTION

Recently, unsolicited takeover bids and shareholder activism targeting listed Japanese companies have begun to gain momentum, with Japan de-

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scribed as the world's second-largest activist market.<sup>1</sup> This development stems from Japanese corporate governance reforms that have emphasized shareholder interests over the past decade (in sharp contrast to the United Kingdom and the United States, where recent discussions have focused on stakeholder interests).<sup>2</sup> These reforms decreased cross-shareholdings and relational shareholdings.<sup>3</sup> Institutional investors have increased their search for investment returns.<sup>4</sup> These changes have enabled proposals to replace the current management teams to gain the support of many shareholders.<sup>5</sup>

Against this backdrop, Japan's approach to M&A regulation is moving toward a distinctive "third path" that differs from the US and European models.<sup>6</sup> This unique approach is characterized by three key features that form the core of this study's analysis.

First, Japanese law has adopted a corporate value standard for evaluating M&A transactions that prioritizes whether an acquisition enhances corporate value over the acquisition price offered to shareholders. This approach differs significantly from rules that focus primarily on offer prices.<sup>7</sup>

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1 See H. SANO/L. DU/T. TANIGUCHI/W. HSU, *Activist Investing Booms in Japan, Led by Elliott's Successes*, Bloomberg, 26 June 2024, <https://www.bloomberg.com/news/articles/2024-06-25/activist-investing-booms-in-japan-led-by-elliott-s-successes?embedded-checkout=true> (on file with author).

2 Japan introduced the Stewardship Code in 2014 and the Corporate Governance Code in 2015. See G. GOTO, *The Logic and Limits of Stewardship Code: The Case of Japan*, *Berkeley Business Law Journal* 15 (2019) 365, 397 (the "goal of the Japanese Stewardship Code is still different than that of the UK Code, as the former aims to prioritize the interests of shareholders over other stakeholders, especially employees") and H. MIYAJIMA, *Corporate Governance Reform, and Ownership, and Control: Perspective from Japan*, *Asian Journal of Political Science* 30 (2022) 260, 268 ("[t]he US and the UK are inclined to the stakeholder model, while CG reform in Japan continues to introduce shareholder primacy models").

3 J. JIDINGER/H. MIYAJIMA, *Does Regulation Matter? Effects of Corporate Governance Reforms on Relational Shareholding in Japan*, RIETI Discussion Paper 20-E-003 (2020), <https://www.rieti.go.jp/jp/publications/dp/20e003.pdf> [<https://perma.cc/8L5G-K4KC>].

4 Y. TSUKIOKA, *The Impact of Japan's Stewardship Code on Shareholder Voting*, *International Review of Economics and Finance* 67 (2020) 148, 150 ("the stewardship code leads signatory non-lending trust banks and signatory nonlending insurance companies to become more likely to vote against representative director and CEO appointments in firms with lower profitability after the code").

5 See, MIYAJIMA, *supra* note 2, 260.

6 It is well known that Japanese defensive measures are not used as negotiation tools, and they function differently from their US counterparts. See A. HOSHI, *The Peculiar Development of Anti-Takeover Measures in Japan*, *Journal of Corporate Law Studies* 24 (2024) 587.

7 See *infra* Part II.1.

Second, Japanese courts have developed a principle of respecting shareholders' intentions in takeover defense situations. While poison pills are available as defensive measures, their implementation, based solely on the board's decisions, is likely to be enjoined by courts. Conversely, shareholder approval significantly reduces the likelihood of judicial intervention. Takeover defense case law has established a norm that shareholders should determine whether corporate value would be damaged.<sup>8</sup> This doctrine stands in tension with corporate value standards, as shareholders may naturally favor higher acquisition prices even if such offers may not maximize long-term corporate value.<sup>9</sup>

Third, Japanese law permits partial tender offers, in which acquirers can gain control without purchasing all outstanding shares, even if the rule requires the acquirer to launch a tender offer.<sup>10</sup> In contrast to European systems, which generally prohibit partial acquisitions when an acquirer gains control, this practice is common in both friendly and hostile takeovers in Japan.<sup>11</sup>

These distinctive features raise several questions that this study seeks to address: How do corporate value standards and the principle of shareholder intent interact, and are they consistent with each other? What is the rationale for allowing partial tender offers when other jurisdictions discourage them? How do these unique characteristics affect shareholder activism and sustainability considerations in corporate governance?

This study explores these questions and makes three points. First, respecting shareholder intent, while it may result in the highest purchase price offer, it may not maximize corporate value. However, this tension does not support rules that permit boards to trigger poison pills without shareholder approval, even if shareholders do not necessarily support corporate value-maximizing takeovers.<sup>12</sup> Second, based on empirical analysis, this study argues that partial tender offers in Japan tend to be beneficial rather than detrimental, thus justifying their allowance.<sup>13</sup> Third, Japanese law is unlikely to permit anti-

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8 See *infra* Part II.2.

9 See *infra* Part II.3.

10 Partial tender offers specify a maximum number of shares to be purchased even if shareholders tender more than that. To prevent shareholders from hastily tendering their shares without due consideration, regulatory frameworks typically mandate pro-rata purchases rather than a first-come, first-served allocation. Under a pro-rata allocation, each shareholder has the same percentage of their tendered shares accepted for purchase. See Art. 27-13, para. 4, items 2 and 5 of 金融商品取引法 (*Kin'yū Shōhin Torihikihō*, Financial Instruments and Exchange Act).

11 See *infra* Part III.

12 See *infra* Part II.4.

13 See *infra* Part III.6.

activist pills like those adopted in the United States, with lower triggering thresholds of 5% to 10%, because that level of activist shareholding does not damage corporate value.<sup>14</sup> Regarding sustainability management, factors not reflected in corporate values cannot justify directors' actions under corporate takeover laws. If sustainability management is to be encouraged, mandatory laws and regulations are necessary, because the current frameworks provide insufficient motivation to directors.<sup>15</sup>

This study argues that Japan's third-way approach is not an incomplete adoption of Western models but rather a rational and coherent system that weighs shareholder interests. The present analysis demonstrates that this approach has a theoretical justification, suggesting that legal transplantation does not always result in complete convergence with source jurisdictions.

This paper proceeds as follows: Part II. analyzes the relationship between corporate value standards and the principle of shareholder intent. Part III. examines the rationale for permitting partial tender offers. Part IV. discusses the impact of these principles on shareholder activism and sustainability. Part V. concludes.

## II. RELATIONSHIP BETWEEN CORPORATE VALUE STANDARDS AND RESPECT FOR SHAREHOLDERS' INTENT

This part analyzes two key issues. First, it analyzes whether corporate value standards and principles of shareholder intent are consistent with one another. Second, it analyzes whether courts should allow poison pills, even without shareholder approval, if these standards are inconsistent.

Section 1 introduces Japan's corporate value standards. Section 2 provides an overview of how courts as well as soft law create principles of shareholder intent. Section 3 clarifies the relationship between corporate value and takeover price and states that price does not necessarily align with corporate value.<sup>16</sup> If shareholders focus on the attractiveness of the takeover price, the principle of shareholder intent may not be logically consistent with corporate value standards. Thus, the following question arises: Should courts allow poison pills without shareholder approval if an acquisition that is otherwise undesirable looks good from a corporate value standpoint? Section 4 examines this question. Trusting shareholder intentions as a proxy for realizing corporate value standards may not be perfect. However, this study finds that it represents a reasonable second-best solu-

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<sup>14</sup> See *infra* Part IV.1.

<sup>15</sup> See *infra* Part IV.2.

<sup>16</sup> See *infra* Part II.3.

tion as it is generally unclear to courts whether a specific acquisition is desirable from a corporate value standpoint.<sup>17</sup>

### 1. Corporate Value Standard

#### a) The Court and the METI Guidelines

The corporate value standard is a norm that says a takeover proposal should proceed if it enhances corporate value but be blocked if it diminishes it. This standard was created by the courts as well as by guidelines of the Ministry of Economy, Trade, and Industry (hereinafter: METI).

In court precedents, impairment of corporate value is the dividing line for whether a takeover defense can be justified.<sup>18</sup> As the defensive measures that show up in litigation are discriminatory against the acquirer, it is necessary to explain why they do not violate the principle of shareholder equality (Art. 109 para. 1 会社法 (*Kaishahō*, Companies Act)<sup>19</sup>) if the court admits their legality. In the *Bulldog Sauce* case, the Supreme Court used the concept of corporate value to justify the pill under discriminatory conditions if it protected corporate value from being damaged by a particular shareholder's acquisition of control.<sup>20</sup> The Supreme Court held that such a pill with discriminatory<sup>21</sup> conditions against an acquirer did not violate the principle of shareholder equality if the acquisition of control by a particular shareholder was likely to impair the existence and development of the company, thereby undermining its corporate value and harming its interests and the common interests of its shareholders.<sup>22</sup>

17 See Y. ITO [伊藤靖史], ブルドックソース事件最高裁決定 [The Bulldog Sauce Case Supreme Court Decision], 旬刊商事法務 *Junkan Shōji Hōmu* 1923 (2011) 37, 41 (arguing that courts lack expertise in corporate takeovers, so deferring to shareholder judgment is less problematic than court intervention).

18 See *infra* Part II.2.a).

19 Law No. 86/2005.

20 Supreme Court, 7 August 2007, 民集 *Minshū* 61, 2215. In this case, Steel Partners initiated a tender offer for all shares of Bulldog Sauce. The board concluded that the offer would impair corporate value and prejudice shareholder interests. Pursuant to a special resolution of the shareholders' meeting, a poison pill was adopted, granting three stock subscription rights per share (excluding Steel Partners). The Supreme Court denied the acquirer's request for injunctive relief.

21 The pill had discriminatory conditions, granting three stock subscription rights per share to shareholders other than Steel Partners, who received cash compensation from the target company instead of exercising the rights. For more details on the scheme of this pill, see HOSHI, *supra* note 6, 602–604.

22 Supreme Court, 7 August 2007, 民集 *Minshū* 61, 2215, 2223–2224 (it held that the principle of shareholder equality obliges a company to treat shareholders equally based on share nature and number. However, individual interests are unthinkable

The Corporate Value Study Group (chaired by Professor Hideki Kanda), formed by METI, presented the corporate value standard in 2005.<sup>23</sup> This established the principle that takeover defenses should maintain and enhance corporate value and shareholders' common interests. Subsequently, METI formed similar study groups and published various documents that consistently upheld corporate value standards.<sup>24</sup> In 2023, METI published the "Guidelines for Corporate Takeovers",<sup>25</sup> prepared by another study group it had established (also chaired by Professor Hideki Kanda) (hereinafter: the "Takeover Guidelines"). Although they are not legally binding, their content is so persuasive that many treat them like a manual, and their influence on M&A market practices is highly significant.<sup>26</sup> They set forth the principles of corporate value and the common interests of shareholders as the first of the three principles proposed. Clearly stated there, as the

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without the company's existence and development. Thus, if a buyer's acquisition of control threatens the company's existence, development, corporate value, and common shareholder interests, discriminatory treatment to prevent such harms may not violate the equality principle, provided it respects equity and reasonableness.)

- 23 METI, Corporate Value Study Group, Report on Takeover Defense Measures to Ensure or Enhance Corporate Value and Shareholders' Common Interests (2005), <https://www.meti.go.jp/policy/economy/keieiinnovation/keizaihousei/pdf/shishinhontai.pdf> [<https://perma.cc/96J9-Y9EK>].
- 24 See, e.g., METI, Guidelines on Fair M&A Practices - Toward Enhancing Corporate Value and Securing Shareholder Profit (2019) 14, <https://www.meti.go.jp/policy/economy/keieiinnovation/keizaihousei/pdf/fairmaguidelinesenglish.pdf> [<https://perma.cc/7FKH-X3M9>] (M&A transactions should be evaluated based on whether they enhance corporate value).
- 25 METI, Guidelines for Corporate Takeovers – Enhancing Corporate Value and Securing Shareholder Interests (2023), <https://www.meti.go.jp/press/2023/08/20230831003/20230831003-b.pdf> [<https://perma.cc/72WV-2ZKA>]. These guidelines are markedly oriented toward stimulating the economy through M&A. They state that "an active market for desirable M&A transactions will optimize resource allocation, accelerate industry restructuring, and promote healthy economic metabolism of Japan's capital markets." Id. at 5. While the 2005 report (METI, *supra* note 21) aimed to present an interpretation of the legality of takeover defense measures, the 2023 Takeover Guidelines address takeover defense measures in a small, descriptive section that refrains from proactively presenting new legal interpretations. See T. FUJITA [藤田友敬], 「企業買収における行動指針」の意義 [The Significance of Takeover Guidelines], *ジュリスト Jurisuto* 1592 (2024) 14, 15.
- 26 For example, in the *FUJISOFT* case, the target company's opinion expressly cites the Takeover Guidelines and relies on its principles. See FUJISOFT INCORPORATED, (Supplement) Notice regarding Expression of Opinion in Support of the Second Tender Offer for the Company Share Certificates by FK Co., Ltd. and Recommendation to Tender Shares, 19 November 2024, [https://www.fsi.co.jp/e/press\\_release/img/20241119\\_02.pdf](https://www.fsi.co.jp/e/press_release/img/20241119_02.pdf) [<https://perma.cc/74W7-SLRB>].

corporate value standard, is the norm that “[w]hether or not an acquisition is desirable should be determined on the basis of whether it will secure or enhance corporate value and the shareholders’ common interests.”<sup>27</sup> The academic community also supports this as the corporate value standard, as it embodies the idea that maximizing societal wealth is a desirable criterion for acquisitions.<sup>28</sup>

*b) Corporate Value and Shareholders’ Common Interests*

The concept of corporate value should be understood as separate from the shareholders’ common interests. The court has never clarified the relationship between these two concepts. From the Supreme Court’s holding, one can assume that corporate value correlates with shareholder interests, but the court does not consider the two concepts to be exactly the same. The Supreme Court implied that the impairment of corporate value was the cause, the effect being impairment of the common interests of shareholders.<sup>29</sup>

The Takeover Guidelines also distinguish between corporate value and the common interests of shareholders. This corporate value standard aims to ensure and enhance corporate value and shareholder interests. The guidelines define corporate value as

“a company’s assets, profitability, efficiency, stability, growth potential, and other company attributes that contribute to the interests of shareholders, or the extent to which they do so. Conceptually, corporate value is the sum of the present values of discounted future cash flows generated by a company.”<sup>30</sup>

The guidelines state that corporate value is “a quantitative concept,”<sup>31</sup> a clarification made with the awareness that the term “corporate value” is used in multiple ways in public discourse.<sup>32</sup> Explaining the relationship between these two concepts, the guidelines state that “an acquisition should be materialized under transaction terms that increase the target company’s corporate value and ensure that the increase in corporate value is fairly

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27 METI, *supra* note 25, 10.

28 M. YUKIOKA [行岡睦彦], 買収をめぐる対象会社の取締役の行為規範 [Code of Conduct for Directors of Target Company Concerning Takeover], 旬刊商事法務 Junkan Shōji Hōmu 2367 (2024) 15, 21.

29 See Supreme Court, 7 August 2007, 民集 Minshū 61, 2215.

30 METI, *supra* note 25, 8. METI’s soft laws have used the corporate value concept since 2005 with some changes. See, M. MATSUNAKA, The Concept of Corporate Value, Corporate Governance, Shareholder Interests, and Stakeholder Interests in Japan, ZJapanR/J.Japan.L. 57 (2024) 83.

31 METI, *supra* note 25, 12.

32 FUJITA, *supra* note 25, 16.

distributed among the parties.”<sup>33</sup> It further states that “a reasonable effort should be made to ensure that the acquisition will be based on terms that will secure the interest which shareholders should enjoy, in addition to determining whether the acquisition is appropriate from the perspective of enhancing the company’s corporate value.”<sup>34</sup> Thus, one must first pay attention to whether the acquisition increases corporate value and, second, to whether the acquisition price includes an adequate distribution of such increased corporate value.

The following notable recent case helps to better understand this standard. KKR and Bain Capital were competing in a takeover bid for FUJISOFT INCORPORATED, a Japanese system development company. The bidding war saw both firms progressively raise their offers, with Bain Capital at one point proposing a higher purchase price than KKR (9,600 versus 9,451 yen per share). Interestingly, despite Bain’s higher bid, FUJISOFT’s board supported KKR’s proposal, pointing out concerns about corporate value enhancement rather than merely focusing on price. This was because (1) KKR’s offer was based on adequate competitive procedures and reasonable efforts to realize shareholder interests and was deemed sufficient; (2) the difference between Bain Capital’s and KKR’s respective offers was relatively small; and (3) considering that Bain Capital was expected to complete its tender offer at least three months after KKR’s was ready, and considering the time value expected by shareholders during that period, ensuring the opportunity to sell at Bain Capital’s tender offer price was considered to be of low priority.<sup>35</sup> The contest eventually concluded on 4 February 2025, when KKR raised its offer to 9,850 yen, prompting Bain Capital to withdraw its offer on 17 February 2025. KKR’s tender offer was ultimately consummated with a shareholding ratio of 57%.<sup>36</sup>

This case raises the immediate question of whether the target company’s directors violated their duties by favoring a lower bid when multiple competing takeover offers existed after accepting a takeover offer to go private. It should be discussed whether, after deciding to sell a company, a director should act as a facilitator of an auction and not support a lower-priced takeo-

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33 METI, *supra* note 25, 13.

34 METI, *supra* note 25, 14.

35 FUJISOFT INCORPORATED, Notice Regarding (Opposing) Opinion of the Board of Directors of the Company on the Tender Offer for the Company Share Certificates by K.K. BCJ-88, 17 December 2024, [https://www.fsi.co.jp/e/press\\_release/img/20241217.pdf](https://www.fsi.co.jp/e/press_release/img/20241217.pdf) [<https://perma.cc/XDR4-C544>].

36 FUJISOFT INCORPORATED, Notice Regarding the Results of Tender Offer for the Shares of FUJI SOFT INCORPORATED (Securities Code: 9749) by FK Co., Ltd., 20 February 2025, [https://www.fsi.co.jp/e/press\\_release/img/20250220\\_1.pdf](https://www.fsi.co.jp/e/press_release/img/20250220_1.pdf) [<https://perma.cc/F3U5-XQBL>].

ver offer, as in the *Delaware* case of *Revlon v. MacAndrews*.<sup>37</sup> Under the corporate value standard, however, the answers to these questions were negative: If a lower-price offer increases corporate value, then it should proceed.

## 2. Principle of Shareholders' Intent

### a) *Nippon Broadcasting System (2005)*

The case law on shareholder intentions has developed through cases involving poison-pill injunctions.<sup>38</sup> The implementation of poison pills solely at the discretion of the board of directors is likely to be enjoined by courts, and defense measures in principle are not permitted without shareholder approval. This doctrine followed from the clear holding of the Tōkyō High Court in the *Nippon Broadcasting System* case in 2005, in which new share subscription rights were issued only by resolution of the board of directors. The court held that “it is generally not permissible to allow directors to issue new shares for the primary purpose of changing the composition of shareholders, who are the electors of directors.”<sup>39</sup>

As an exception, the Tōkyō High Court held—in dicta—that the issuance of new stock subscription rights via the board’s decision can be legal if

“there are special circumstances justifying such issuance from the viewpoint of protecting shareholders’ interests as a whole, specifically, when the hostile acquirer is not sincerely aiming for rational management, and the company prima facie proves that the acquisition of control by the hostile acquirer will cause irreparable damage to the company.”<sup>40</sup>

37 See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985). In the *FUJISOFT* case, the target company’s board, not deploying a poison pill, merely expressed opposition to the higher takeover bid. Therefore, even if this occurred in Delaware, the directors’ actions likely wouldn’t constitute a Revlon duty breach.

38 See C. MILHAUPT/Z. SHISHIDO, *The Enduring Relevance of the Poison Pill: A U.S.-Japan Comparative Analysis*, *Stanford Journal of Law, Business & Finance* 28 (2023) 336 (“the pill as transplanted into the Japanese host (the “J-Pill”) differed conceptually from the graft validated under Delaware law (the “D-Pill”) in two crucial ways. First, while the board has sole discretion to adopt and exercise the D-Pill without shareholder approval, the J-Pill contemplates approval by shareholders.”).

39 Tōkyō High Court, 23 March 2005, 判例タイムズ Hanrei Taimuzu 1173 (2005) 125, 132. Livedoor acquired approximately 35% of Nippon Broadcasting System via off-floor transaction on Tōkyō Stock Exchange instead of tender offer. The target then issued new share rights to Fuji Television (22.5% owner), which would have increased Fuji’s stake to 59% and diluted Livedoor’s from 42% to 17%. The court enjoined the issuance.

40 Tōkyō High Court, 23 March 2005, 判例タイムズ Hanrei Taimuzu 1173 (2005) 125, 133.

The court took the view that a defense measure is lawful even without shareholders' explicit approval if the hostile takeover will damage corporate value by causing irreparable harm to the company. The board of directors bears the burden of proving irreparable harm to corporate value.

However, this exception is extremely narrow. The court held that it would not evaluate whether the target company's corporate value would be enhanced if either a raider or a current major shareholder controlled the target company, because the court was unsuitable for making this judgment as part of the judicial process.<sup>41</sup> The court will not judge which acquirer enhances corporate value more; this is left to shareholder intent.

*b) Bulldog Sauce (2007)*

Conversely, if shareholder approval is obtained, the possibility of a judicial injunction issuing is reduced; if shareholders approve of defensive measures, the court will likely respect their will and recognize those defensive measures as lawful.

In the *Bulldog Sauce* case, where the triggering of a poison pill in response to a takeover bid was approved at a meeting of shareholders, the Supreme Court recognized its legality and denied an injunction against the pill.<sup>42</sup> It held that the triggering of the poison pill generally respected shareholder intent and did not pass upon whether corporate value would be damaged if shareholders approved the takeover defense measure. Nor did it independently evaluate whether a hostile acquirer would damage corporate value before it assessed the credibility of the shareholders' judgment. This doctrine differs from the Tōkyō High Court's approach in the *Bulldog Sauce* case:<sup>43</sup> The Tōkyō High Court had held that triggering poison pills was legal if it was recognized as a necessary and reasonable means for resisting an abusive takeover. It then evaluated whether the acquirer qualified as abusive based on court-determined facts. The Supreme Court, however, did not take such an approach to determining whether the acquirer was abusive but instead respected shareholder intent.

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41 Tōkyō High Court, 23 March 2005, 判例タイムズ Hanrei Taimuzu 1173 (2005) 125, 134.

42 Supreme Court, 7 August 2007, 民集 Minshū 61, 2215 (“Whether the corporate value and, in turn, the common interests of its shareholders is damaged by a particular shareholder's acquisition of management control should ultimately be determined by the shareholders themselves, to whom the company's interests belong; and such shareholders' decision should be respected unless there is a serious defect that makes it unjustifiable, such as improper shareholders' meeting procedures or that the facts on which the decision was based did not exist or were false.”)

43 Tōkyō High Court, 9 July 2007, 民集 Minshū 61, 2306.

However, one can argue that the Supreme Court's decision respects shareholder approval of the pill too broadly. There is room for doubt as to whether shareholders are a true determinant of whether a hostile takeover would damage corporate value; when shareholders vote on the poison pill, the opinion they express is on whether it should be introduced to thwart the hostile takeover, not (directly) on whether such a hostile takeover would damage corporate value. Theoretically, shareholders are most likely to decide on defensive measures by comparing the acquirer's proposed takeover price with the share value they would enjoy under current management upon introducing defense measures; they do not pay much attention to whether a target company's corporate value will increase or decrease after a hostile takeover is complete. Additionally, cross-shareholding shareholders might favor defensive measures, even against hostile takeovers that would increase the target company's corporate value, in order to maintain friendly relationships with allied businesses.<sup>44</sup> But despite these logical possibilities, the Supreme Court directly connected shareholder approval of defensive measures to their judgment that a hostile takeover would damage corporate value.

c) *Nippo Sangyo (2021)*

The Supreme Court's reasoning in the *Bulldog Sauce* case was confirmed by lower court precedents 14 years later. In the *Nippo Sangyo* case, an ordinary shareholder meeting resolution approved the introduction of a defensive measure, and the acquirer initiated a partial takeover bid. The Nagoya High Court held that the poison pill invoked by the subsequent board resolution was legal under the Companies Act and refused to enjoin the pill.<sup>45</sup> The Nagoya High Court held that the purpose of the defensive measures was not to prevent the takeover itself as a matter of the board's judgment, but to ensure that shareholders had sufficient time and information to make appropriate judgments about selling their shares to the acquirer or keeping them and having an opportunity to negotiate with a person intending to make large-

44 P. XU/W. TANAKA, 買取防衛策イン・ザ・シャドー・オブ株式持合い——事例研究 [Takeover Defense Measures in the Shadow of Cross-Shareholding – A Case Study], 旬刊商事法務 *Junkan Shōji Hōmu* 1885 (2009) 4 (found that 58% of the shareholders in this case were cross-shareholders).

45 Nagoya High Court, 22 April 2021, 資料版商事法務 *Shiryōban Shōji Hōmu* 446 (2021) 130. The target company's shareholders approved a takeover defense plan at two meetings (66.64% and 64.64% of votes present). This plan required potential acquirers of 20% or more of shares to inform the board. The acquirer launched a partial tender offer without following these procedures, aiming for 27.57% of voting rights to block special resolutions (based on 82.72% average voting participation). The target triggered its defense pill; the court denied the acquirer's injunction request.

scale purchases of the target company's shares. The court held that this purpose was to secure and enhance shareholders' common interests.<sup>46</sup>

*d) Japan Asia Group (2021)*

In cases where there are no plans to obtain shareholder approval for defensive measures, such measures are highly likely to be enjoined. In the *Japan Asia Group* case, the poison pill was introduced by the board of directors without shareholder approval. The Tōkyō High Court ruled that the poison pill, introduced and triggered only by board resolution, was illegal under the Companies Act and enjoined the pill intended to counter an unsolicited takeover.<sup>47</sup> It held that it is reasonable to infer that the primary purpose of the poison pill, in this case, was to maintain and secure the right to control the management of the directors or certain shareholders who support and exert de facto influence over them.<sup>48</sup> A reason for the Tōkyō High Court's conclusion was that the target company did not plan to hold shareholder meetings to approve the takeover defense measures.<sup>49</sup>

*e) Fuji Kosan (2021)*

In the *Fuji Kosan* case, the Tōkyō High Court reaffirmed the doctrine that courts should respect shareholder intentions when approving defensive measures.

In this case, the acquirer, after a rejected privatization proposal, launched an any-and-all tender offer subject to the minimum tender ratio condition at 40% of voting rights and planned to freeze out the remaining shareholders at the same price as the tender offer through a reverse stock split if the tender offer was successful. The target responded with a poison pill.

The Tōkyō District Court rejected the acquirer's request for an injunction on 23 June 2021. The shareholders' meeting was scheduled for 24 June.

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46 Nagoya High Court, 22 April 2021, 資料版商事法務 Shiryōban Shōji Hōmu 446 (2021) 130.

47 Tōkyō High Court, 23 April 2021, 資料版商事法務 Shiryōban Shōji Hōmu 446 (2021) 154. A hostile tender offer outbid and defeated an MBO. The target's large dividend prompted the hostile bid's withdrawal. When the acquirer resumed market purchases and announced another tender offer, the target board unilaterally activated a poison pill. The court enjoined this as an unfair issuance, finding the pill's primary purpose was preserving control for incumbent directors or supporting shareholders.

48 Tōkyō High Court, 23 April 2021, 資料版商事法務 Shiryōban Shōji Hōmu 446 (2021) 154.

49 Tōkyō High Court, 23 April 2021, 資料版商事法務 Shiryōban Shōji Hōmu 446 (2021) 154, 156.

At the time of the Tōkyō District Court's decision, shareholder approval had not yet been granted. However, the Tōkyō District Court found that the target company's board planned to withdraw the defensive measure if shareholder approval was not obtained at the annual meeting the next day. The board's response was to let the shareholders themselves decide whether the corporate value, and in turn the common interests of the shareholders, would be harmed by an inability to secure sufficient information and lack of time to make appropriate tender offer decisions.<sup>50</sup>

The next day, on 24 June 2021, 66% of shareholders voted for the defense plan. The acquirer appealed to the Tōkyō High Court, which upheld the Tōkyō District Court's reasons and dismissed the appeal.<sup>51</sup>

One might question whether a defensive measure would be allowed with shareholder approval when the takeover method is not coercive (i.e., a two-step takeover with the same freeze-out price as the tender offer price). The Tōkyō High Court found it problematic that the minimum tender offer condition was set at 40% rather than at two-thirds, which would ensure a special resolution. It held that such an offer might coerce shareholders to tender their shares to the offeror in fear of corporate value decreasing without the shareholders' meeting's resolution on the reverse stock split being passed.<sup>52</sup> Furthermore, regarding confirming shareholder intent to approve the poison pill, the Tōkyō High Court held that there was no such problem at the shareholders' meetings, whereas in this case the tender offer was not entirely free from the problem of coercion.

Unlike the *Japan Asia Group* case, the fact that shareholders approved the implementation of the poison pill at the shareholders' meeting was a particularly important factor, obliterating the fact that the main objective was to maintain and secure management control.

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50 Tōkyō District Court, 23 June 2021, 資料版商事法務 Shiryōban Shōji Hōmu 450 (2021) 151.

51 Tōkyō High Court, 10 August 2021, 資料版商事法務 Shiryōban Shōji Hōmu 450 (2021) 143.

52 Tōkyō High Court, 10 August 2021, 資料版商事法務 Shiryōban Shōji Hōmu 450 (2021) 143, 149.

Some critics argue there's no coerciveness in two-step acquisitions because shareholders who oppose the tender offer can simply vote for the second-stage cash-out. See W. TANAKA, 防衛策と買収法制の将来 (上) ——東京機械製作所事件の法的検討 [Defense Measures and the Future of Takeover Legislation (1): Legal Analysis of the Tōkyō Kikai Seisakusho Case], 旬刊商事法務 Junkan Shōji Hōmu 2286 (2022) 4, 14.

However, if 60% of shareholders don't tender because they consider the price too low, they would logically vote against the cash-out at the shareholders' meeting. Some shareholders might tender their shares to avoid remaining as minority shareholders with the acquirer holding 40% and uncertain prospects of future cash-out.

*f) Tokyo Kikai Seisakusho (2021)*

In the *Tokyo Kikai Seisakusho* case, the Supreme Court upheld the Tōkyō High Court's decision that a poison pill mechanism, introduced by board resolution and triggered after a shareholders' meeting to confirm shareholder intent, was legal. The acquirer in this case had increased its shareholding in the target company to 32.72% through market purchases. The target company responded by introducing defensive measures, demanding information about the purchase. When the acquirer further increased its stake to 38.64%, the target company's board resolved to trigger the poison pill. But the target company also agreed to cancel these measures unless they were approved at a subsequent shareholder meeting. This meeting exercised a majority voting requirement that excluded both the acquirer's group and the target company's directors. With approximately 79% of eligible shareholders approving them, the defensive measures remained in place. The acquirer sought an injunction against these measures, but the Tōkyō High Court ruled the pill legal and rejected the requested injunction.<sup>53</sup>

The target company excluded the voting rights of acquirers and target company directors in shareholder meetings because of prior court decisions (*Nippo Sangyo*, *Japan Asia Group*, and *Fuji Kosan*), understood in practice to mean that, when defensive measures were introduced and triggered only by the board, the legality of such measures depended on whether they were subject to the condition that a shareholder meeting would be held afterward and the pill canceled if shareholders disapproved.<sup>54</sup> In the *Tōkyō Kikai Seisakusho* case, where a poison pill was introduced in response to market purchases, the shareholder composition itself changed in the acquirer's favor over time in spite of the board of directors wanting to convene shareholder meetings to confirm shareholder intent.<sup>55</sup> The target company's board has no effective countermeasures against rapid market purchases before the record date of shareholder meetings.<sup>56</sup> Therefore, they were deprived of their voting rights.

The Tōkyō High Court held that target companies must prevent harm to corporate value and common shareholder interests. Shareholders facing rapid market purchases often lack sufficient time and information to formulate an adequate response, which could damage these interests. Therefore, countermeasures like poison pills are reasonable. In this case, the pill primarily aimed to prevent such damage. The Court held that shareholder

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53 Tōkyō High Court, 9 November 2021, 資料版商事法務 Shiryōban Shōji Hōmu 453 (2021) 98.

54 H. KANDA [神田秀樹], 会社法 [Corporate Law] (26<sup>th</sup> ed., 2024) 187.

55 KANDA, *supra* note 54, 187.

56 KANDA, *supra* note 54, 187.

meetings should confirm the intent of shareholders, free from coercion, regarding the potential harms of inadequate time and information. Allowing acquirers to vote was inappropriate to that end; thus, invoking the pill after confirming the other shareholders' intent was lawful.<sup>57</sup>

g) *Mitsuboshi (2022)*

Even when shareholder approval has been formally obtained, defensive measures cannot be justified if shareholders' rights are distorted. At issue in the *Mitsuboshi* case was a board resolution that introduced a poison pill, triggered through an ordinary resolution at the shareholders' meeting to confirm the target company's, MITSUBOSHI Co., Ltd's, shareholder intent. The Supreme Court<sup>58</sup> approved the injunction against the defensive measure, upholding the Ōsaka High Court's<sup>59</sup> finding—despite affirming an inference of necessity—that the measure was not reasonable (too excessive<sup>60</sup>).

The issue centered on the target company's identification of acquirers (including ones acting in concert) to target with defensive measures. The target announced that shareholders who submitted proxies favoring proposals of acquirers would be classified as poison-pill targets; it considered this to be pro-acquirer conduct. The Ōsaka High Court found that this could coerce shareholders into voting for the target's proposals in order to avoid unfavorable treatment. Thus, despite the defensive measures passing with 54.46% approval, the court questioned whether this reflected true shareholder support for current management and concluded that the resolution alone did not make the pill reasonable.<sup>61</sup>

In this case, multiple parties simultaneously purchased shares of the target company. On 28 August 2024, an individual and two entities were fined by the Financial Services Agency for violating large-shareholding reporting regulations.<sup>62</sup> While the target company understandably had difficulty iden-

57 Tōkyō High Court, 9 November 2021, 資料版商事法務 Shiryōban Shōji Hōmu 453 (2021) 98, 103–104. Since the *Bulldog Sauce* case, case law has established that courts infer that when shareholders approve a takeover defense measure, the acquisition would damage corporate value. The burden then shifts to the acquirer to prove otherwise. However, in the *Tōkyō Kikai Seisakusho* case, the court merely confirmed the intent of non-acquirer shareholders without inferring damage to corporate value. See KANDA, *supra* note 54, 187.

58 Supreme Court, 28 July 2022, 金融商事判例 Kin'yū Shōji Hanrei 1667 (2023) 56.

59 Ōsaka High Court, 21 July 2022, 金融商事判例 Kin'yū Shōji Hanrei 1667 (2023) 30.

60 KANDA, *supra* note 54, 186.

61 Ōsaka High Court, 21 July 2022, 金融商事判例 Kin'yū Shōji Hanrei 1667 (2023) 30, 40.

62 FSA, FSA Weekly Review No. 601, 5 September 2024, <https://www.fsa.go.jp/en/newsletter/weekly2024/601.html#e05> [<https://perma.cc/TP9C-TDP8>].

tifying the scope of the acquirer group, it was misleading to explain that a shareholder was the target of a defensive measure simply for delivering a proxy to an acquirer. Therefore, one can argue that the enjoinder of the pill was appropriate.

*h) Takeover Guidelines*

METI's Takeover Guidelines adhere to the case law. One of the three principles, styled as "Principle 2: Principle of Shareholders' Intent", states that "the rational intent of shareholders should be relied upon in matters involving the corporate control of the company."<sup>63</sup>

Furthermore, the Takeover Guidelines attempt to logically organize defense measures from the perspective of shareholder intent.<sup>64</sup> Recent court decisions have clarified that whether defense measures are evaluated as lawful depends on whether damage to corporate value is inferred, which in turn depends on whether approval is obtained at a shareholder meeting regarding the merits of the pill.<sup>65</sup> However, the Tōkyō High Court in the *Nippon Broadcasting System* case allowed, in dicta, the introduction and implementation of the pill based solely on the board's judgment.<sup>66</sup> There has been no reference to this position in subsequent court decisions; no METI documents after the 2005 guidelines were issued explain this exception in a manner consistent with the principle of shareholders' intent.

In contrast, the 2023 Takeover Guidelines do acknowledge exceptional cases—such as *Nippon Broadcasting*—and argue that such an exception can be justified with respect to shareholders' intent. Reaching metaphorically for a criminal-law concept, the guidelines describe such an exception as a "necessity" defense, stating that "in certain exceptional cases, such as acquisitions by antisocial forces or acquisitions where there is a high probability that the acquiring party will gain an unfair advantage at the expense of the target company and general shareholders, it may be possible for the board of directors to conclude that reasonable shareholders would naturally approve the countermeasure, and so even without an explicit shareholder approval having been received, there may be justification for the board to take this type of action as an emergency action."<sup>67</sup> In short, the Takeover Guidelines attempt to justify the legality of the board alone triggering defensive measures where shareholder approval can be assumed and where it

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63 METI, *supra* note 25, 10.

64 FUJITA, *supra* note 25, 14.

65 See *supra* Part II.2.

66 See *supra* Part II.2.a).

67 METI, *supra* note 25, 58.

is difficult for shareholders to express their intent.<sup>68</sup> In this respect, the Takeover Guidelines entertain a theoretical rationale.<sup>69</sup>

Furthermore, unlike the 2005 version, the 2023 Takeover Guidelines state that passive confirmation of shareholder intent is insufficient.<sup>70</sup> But the 2005 guidelines justified such passive approval, stating that “[e]ven in the case where a takeover defense measure has been adopted by a resolution of the board of directors, if there is a mechanism that allows the shareholders to terminate the defensive measure (and their failure to do so indicates passive approval), it does not run counter to the principle of shareholders’ will (passive approval).”<sup>71</sup> The 2023 guidelines, while not rejecting this principle outright, state that “there will be only limited cases in which the invocation of countermeasures is permitted in a state of only passive approval without ex post confirmation of shareholders’ intentions for a response policy adopted solely based on the judgment of the board of directors.”<sup>72</sup> In short, respect for shareholder intent does not mean merely ensuring the opportunity to elect or dismiss directors at shareholder meetings. In other words, avoiding dead-hand poison pills<sup>73</sup> is insufficient. Instead, establishing shareholder intent requires explicit shareholder approval of a defensive measure at the point when the acquirer and the nature of the acquisition have been identified.<sup>74</sup>

This expression of doctrine was preceded by case law through 2021, which the 2023 Takeover Guidelines organized retrospectively. As described above, the principle of shareholder intent occupies an important position in both case law as well as the METI Takeover Guidelines.

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68 M. MATSUNAKA, 「企業買収における行動指針」の理論的検討(2)——買収への対応方針・対抗措置 [Theoretical Analysis of Takeover Guidelines (2)], 1592 *Jurisuto* 26, 27 (2024).

However, in an all-or-nothing offer (a two-step takeover with a minimum condition of two-thirds to acquire all shares), target shareholders need not worry about post-takeover damage to corporate value, as they will cash out upon completion. Therefore, the main text’s explanation aligns with the principle of shareholder intent only for takeovers that are not all-or-nothing offers.

69 FUJITA, *supra* note 25, 15.

70 FUJITA, *supra* note 25, 18.

71 METI and the Ministry of Justice, Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders’ Common Interests (2005) 6, [https://www.meti.go.jp/policy/economy/keiei\\_innovation/keizaihousei/pdf/shishin\\_hontai.pdf](https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf) [<https://perma.cc/755C-35HH>].

72 METI, *supra* note 25, 58.

73 *Carmody v. Toll Bros.*, 723 A.2d 1180, 1182 (Del.Ch. 1998) (“a ‘dead hand’ rights plan is one that cannot be redeemed except by the incumbent directors who adopted the plan or their designated successors.”).

74 MATSUNAKA, *supra* note 68, 27.

*i) Tension between the corporate value standard and the principle of shareholder intent*

Between the corporate value standard and the principle of shareholder intent, a question arises: Shareholders generally favor acquisitions at higher offered prices, and economically rational shareholders who tender their shares are little concerned about whether the company's corporate value will be impaired after the sale;<sup>75</sup> therefore, is the legal norm of respecting shareholder intent consistent with corporate value standards?

This question highlights fundamental differences between the Japanese and Delaware corporate law approaches to defensive measures. In Japanese law, which limits board discretion in implementing the poison pill, tension exists between respecting shareholder intentions and protecting corporate values. Shareholders naturally favor higher offer prices, potentially sacrificing long-term value for short-term gains. The Japanese approach emphasizes direct shareholder approval of defensive measures, creating a more shareholder-centric system than Delaware's, in which boards have greater discretion in implementing defensive measures.<sup>76</sup> This divergence reflects different corporate governance priorities: Japan places more trust in shareholders' collective decision-making, whereas Delaware grants directors more authority to evaluate threats to corporate policies. The challenge for Japanese corporate law is to reconcile these competing interests by respecting shareholder intent (which may favor short-term price maximization), while protecting a corporate value standard that considers long-term interests and creating a framework that differs significantly from the board-centric Delaware approach.

The following section explores the relationship between corporate value and takeover prices to answer the question posed a moment ago: Are they mutually compatible?

*3. Relationship between Corporate Value and Acquisition Price*

*a) When the best acquisition price offer maximizes corporate value*

The relationship between shareholder intention and corporate value is interesting and dynamic. Shareholders primarily focus on the acquisition price rather than potential changes in the target company's corporate value under new management. The compatibility of these two principles remains debatable.

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<sup>75</sup> W. TANAKA, 企業買収と防衛策 [Corporate Takeover and Defense Measures] (2012) 247.

<sup>76</sup> See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

Corporate value standards and shareholder intent principles are typically consistent with one another. The acquirer proposes a higher acquisition price because this can increase the corporate value of the target company.<sup>77</sup>

To simplify the discussion, suppose that the acquisition is made in all-or-nothing terms: either all shares are acquired for cash (with a cash tender offer followed by a cash-out of minority shareholders) or no share is purchased unless the number of shares tendered by the target company shareholders exceeds the minimum tender condition.<sup>78</sup> Suppose there are two acquirers: A, who increases the company value by 100, and B, who increases it by 50. An acquirer will not lose money if the offer price falls within the range of the increase in corporate value. Thus, A can reflect up to 100 in the purchase price, whereas B can reflect only up to 50. Therefore, A pays a higher price. In this relationship, the acquirers can pay higher acquisition prices because they can increase their corporate value. If this is the case, then adopting the norm of respecting shareholder intent concerning takeover outcomes means that even when shareholders are interested only in the purchase price, their decision will ultimately be consistent with the corporate value standard.

The same discussion is valid if we consider the synergies accrued by the acquirer. As the standard that should be adopted is the maximization of social wealth, the sum of the synergies generated for both the target company and the acquirer should be considered. Thus, the acquisition with the best synergistic effect would be preferred. But even so, the simplest model is one in which the acquirer with the best synergies is likely to pay the highest acquisition price. This is because the acquirer can enjoy the synergies generated in the target company after the acquisition, and the synergies of both the target and acquirer can be the source of the acquisition price payment. Therefore, even when maximizing synergies is considered, the essence of the argument is not affected.

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77 METI, Fair M&A Guidelines, *supra* note 24, 41 (“an acquisition proposal that will more substantially increase the corporate value of the target company will normally result in greater benefit (acquisition consideration) to general shareholders”).

78 For partial tender offers, target shareholders consider both tender profits and the post-acquisition value of remaining shares. If the latter forms a larger portion of their total gain, shareholders will focus more on the company’s future value than the purchase price. Unlike all-or-nothing acquisitions, this encourages decisions based on corporate value standards. Conversely, if most value comes from tendered shares, the situation more closely resembles an all-or-nothing acquisition.

b) *When the best acquisition price offer does not coincide with maximizing corporate value*

However, the relationship in which the maximum acquisition price maximizes corporate value (or the sum of synergies) does not always hold. In an all-or-nothing acquisition, target company shareholders are not particularly interested in whether corporate value will be damaged after the acquisition; their interest is in the more advantageous of either the purchase price paid for a successful acquisition or the value of shares after a failed acquisition.

Consider the following example. Suppose there are two cash takeover offers with all-or-nothing terms: one promising higher corporate value but at a lower takeover price (hereinafter: Takeover Offer A) and one at a higher takeover price but damaging to corporate value (hereinafter: Takeover Offer B). If we ask shareholders what they want, Takeover Offer B, at the higher takeover price, is highly likely to prevail while under corporate value standards, Takeover Offer A should prevail. Thus, corporate value standards and shareholder intent principles are not always consistent.

This may occur in at least three kinds of situations: First, offeror B could be overconfident, believing that it can increase corporate value by 150 when it can only increase it by 50 and reflect 150 in the acquisition price. In this case, offeror A would pay only up to 100, and B's acquisition price would be higher.<sup>79</sup>

Second, suppose that A and B are competitors; if A acquires the target company, B will be significantly disadvantaged in the market in which they compete (e.g., a disadvantage of minus 200). In this case, even if B acquires the target at an excessively high price (e.g., resulting in a loss of 150), this loss will be smaller than the disadvantage it would incur in the product market. Subsequently, B would propose a higher acquisition price than A.<sup>80</sup>

Third, the acquisition might harm stakeholder interests (e.g., those of employees) and increase shareholder value.<sup>81</sup>

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79 For a general discussion of how auctions can be won at too high a price based on too high a valuation, see R. Thaler, *Anomalies: The Winner's Curse*, *Journal of Economic Perspectives* 2 (1988) 191, 192.

80 R. T. MILLER, *Inefficient Results in The Market for Corporate Control: Highest-Value Users and Socially Optimal Owners*, *Journal of Corporation Law* 39 (2013) 101, 122–129.

81 See, e.g., A. SHLEIFER/L. SUMMERS, *Breach of Trust in Hostile Takeovers*, in: Auerbach (ed.), *Corporate Takeovers. Causes and Consequences* (1988) 33; C. PETRUCCI/G. SUBRAMANIAN, *Stakeholder Amnesia in M&A Deals*, *Journal of Corporation Law* 50 (2024) 87; METI, *Fair M&A Guidelines*, *supra* note 24, 41.

It is difficult to objectively observe how many acquisitions actually occur at high prices but without maximizing corporate value. Thus, we can only say that sometimes the highest-priced acquisition maximizes corporate value, but sometimes it does not.

4. *Should the defensive measure be legal without shareholders' express approval if the best acquisition price offer does not coincide with maximizing corporate value?*

If the highest-priced acquisition proposal does not necessarily maximize corporate value, the framework for respecting shareholder intent could result in acquisitions that are undesirable according to corporate value standards. Conversely, acquisitions that should be realized may be defeated if shareholders support a higher-priced offer that does not maximize corporate value. What should be considered when corporate value standards conflict with shareholder intent?

If the board of directors believes that a takeover proposal would reduce corporate value, it is permitted to reject such a proposal, express opposition, or call on shareholders not to accept it. 金融商品取引法 (*Kin'yū shōhin torihiki-hō*, Financial Instruments and Exchange Act, hereinafter: the JFIEA)<sup>82</sup> naturally contemplates expressing dissent in the target company's opinion report.<sup>83</sup>

The question is whether poison pills can be triggered without shareholder approval solely at the board's discretion. Case law, not to mention the Takeover Guidelines, does not permit this. Defensive measures based solely on the judgment of the board are permitted only in exceptional cases.<sup>84</sup> Outside such exceptional circumstances, triggering countermeasures based solely on the board's judgment is not permitted.<sup>85</sup>

In brief, inefficiencies in shareholder intent can sometimes result in takeovers that damage corporate value.<sup>86</sup> However, allowing countermeasures to be triggered at the board's sole discretion can result in greater inefficiencies. In this case, a second-best solution can be achieved by combining the corporate value standard with the principle of shareholder intent.

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82 Law No. 25/1948.

83 Art. 27-10, JFIEA.

84 See *supra* Part II.2.

85 FUJITA, *supra* note 25, 17.

86 Given this, legal and market systems should prevent such inefficiencies. For instance, antitrust law could regulate businesses willing to pay high prices in the market for corporate control, avoiding product market disadvantages. Additionally, designing legal apparatuses, such as labor law, to prevent easy profit transfers from stakeholders to shareholders would be preferable.

Logically, this compound principle—that a target company’s board should base its decision for or against a takeover on corporate value but also cannot prevent shareholders from accepting a takeover—can be supported by the following balance of interests: First, the desirability of the takeover depends on corporate value standards. If the offer price is the criterion, higher-priced acquisition offers are treated as more desirable, but higher prices are also detrimental to acquirers to the extent that they benefit the target’s shareholders and do not increase society’s net welfare. Therefore, corporate value standards should be favored.<sup>87</sup> Second, giving the board of directors the power to decide whether to accept takeover offers risks abuse, with directors citing corporate value as a pretext for rejecting takeover bids out of self-interest. Thus the combined principle should be supported because it serves as a safety valve against abuses of power by directors by allowing shareholders to retain their final decision-making rights on takeover acceptance.<sup>88</sup> Moreover, if countermeasures based solely on the judgment of the board of directors were widely allowed, the incentive for potential acquirers to make takeover bids will be eliminated.

### III. PARTIAL TENDER OFFERS AND CORPORATE VALUE

#### 1. *Prevalence and Characteristics of Partial Offers in Japan*

Japan’s approach to partial tender offers also represents a significant difference to M&A practices in the United States and the United Kingdom, where partial offers are rare.<sup>89</sup> In Japan, takeovers of listed companies through partial tender offers are common. Of 1012 tender offers between 2008 and 2024, 153 were partial offers in which acquirers held less than one-third of the shares before the tender offers and tried to cross the one-third threshold via partial tender offers.<sup>90</sup> Partial tender offers are often used for various strategic

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87 W. TANAKA, 総論—M&A 法制の検討課題 [General Remarks. M&A Legislation Issues], 旬刊商事法務 Junkan Shōji Hōmu 2367 (2024) 4, 6.

88 TANAKA, *supra* note 87, 6–7.

89 K. INOUE [井上光太郎]/ N. IKEDA [池田直史], 株式非公開化取引における株主保護制度の効果に関する国際比較研究 [A cross-country analysis of shareholder protection in the going private transactions], JSDA キャピタルマーケットフォーラム論文集 JSDA Kyapitaru Māketto Fōramu Ronbunshū 1 (2017) 1 (report that the portion of partial bids for tender offers whose deal size is more than 10 million US-Dollar is less than 4% in the United States and less than 1% in the United Kingdom, but was 16% in Japan between 2010 and 2014).

The UK or European rules prohibit partial takeovers in principle if the acquirer wants to attain control. See Rule 36.1, Takeover Code (UK); Sec. 29, Securities Acquisition and Takeover Act (Germany).

90 Data source is SPEEDA by Userbase Corporation.

purposes, including maintaining a target company's listing after acquisition. A notable example is the tender offer by ITOCHU Corporation for Descente Ltd., considered the first hostile takeover bid between major Japanese companies, which was structured as a partial takeover bid.<sup>91</sup>

In a partial offer, target company shareholders must consider both the consideration received for shares tendered and accepted in the offer as well as the value of shares remaining in their possession if the offer settles on a pro-rata basis. The value of the latter component is determined by corporate value under the acquirer's control. The greater the latter value as a percentage of the total value received, the more shareholders will focus on post-acquisition corporate value rather than on offer price. Consequently, unlike in all-or-nothing acquisitions, shareholder decisions regarding partial offers are more likely to align with corporate value standards. As discussed in Part II, this reduces the potential conflict between corporate value standards and the principle of shareholder intent. Conversely, if most of the value that shareholders receive is derived from shares sold through the tender offer, the situation more closely resembles an all-or-nothing acquisition.

Japanese tender offer regulations permit partial offers under certain conditions while prohibiting them in others. Partial offers are permitted when the tender offeror's post-offer shareholding ratio is less than two-thirds. However, partial offers are prohibited when the shareholding ratio exceeds two-thirds of total shares.<sup>92</sup> For instance, a partial tender offer in which the maximum number of shares to be purchased equals 70% of total outstanding shares is prohibited; the maximum limit is less than two-thirds of the target company's total shares. This represents a partial prohibition of partial purchases.

Is it rational for Japanese law to allow partial offers? In a partial tender offer, if a premium is attached to the tender offer price, then the market share-price after the tender offer is typically lower than the tender offer price, making the partial tender offer coercive.<sup>93</sup> For target company shareholders, there is also uncertainty, at the time of tendering, as to whether a pro-rata settlement will be made or whether all tendered shares will be

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91 For more information on this case, see W. TANAKA, 従業員と会社法についての一試論—伊藤忠のデサントに対する公開買付け成立に寄せて [An Essay on Employees and Corporate Law – In Response to the Passage of Itochu's Tender Offer for Descente], NBL 1146 (2019) 4.

92 Art. 27-13, para. 4 JFIEA; Art. 14-2-2 金融商品取引法施行規則 *Kin'yū shōhin torihikihō shikō kisoku* [Order for Enforcement of the Financial Instruments and Exchange Act], Cabinet Order No. 321/1965.

93 M. BREMER/K. INOUE/H. K. KATO, Empirical Evidence of Coercive Tender Offers in Japan, Japan and the World Economy 41 (2017) 71, 74.

purchased.<sup>94</sup> While hostile takeovers can be countered by shareholder-approved poison pills, such countermeasures are virtually non-existent in friendly takeovers. That partial tender offers are still allowed raises concerns about the underlying rationale.<sup>95</sup>

To evaluate this regulatory approach, we must consider whether partial tender offers should be permitted. This part examines the theoretical foundations, advantages, and disadvantages of partial offers and analyzes their impact on the target company's corporate value when control is acquired through such means.

Section 2 provides an overview of amendments to the tender offer regulations. Section 3 provides an overview of the current rules on partial offers, highlighting that while certain jurisdictions such as the United Kingdom generally prohibit partial tender offers, they remain common in Japan. Section 4 summarizes the advantages and disadvantages of partial tender offers. Whether a partial tender offer disadvantages the target company's shareholders remains unclear; therefore, Section 5 presents an empirical analysis assessing the benefits and detriments of partial tender offers as a first step toward determining whether the Japanese regulations require reform.

## 2. Overview of Japanese Takeover Bid Regulations

### a) 1971 Amendment

Japan's takeover bid regulations are not in the Companies Act but rather in the JFIEA. Enacted in 1948 under the direction of the General Headquarters of the Allied Powers (GHQ), the JFIEA's disclosure rules were modeled after the US Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>96</sup>

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94 S. HANNES/O. YADLIN, *The SEC Regulation of Takeovers: Some Doubts from a Game Theory Perspective and a Proposal for Reform*, *Yale Journal on Regulation* 25 (2008) 35.

95 In 2024, JFIEA amendments revised tender offer regulations. Market trading now falls under regulation when a 30% ownership threshold is exceeded or when shareholders already holding 30% or more increase their stake. Acquirers can exceed 30% or increase existing stakes above 30% only through tender offers (Art. 27-2, par. JFIEA); however, these can still be partial offers without mandatory conditions or UK-style requirements for approval by a majority of non-acquirer shareholders (cf. Rule 36.5, UK Takeover Code). A Financial Services Agency working group (chaired by University of Tōkyō professor emeritus Hideki Kanda) discussed adopting European-style regulations prohibiting partial takeovers in principle, but this was not proposed to the Diet. See FINANCIAL SERVICES AGENCY, *Report by the Working Group on the Tender Offer Rule and Large Shareholding Reporting Rule of the Financial System Council (2024)*, [https://www.fsa.go.jp/en/refer/councils/singie\\_kinyu/20240130.html](https://www.fsa.go.jp/en/refer/councils/singie_kinyu/20240130.html) [<https://perma.cc/EK2N-R7KT>].

The 1971 amendment introduced Japanese law to tender offer regulations inspired by US and European frameworks. These rules, part of broader disclosure regulations, focused on proper disclosure and fair investor treatment. They also addressed transaction conditions, including mandatory pro-rata settlement for partial tender offers.<sup>97</sup>

The regulations established the following framework for partial tender offers. First, a tender offeror could specify the maximum number of shares to be acquired; when the tendered shares exceeded this limit, the acquirer was not required to purchase the excess shares, but rather the transaction was settled on a pro-rata basis. This pro-rata requirement addresses several concerns with first-come, first-served approaches: (1) preventing hasty and unconsidered tendering that would undermine the 20-day minimum purchase period regulation; (2) eliminating the risk of arbitrary selection of tendering shareholders; and (3) maintaining fairness among tendering shareholders.<sup>98</sup> Tender offerors violating the pro-rata rule faced liability for damages to shareholders whose tendered shares were not purchased.<sup>99</sup> The amount of damages equaled the number of shares that should have been purchased on a pro-rata basis minus those purchased, multiplied by the difference between the tender offer price and the market price at the time of the claim for damages.<sup>100</sup>

#### *b) 1990 Amendment*

Between 1971 and 1990, only three tender offers occurred before the 1990 amendment significantly revised takeover bid regulations. This revision stemmed from the Japan–US Structural Consultations, by which Japan aimed to boost foreign direct investment. A bill to review the tender offer system was part of Japan’s measures. The prior notification rule, requiring offerors to file tender offer documents before soliciting investors, was thought to restrict foreign capital, and its abolition in the 1990 amendment addressed this concern. Additionally, the tender offer rule was fundamentally revised to thoroughly protect shareholders, notably introducing the so-called “one-third rule.”<sup>101</sup>

96 H. KANSAKU et al., *Japanese Financial Instruments and Exchange Act* (2018) 82.

97 H. IIDA [飯田秀総], *金融商品取引法 [Financial Instruments and Exchange Act]* (2016) 214–215.

98 T. MATSUKAWA [松川隆志], *有価証券の公開買付けの届出制度 [Notification System for Tender Offers for Securities]*, *旬刊商事法務研究 Junkan Shōji Hōmu Kenkyū* 556 (1971) 2, 8.

99 Art. 27-18 para. 1 JFIEA.

100 Art. 27-18 para. 2 item 2 JFIEA.

101 J. NAITO [内藤純一], *新しい株式公開買付制度 (上) [New Takeover Bid System (1)]*, *旬刊商事法務 Junkan Shōji Hōmu* 1219 (1990) 2.

The one-third rule mandates the placement of a tender offer for share purchases outside the stock exchange from ten or fewer persons if the owner's post-purchase position was to exceed one-third.<sup>102</sup> This was a new exception; previously, tender offers were only required for acquiring over 5% of shares by soliciting many people—not for purchases from a considerably small number of persons.

The one-third threshold was established because owning over one-third of a company's shares allows the owner to block special resolutions and exercise de facto corporate control.<sup>103</sup>

Purchasing such controlling blocks is considered to significantly affect other shareholders by changing control of the target company.<sup>104</sup> The one-third rule requires acquirers to launch a tender offer, disclosing information in advance such as the offer period, quantity of shares, and purchase price. This compels bidders to ensure that all shareholders have an equal opportunity to sell their holdings.

The 1990 amendment was developed with reference to the UK rules.<sup>105</sup> Although the Japanese one-third rule looks similar to the mandatory takeover bid systems of the UK and the European Takeover Bids Directive (Directive 2004/25/EC), two important differences make Japan's approach unique. First, while the European directive implements ex post regulations (Art. 5 of the Takeover Bids Directive),<sup>106</sup> Japan employs ex ante regulations. In Japan, the acquirer is prohibited from acquiring a controlling stake (e.g., 40% of shares) in an off-market transaction with an existing major shareholder unless through a tender offer. Acquirers must initiate a tender offer if they want to buy shares held by such a major shareholder. Under the European Directive, if an acquirer obtains control (e.g., 40% of shares), it is required to initiate a tender offer for the remaining shares (e.g., 60%). Thus, one difference between the two regimes is the point at which a tender offer becomes mandatory.

Second, partial tender offers are permitted in Japan, whereas in the United Kingdom, partial takeovers are prohibited, in principle, for voluntary takeo-

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102 Art. 27-2 para. 1, item 2 JFIEA; Art. 6-2 para. 3 Order for Enforcement of the Financial Instruments and Exchange Act.

103 NAITO, *supra* note 101, 5.

104 NAITO, *supra* note 101, 5.

105 NAITO, *supra* note 101, 5.

106 Despite the United Kingdom's primarily ex post regulatory system, some ex ante rules exist. While acquiring 30% or more of voting rights outside a takeover bid is generally prohibited (Rule 5.1 Takeover Code), exceptions exist for certain related transactions (Rule 5.2 Takeover Code), which then require a mandatory takeover bid (Rule 9 Takeover Code). However, purchasing from multiple persons to exceed a 30% stake still requires a tender offer, similar to Japan's approach. Thus, certain ex post elements function as ex ante regulation.

vers (Rule 36 of the Takeover Code). Also, under the European directive (Art. 5 para. 1) and in the UK (Rule 9.1 of the Takeover Code), the mandatory bid rule requires that a takeover bid be made for all remaining shares when control changes hands. The rationale for the mandatory bid rule is to protect minority shareholders by offering an exit opportunity in the event of a change in control.<sup>107</sup> Partial takeover bids are generally not allowed, because permitting them would result in insufficient exit rights for minority shareholders.

*c) 2006 Amendment*

The 2006 amendment introduced a partial prohibition of partial offers; that is, if the shareholding ratio after the tender offer reaches two-thirds or more, all tendered shares must be purchased.<sup>108</sup>

This amendment aimed to ensure fairness among investors and to protect minority shareholders. If the ownership ratio of shares after purchase is two-thirds or more, there is a risk that the numbers of shareholders and shares in circulation will fall below the thresholds of the listing standard, potentially resulting in delisting by a stock exchange. Even if a company is not delisted, the liquidity of its shares may decline significantly. If partial tender offers are allowed in such scenarios, tendering shareholders may not sell all tendered shares. Therefore, all tendered shares must be purchased.<sup>109</sup>

Academics have criticized this regulatory approach as inadequate because it is under-inclusive. While the obligation to purchase all tendered shares when the two-thirds threshold is exceeded aims to protect minority shareholders, this protection extends only to shareholders who tender their shares. Minority shareholders who do not tender receive no protection.<sup>110</sup>

*d) 2024 Amendment*

The 2024 amendment implemented several changes regarding the one-third rule.

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107 P. L. DAVIES, The Notion of Equality of Treatment in European Takeover Regulation, in: Payne (ed.), *Takeovers in English and German Law* (2002) 9, 23; D. A. DEMOTT, Current Issues in Tender Offer Regulation: Lessons from the British, *New York University Law Review* 58 (1983) 945, 992–994; J. PAYNE, Introduction, in: Payne (ed.), *Takeovers in English and German Law* (2002) 1, 2.

108 Art. 27-13 para. 4 JFIEA, and Art. 14-2-2 Order for Enforcement of the Financial Instruments and Exchange Act.

109 S. OHKITA [大来志郎], 公開買付制度・大量保有報告制度 [Tender Offer System and Large Shareholding Reporting System], 旬刊商事法務 *Junkan Shōji Hōmu* 1774 (2006) 38, 39.

110 E. KURONUMA [黒沼悦郎], 金融商品取引法 [Financial Instruments and Exchange Act] (2<sup>nd</sup> ed., 2020) 296.

First, the scope of application of the one-third rule was expanded. The 2024 amendment made purchases in market transactions on a stock exchange subject to the tender offer rule. The rationale for this change is as follows. The one-third rule focuses on the significant impact of securities transactions that materially affect control of the company, which affect not only shareholders solicited for such transactions but also non-solicited shareholders; the rule aims to protect the latter. To ensure that all shareholders have an opportunity to make appropriate investment decisions, it is important to (1) disclose, in advance, information on the purpose, volume, and price of such transactions; (2) ensure a deliberation period for investors; and (3) ensure that shareholders receive equal treatment. However, market transactions do not possess these characteristics.<sup>111</sup> Even after the 2024 amendment, a tender offer can still be a partial offer with a maximum of less than two-thirds. This demonstrates that Japanese law does not attempt to guarantee complete exit opportunities for minority shareholders but instead focuses on ensuring prior disclosure, providing deliberation periods, and maintaining uniformity in purchase prices.

Second, the threshold was reduced from one-third to 30%. This change aligns with many foreign tender offer systems that also set a mandatory tender offer threshold of 30%. In addition, considering the typical percentage of voting rights exercised in Japanese listed companies, a 30% voting right can prevent special resolutions from passing at general shareholders' meetings in many listed companies and can significantly impact ordinary resolutions at these meetings.<sup>112</sup>

### 3. Discussion of Partial Tender Offers

The Japanese tender offer rule represents a distinct third path. The United States follows the so-called “market rule”, where an acquirer can purchase a controlling block of shares (such as represent 50% voting rights) from the existing controlling shareholder without launching a tender offer. Under Japanese rules, an acquirer must launch a tender offer even in such cases, which distinguishes the Japanese approach from that of the United States. Furthermore, under the European mandatory-bid rule, an acquirer may first obtain a controlling block and then launch a mandatory bid for the remaining shares. These mandatory bids must not be partial offers. However, Japanese rules allow partial offers even when an acquirer is mandated to

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111 A. NOZAKI et al., 公開買付制度に係る金融商品取引法等の改正 [Amendments to the Financial Instruments and Exchange Act, etc., Relating to Tender Offer Systems], 旬刊商事法務 *Junkan shōji hōmu* 2363 (2024) 11, 12.

112 A. NOZAKI et al., *supra* note 111, 12.

launch a tender offer that crosses the threshold of 30%.<sup>113</sup> In this respect, Japanese rules differ from European regulations. The Japanese amendments of 1990, 2006, and 2024 paid considerable attention to the European rules but did not adopt them entirely. Although the Japanese legislation was based on comparative legal analysis, the resulting regulations are unique to Japan and different from the US, UK, and EU rules.

When focusing on the differences in tender offer rules between the UK, the EU, and Japan, the core issue is whether partial offers should be prohibited and exit rights granted to minority shareholders when control changes. One may argue that if minority shareholder protection under corporate law is insufficient, then upon a change in control it is rational to grant exit rights to minority shareholders through a mandatory bid rule. Controlling shareholders may derive unreasonable private benefits from companies at the expense of the minority shareholders. However, it remains unclear whether minority shareholder interests have been severely impaired in Japan due to changes in control of companies. Partial tender offers have both advantages and disadvantages. Therefore, the next several sections provide a brief overview of both perspectives.

#### 4. *The Advantages*

##### a) *Cost of Finance*

Partial tender offers have the advantage of reducing acquirers' financing costs.<sup>114</sup> Under a legal system prohibiting partial offers, potential acquirers who cannot raise sufficient funds to acquire all the target company's shares may abandon takeover attempts. However, under a legal system that permits partial offers, such entities would have the opportunity to acquire controlling interests in the target company. Thus, a system permitting partial tender offers considerably reduces the risk that an acquirer's financial constraints will prevent a favorable takeover, thereby stimulating the market for control rights.

In response to this argument, one might question whether the acquirer's financing constraints should be taken for granted. A possible answer is that, as a practical matter, banks and other financial institutions may indeed be reluctant to finance acquisitions, especially during economic downturns,

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113 It is well known that both rules have their advantages and disadvantages. See L. A. BEBCHUK, *Efficient and Inefficient Sales of Corporate Control*, *Quarterly Journal of Economics* 109 (1994) 957.

114 MORI HAMADA MATSUMOTO HÖRITSU JIMUSHO [森・濱田松本法律事務所], *M&A 法大系* [Comprehensive Analysis of M&A Laws of Japan] (2<sup>nd</sup> ed., 2022) 55 (partial acquisitions are often preferred because buyers can gain control without purchasing all shares, making it a cost-effective option for those with limited capital).

and significant constraints may also follow from factors such as inefficient financing due to information asymmetry.<sup>115</sup>

It can also be argued that financially constrained acquirers can use their own shares as consideration (exchange tender offers).<sup>116</sup> However, in Japan, there have been few exchange tender offers; mostly, tender offers have all been for cash. This is because exchange tender offers are difficult to execute because of overly rigid rules that make exchange tender offers impractical.<sup>117</sup>

*b) Acquiring a Large Share of a Business Alliance with a Listed Target Company*

In Japan, it is common for an acquirer to wish to acquire control of a target company while simultaneously maintaining its listing status. The Tōkyō Stock Exchange's delisting criteria include standards for the ratio of shares in circulation.<sup>118</sup> Consequently, an unexpected delisting could occur due to a larger-than-anticipated number of tender acceptances if an any-and-all tender offer is made. By contrast, a partial tender offer reliably allows the target company to maintain its listing. We often observe cases in which companies acquire substantial shareholdings in business alliances and capital tie-ups while keeping target companies listed on the exchange.<sup>119</sup>

There is a discussion to be had about whether it would be possible to create a situation equivalent to a partial takeover even if partial takeovers

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115 For the fact that the financial constraints of the acquirer are also a factor to be taken into account when considering how takeover bids should be regulated, see T. FUJITA [藤田友敬], 支配株式の取得と強制公開買付-強制公開買付制度の機能 [Acquisition of Controlling Shares and Compulsory Takeover Bids – The Function of the Compulsory Takeover Bid System], in: Iwahara [岩原]/Yamashita [山下]/Kanda [神田] (eds.), 会社・金融・法 (下巻) [Companies, Finance, and Law (Vol. 2)] (2013) 33, 59.

116 L. A. BEBCHUK, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, *Harvard Law Review* 98 (1985) 1693, 1736 n.108.

117 NAGASHIMA ŌNO & TSUNEMATSU HŌRITSU JIMUSHO [長島・大野・常松法律事務所], 公開買付けの理論と実務 [Public Tender Offers: Theory and Practice] (3<sup>rd</sup> ed., 2016) 391 (exchange offers are rarely conducted in Japan, resulting in a lack of practical experience in this area); A. ŌISHI et al., 税務・法務を統合した M&A 戦略 [Integrated Tax and Legal M&A Strategy] (3<sup>rd</sup> ed., 2022) 28 (Exchange offers do not allow tax deferral on capital gains, forcing target shareholders to pay taxes immediately despite receiving no cash. This tax burden is the main reason exchange offers are not used for acquisitions in Japan).

118 Rule 601 para.1 item 2c Tōkyō Stock Exchange Securities Listing Regulations.

119 For example, Taisei Corporation made a partial offer to acquire shares of P.S. Mitsubishi Construction Co., Ltd. up to a 50.02% stake in order to keep the target listed on the Tōkyō Stock Exchange. See Taisei Corporation, Notice regarding Commencement of Tender Offer for Shares of P.S. Mitsubishi Construction Co., Ltd. (Code Number: 1871) and Execution of Capital and Business Alliance Agreement

were prohibited. An acquirer could initially acquire more shares than desired and then sell excess shares until it reached the desired number. A company that meets the delisting criteria regarding the percentage of tradable shares does not immediately face delisting the day after the violation; if it gets back in line with the listing standards within a one-year grace period, its listed status will be maintained.<sup>120</sup> At that point, it would be sufficient to sell an adequate number of shares on the market.

One counterargument is that, compared to scenarios in which partial tender offers are permitted, this approach would incur wasteful transaction costs in the buying and selling of unwanted shares. But costs limited to these transaction costs may not be substantial.<sup>121</sup>

### *c) Due Diligence Opportunity for a Bidder*

Even when a buyer aims to acquire all the shares, rules permitting partial tender offers can make the transaction more reasonable for the buyer.

A hostile buyer can acquire control of the target company through a partial tender offer, conduct due diligence for the acquisition, and purchase the remaining shares at a reasonable price. Conversely, when an any-and-all tender offer is mandatory, such arrangements are not possible. Thus, a uniform prohibition of partial tender offers would make hostile takeovers extremely difficult, because due diligence would not be available to a hostile bidder before it gained control of the target company.<sup>122</sup>

In friendly acquisitions, bidders can adopt a staged approach. They may initially acquire approximately 50% of the target company and operate it as a subsidiary for several years to assess whether synergies can be realized through actual management experience. Based on the results, they can then choose to either proceed with full acquisition if the synergies prove efficient or divest if the expected benefits do not materialize.

## *5. The Disadvantages*

### *a) Inefficient Takeovers Might Succeed*

One disadvantage of partial offers is that they may be exploited for inefficient acquisitions. Some argue that the risk of undesirable takeovers owing to coercion is greater in the partial purchase than in the any-and-all offer

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with the Company (2023), [https://ssl4.eir-parts.net/doc/1801/ir\\_material7/217506/00.pdf](https://ssl4.eir-parts.net/doc/1801/ir_material7/217506/00.pdf) [<https://perma.cc/7GJ6-8J2P>].

120 See Tōkyō Stock Exchange, Outline of Delisting Criteria, <https://www.jpx.co.jp/english/equities/listing/delisting/outline/01.html> [<https://perma.cc/8AZ4-Y4WR>].

121 BEBCHUK, *supra* note 116, 1737 fn. 108.

122 KURONUMA, *supra* note 110, 294.

scenario.<sup>123</sup> Additionally, if the target company's shareholding structure is diversified (that is, without controlling shareholders) and an entity attempts to acquire control through a tender offer, takeovers that reduce corporate value can succeed if partial takeovers are permitted. However, if partial purchases are prohibited and any-and-all offers required, such detrimental takeovers may be deterred.<sup>124</sup>

A counterargument suggests that coercion issues can be addressed by introducing legal mechanisms—specifically, systems that separate the approval or disapproval of the acquisition itself from the declaration of intent to tender—without prohibiting partial takeover bids.<sup>125</sup> With such legal mechanisms in place, partial offers that reduce corporate value may not be approved.

*b) May harm minority shareholders*

If partial tender offers are permitted, there is a risk that acquirers who become controlling shareholders in the target companies may pursue private interests at the expense of minority shareholders. This occurs because controlling shareholders are not interested in maximizing the common interests of all shareholders, but rather in maximizing the sum of private benefits enjoyed exclusively by controlling shareholders as well as the value of their shareholdings. Theoretically, the objectives of controlling shareholders differ from those of the rest of the shareholders.<sup>126</sup>

However, the threat to minority shareholders cannot be resolved by prohibiting partial purchases. Even after a full tender offer, the conflict of interest between the controlling and minority shareholders persists unless a cash-out or similar transaction occurs; in other words, the risk that controlling shareholders harm minority shareholders is not exclusive to partial purchases. Therefore, arguing for the prohibition of partial acquisitions based solely on this risk is inadequate from the perspective of minority shareholder protection. For comprehensive protection of minority shareholders, a system could be introduced that allows them to exit the company by requesting that the controlling shareholders or the company purchase their shares in the event of a change in control, regardless of the acquisition method.

As outlined above, the pros and cons of partial offers are at least partly convincing but are not decisive in theory. Therefore, this article's next section reports on an empirical study to assess whether partial tender offers disad-

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123 TANAKA, *supra* note 75, 387–391.

124 FUJITA, *supra* note 115, 55–58.

125 BEBCHUK, *supra* note 116, 1762.

126 See R. J. GILSON / J. N. GORDON, Controlling Controlling Shareholders, *University of Pennsylvania Law Review* 152 (2003) 785.

vantage minority shareholders in Japan. If the evidence indicates that partial tender offers tend to disadvantage minority shareholders, one could argue that Japanese law should also introduce exit rights. Otherwise, Japanese law does not need to follow the EU approach but may take a third path.

## 6. Empirical Analysis

### a) The Data

Data were obtained from SPEEDA by the Userbase Corporation. Of the 1,015 tender offers from January 1, 2008, to December 31, 2024, 239 were partial tender offers, of which 229 transactions were completed. After excluding 11 cases in which the target was a non-listed company and one in which the target's stock price information was unavailable, 196 cases remained for analysis.

Table 1: Partial Tender Offers Premium

Variable	Obs	Mean	Std. Dev.	Min	Max
A. All Samples					
Premium to 1 day before	196	0,1787	0,3251	-0,9030	1,8064
Premium to 1 month before	196	0,1874	0,3300	-0,9111	1,8562
Premium to 3 months before	196	0,1943	0,3335	-0,9124	1,8385
Premium to 6 months before	196	0,1850	0,3479	-0,9127	1,9487
B. Pro-rata settled cases					
Premium to 1 day before	125	0,2472	0,2515	-0,3129	1,1875
Premium to 1 month before	125	0,2593	0,2500	-0,1647	1,1807
Premium to 3 months before	125	0,2599	0,2551	-0,1582	1,1352
Premium to 6 months before	125	0,2439	0,2487	-0,2271	1,1629

Table 1 lists the premiums associated with the partial tender offers. The average premium over the average market price one month before the announcement was 18.74%. Cases in which pro-rata settlements occurred were significant in this study. Partial purchases that are not settled pro-rata may have yielded the same results if purchased in any-and-all tender offers. Panel B of Table 1 reports that in partial purchases settled pro-rata, the average premium over share price one month before the announcement was 25.93%.

The target companies' long-term stock price performance was notably positive, as shown in Table 2. This table summarizes the monthly and market-adjusted returns for the month following the end of the tender offer peri-

od 12 (return 1Y), 24 (return 2Y), and 36 months later (return 3Y). Panel A of Table 2 summarizes all the samples. Examining the 118 cases for which stock price data are available, the average one-, two-, and three-year returns are 11.2%, 26.2%, and 55.7%, respectively, all of which are statistically significantly positive at the 1% level. The market-adjusted returns are 5.6%, 12%, and 29.9% after one, two, and three years, respectively, with only the 3-year return being statistically significantly positive at the 5% level.

*Table 2: Market-Adjusted Returns of Target Companies after Partial Tender Offers*

Variable	Obs	Mean	Std. Dev.	Min	Max
A. All Samples					
Return 1Y	118	0,112***	0,444	-0,948	1,842
Return 2Y	118	0,262***	0,787	-0,978	5,319
Return 3Y	118	0,557***	1,631	-0,995	13,602
Market Adjusted Return 1Y	118	0,056	0,372	-0,710	1,337
Market Adjusted Return 2Y	118	0,120*	0,732	-1,106	4,634
Market Adjusted Return 3Y	118	0,299**	1,615	-1,853	13,428
B. Pro-rata Settled cases					
Return 1Y	72	0,057	0,356	-0,948	1,155
Return 2Y	72	0,189***	0,602	-0,978	1,994
Return 3Y	72	0,597***	1,870	-0,995	13,602
Market Adjusted Return 1Y	72	0,034	0,307	-0,679	0,991
Market Adjusted Return 2Y	72	0,096	0,576	-0,768	2,041
Market Adjusted Return 3Y	72	0,403*	1,866	-0,802	13,428

\*\*\*, \*\* and \* indicate statistical significance at 1%, 5% and 10% level, respectively.

Panel B of Table 2 summarizes the 72 cases in which pro-rata settlements occurred. The returns for this subsample averaged 5.7% after one year, 18.9% after two years, and 59.7% after three years, and were statistically significantly positive at the 5% level after two and three years. The market-adjusted returns are 3.4%, 9.6 %, and 40.3% after one, two, and three years, respectively, none of which is statistically significant.

*Table 3: Firm Performance for Target Firms*

Variable	Obs	Mean	Median	Std. Dev	Min	Max
<b>A. All Samples</b>						
ROE <sub>t</sub>	80	0,029	0,052	0,396	-1,994	1,733
ROE <sub>t+1</sub>	80	0,050	0,069	0,255	-1,164	0,805
ROE <sub>t+2</sub>	80	0,017	0,071	0,275	-1,551	0,625
ROE <sub>t+3</sub>	80	0,085	0,079	0,221	-0,825	1,111
ROA <sub>t</sub>	80	0,013	0,023	0,156	-0,778	0,728
ROA <sub>t+1</sub>	80	0,023	0,028	0,115	-0,649	0,433
ROA <sub>t+2</sub>	80	0,013	0,025	0,118	-0,640	0,323
ROA <sub>t+3</sub>	80	0,042	0,038	0,105	-0,569	0,444
<b>B. Pro-rata Settled Cases</b>						
ROE <sub>t</sub>	50	0,063	0,060	0,325	-0,931	1,733
ROE <sub>t+1</sub>	50	0,041	0,069	0,209	-0,809	0,688
ROE <sub>t+2</sub>	50	0,045	0,074	0,218	-0,817	0,625
ROE <sub>t+3</sub>	50	0,080	0,078	0,170	-0,662	0,601
ROA <sub>t</sub>	50	0,015	0,025	0,128	-0,778	0,226
ROA <sub>t+1</sub>	50	0,016	0,025	0,111	-0,649	0,281
ROA <sub>t+2</sub>	50	0,016	0,025	0,114	-0,640	0,273
ROA <sub>t+3</sub>	50	0,028	0,035	0,099	-0,569	0,279

*This Table shows how target firms performed using ROE and ROA from the year the tender offer launched ( $t = 0$ ) and up to three years out ( $t = 3$ ).*

Table 3 reflects target firm performance using ROE and ROA from the year the tender offer was launched ( $t = 0$ ) and up to three years after ( $t = 3$ ). The ROE and ROA data were obtained from SPEEDA. Panel A of Table 3 reports a sample of 80 cases in which ROE and ROA data for this period are available in the database. The ROE and ROA improved after the partial tender offer. The mean (median) of ROE at  $t=0$  and  $t=3$  are 2.9% (5.2%) and 8.5% (7.9%), respectively. Also, the mean (median) of ROA at  $t=0$  and  $t=3$  are 1.3% (2.3%) and 4.2% (3.8%), respectively.

Panel B of Table 3 focuses on the 50 cases with pro-rata settlements. The mean (median) of ROE at  $t=0$  and  $t=3$  are 6.3% (6.0%) and 8.0% (7.8%),

respectively. Also, the mean (median) of ROA at  $t=0$  and  $t=3$  are 1.5% (2.5%) and 2.8% (3.5%), respectively. Both panels demonstrate that ROE and ROA tend to improve in the three years following the tender offer.

These findings suggest that there is no robust evidence for the argument that partial takeover bids have systematically damaged corporate or shareholder value, whether measured using stock prices (Table 2) or firm performance (Table 3). Thus, there is no evidence to suggest that partial offers should be prohibited in general.

#### *b) Discussion*

There are advantages and disadvantages to allowing partial offers. If corporate value commonly declines after partial takeovers, prohibiting them, in principle, would be preferable. However, as demonstrated by the data presented above, this was not the case. Instead, corporate and stock values tended to increase after partial takeover bids. Therefore, Japanese law, which generally permits partial takeovers, can be evaluated as having advantages that outweigh disadvantages.

Logically, controlling shareholders can use their position to expropriate corporate assets, potentially disadvantaging minority shareholders. One possible solution to this problem would be an ex-post remedy whereby minority shareholders can claim damages against controlling shareholders after the latter have committed illegal acts. However, even if such a system were legislated into existence, it may not function effectively. Consequently, some argue that to protect minority shareholders from changes in control, it is necessary to guarantee exit rights.<sup>127</sup>

However, there is no convincing argument for introducing exit rights. Theoretically, control changes in one of two primary ways: first, when a controlling shareholder emerges in a company that previously had a dispersed shareholding structure; and second, when controlling shares in a company with existing controlling shareholders are transferred to a new party. In either case, it is uncertain what the new controlling shareholders will do, and the risk that they might act opportunistically, and to the detriment of minority shareholders, cannot be dismissed. Nevertheless, changes in control often increase corporate value and improve the interests of minority shareholders. For example, effective shareholder monitoring is impeded by rational apathy in companies with dispersed shareholding structures; however, this problem can be mitigated in companies with controlling shareholders. In general, no clear relationship exists between share-

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<sup>127</sup> See DAVIES, *supra* note 107, 24.

holder structure and corporate profitability.<sup>128</sup> Moreover, if there was already a controlling shareholder, they may have already exploited the interests of minority shareholders, and a new controlling shareholder may be less inclined to engage in such exploitation. As long as the same Japanese corporate law applies, in terms of the potential for minority shareholder exploitation, there is no qualitative difference between the old and new controlling shareholders. Therefore, the general theory that minority shareholders are disadvantaged when the controlling shareholder changes is not universally valid.<sup>129</sup> As a controlling shareholder's presence can have both positive and negative effects, a case-by-case assessment is more appropriate than a uniform approach.

Under Japanese law, a poison pill is available to shareholders to prevent a corporate value-reducing takeover through a partial offer. This approach may be more efficient than a categorical prohibition of partial tender offers. However, in friendly partial takeovers, the target company boards are unlikely to introduce poison pills; this deprives shareholders of an opportunity to express their undistorted views on friendly takeovers that might reduce corporate value. Owing to the coercive nature of partial tender offers, many shareholders may tender their shares. Therefore, it would be worthwhile to consider introducing a rule requiring a general shareholders' meeting to confirm whether a partial takeover bid is acceptable when shareholders with significant voting rights (e.g., 10% or more) voice their opposition to such a bid.<sup>130</sup> Once such a mechanism is introduced in the future, there will be no need to prohibit partial tender offers.

#### IV. THE IMPACT OF CORPORATE VALUE STANDARDS AND THE PRINCIPLE OF SHAREHOLDER INTENT ON ACTIVISM AND SUSTAINABILITY

##### 1. *Anti-activist pills*

Although hostile takeovers and shareholder activism are distinct phenomena, activists often emerge as key actors in hostile takeovers. After acquiring 5 to 10% of a target company's stock, activists make various proposals to the current management team under the threat of replacing directors through proxy fights. These proposals typically require improvements in

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128 See Y. MIWA [三輪芳朗]/J. M. RAMSEYER [J. M. ラムザイヤー], 経済学の使い方—実証的日本経済論入門 [How to Use Economics – Introduction to Empirical Japanese Economic Theory] (2007) 187–225.

129 L. ENRIQUES, The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization as Rent-Seeking?, in: Ferrarini/Hopt/Winter/Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (2004) 767, 785.

130 See FINANCIAL SERVICES AGENCY, *supra* note 95, 7, fn. 4.

capital policies, such as the sale of unnecessary non-business assets and the return of excessive cash reserves to shareholders. Activists frequently seek to improve business operations by selling non-core businesses, reducing fixed costs, enhancing governance by appointing independent directors, and securing board positions for their nominees.<sup>131</sup> This raises the question: Will anti-activist pills similar to those used in the United States be employed in Japan?<sup>132</sup>

We did not identify any cases in which Japanese companies introduced takeover-defensive measures with reduced trigger thresholds of 5% or 10%. While the precise reasons for this absence cannot be determined, it is worth noting that, since acquiring control is impossible at the 10% ownership level, an activist cannot damage corporate value merely by acquiring 10% of a company's shares. Therefore, based on established case law, it would not be easy to justify triggering such defensive measures. If activists make various proposals while only acquiring a 5 to 10% stake, they must submit shareholder proposals at general shareholders' meetings and secure approval from other shareholders to implement their proposals. Consequently, an activist's acquisition of a 10% stake does not confer control over the company, and the target company cannot demonstrate corporate value impairment simply because the activist has submitted various shareholder proposals. Even without specific defensive measures, the merits of an activist's proposals are decided at general shareholders' meetings, thereby upholding the principle of shareholder intent.

Conversely, provisions equivalent to the "acting in concert" clauses found in anti-activist pills in the United States were employed in the *Mitsuboshi* case.<sup>133</sup> The countermeasures in that case included a clause setting the trigger threshold at approximately 20% but also encompassed the following as activities subject to the pill: any actions by the target shareholder in conjunction with other shareholders of the target company; and any actions establishing relationships in which parties act in concert or cooperate. The target company's board of directors retained reasonable

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131 A. HOSHI [星明男], 買収防衛策のアクティビスト対抗策への変容とその司法審査 [Takeover Defense Measures's Transformation into Anti-Activist Countermeasures and Their Judicial Review], in: Matsui [松井] et al. (eds.), 商法学の再構築—岩原紳作先生・山下友信先生・神田秀樹先生古稀記念 [Reconstruction of Commercial Law Studies: A Commemoration of the 70<sup>th</sup> Birthday of Professor Shinsaku Iwahara, Professor Tomonobu Yamashita, and Professor Hideki Kanda] (2023) 257, 259–260.

132 On the American situation, see C. PETRUCCI/G. SUBRAMANIAN, Pills in a World of Activism and ESG, *University of Chicago Business Law Review* 1 (2022) 417; J. N. GORDON, The Rejected Threat of Corporate Vote Suppression: The Rise and Fall of the Anti-Activist Pill, *Columbia Business Law Review* 2022, 206.

133 See *supra* Part II.2.g).

discretion to determine whether such actions had occurred. In the *Mitsuboshi* case, the court highlighted concerns that the formulation of a concerted action clause granted excessive discretion to the board of directors, potentially enabling arbitrary implementation. General shareholders may refrain from responding to proxy solicitations against such a pill if they fear becoming targets themselves, regardless of their actual intentions.<sup>134</sup> Thus, the case law principle prohibiting methods that distort shareholders' genuine intentions regarding the merits of a poison pill (or the desirability of a particular activist buyout) is reasonable considering the principle of shareholder intent.

## 2. Sustainability Impact

Under the corporate value standard, which favors M&A transactions that enhance corporate value, sustainability factors, such as human capital and environmental considerations, do not directly influence the evaluation of whether an acquisition is desirable. Instead, they are evaluated on the basis of their impact on the target company's corporate value.<sup>135</sup> In other words, it is impermissible for boards of directors to introduce defensive measures to protect stakeholder interests separately from common shareholder interests.<sup>136</sup>

Shareholders remain free to make triggering decisions if they believe that their common interests are affected by employee treatment or other factors.<sup>137</sup> But on the other hand, since corporate value serves as the criterion, it would be challenging to justify shareholders making decisions based on altruistic considerations of stakeholder interests that are not reflected in corporate value.<sup>138</sup>

As described above, when management is displaced through a corporate takeover, sustainability factors are considered to the extent that they are reflected in corporate value while factors not incorporated into corporate value are disregarded. This has no direct impact on how sustainability factors influence routine management operations. However, it does indicate that the Japanese corporate law provides relatively weak incentives for directors to engage in sustainability-oriented management.

Under Japanese law, maximizing shareholder value remains fundamental to the directors' duties. Certainly, there are exceptions in which donations not directly serving shareholder interests may be recognized as lawful. According to the criteria established by the Supreme Court, when directors

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134 HOSHI, *supra* note 131, 284–286.

135 FUJITA, *supra* note 25, 17.

136 MATSUNAKA, *supra* note 68, 28.

137 MATSUNAKA, *supra* note 68, 29.

138 MATSUNAKA, *supra* note 68, 29.

make donations, the amount should be determined within a reasonable range, considering various circumstances including the company's size, financial performance, social and economic status, and the donation recipient.<sup>139</sup> The court also held that disproportionate donations beyond the appropriate scope violated a director's duties.<sup>140</sup> If they do meet these criteria, socially beneficial activities are permissible even if they potentially risk long-term shareholder interests.

However, questions may arise as to whether a framework permitting only this level of activity from individual companies constitutes an adequate response to global warming and other environmental challenges. Moreover, there are inherent limitations to what can be accomplished under the Companies Act, necessitating coordination among mandatory legal frameworks such as environmental regulations. When companies are subject to mandatory laws and regulations, directors must ensure compliance even when such compliance may not serve shareholder interests.<sup>141</sup>

Conversely, addressing sustainability factors that would not otherwise be reflected in corporate value remains at directors' discretion, provided that such management decisions remain within reasonable limits considering the company's size and other relevant factors. Sustainability factors that are not reflected in corporate value are not considered in corporate takeover scenarios. Therefore, such sustainability activities cannot appeal solely to directors' economic rationality but must also engage their ethical sensibilities. This represents the weak motivational framework provided by Japanese corporate law and takeover rules. To encourage sustainability management effectively, we must acknowledge that at least under Japanese law, motivation remains insufficient unless supplemented by mandatory legal requirements.

## V. CONCLUSION

This study clarifies five points. First, regarding takeover defenses, corporate value standards are adopted within a framework that respects shareholder intent. Second, though respecting shareholder intent may result in the highest purchase price offer, it does not necessarily maximize corporate value. Third, even if shareholders will not necessarily support corporate value-maximizing takeovers, a rule permitting boards to trigger poison pills without shareholder approval is undesirable. Fourth, Japanese law, which

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139 Supreme Court, 24 June 1970, 民集 Minshū 24, 625.

140 Supreme Court, 24 June 1970, 民集 Minshū 24, 625.

141 K. EGASHIRA [江頭憲治郎], 株式会社法 [Laws of Stock Corporations] (8<sup>th</sup> ed., 2021) 492.

permits partial tender offers, tends to leverage benefits rather than harm. This study argues against the categorical prohibition of partial tender offers. Fifth, as a derivative consideration, Japanese law is unlikely to permit anti-activist pills such as those adopted in the United States, with lower triggering thresholds of 5% to 10%. Regarding sustainability management, factors not reflected in corporate value cannot justify directors' actions under corporate takeover laws. If sustainability management is to be encouraged, mandatory laws and regulations are necessary, because the current frameworks provide insufficient motivation.

As described above, this study's central message is that Japan's corporate takeover law has developed into a coherent and deliberate "third path" that differs from both the U.S. and European models. Its value-based yet shareholder-centric framework demonstrates that a non-convergent approach can function effectively and may provide a meaningful reference point for jurisdictions searching beyond the dominant templates.

#### SUMMARY

*This paper advances a new account of Japan's takeover and shareholder-activism regime, arguing that it constitutes neither a derivative nor an incomplete version of U.S. or European models but a coherent "third path" with its own internal logic. Japan's framework combines a corporate value standard with a strong principle of deference to shareholder intent. While boards are expected to evaluate bids by reference to long-term corporate value, defensive measures initiated without shareholder approval are typically enjoined by courts; conversely, shareholder-ratified poison pills are upheld. This equilibrium constrains managerial discretion and places ultimate decision-making authority in shareholders' hands, even where shareholder preferences may diverge from managerial assessments of long-term value.*

*A distinctive feature of this system is its permissive stance toward partial tender offers in Japan. Drawing on a dataset of 196 partial bids from 2008 to 2024, the paper shows that target firms generally experience positive long-term stock performance and improvements in operating metrics such as ROE and ROA in the years following settlement. Contrary to conventional criticisms claiming that partial offers are harmful to minority shareholders, the empirical evidence suggests that such bids often enhance both corporate and shareholder value.*

*The paper concludes that Japan's value-based yet shareholder-centric framework provides a coherent and normatively defensible alternative for jurisdictions seeking models beyond the dominant Anglo-American and European templates.*