Shareholder Activism in Japan and Beyond

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Carl Heymanns Verlag 2026

ZEITSCHRIFT FÜR JAPANISCHES RECHT
JOURNAL OF JAPANESE LAW

SPECIAL ISSUE 18 (2026)

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Verlag / Publisher: Carl Heymanns Verlag – a brand of Wolters Kluwer Germany, Wolters-Kluwer-Straße 1, 50354 Hürth, phone: +49 2233 3760-7000; Internet: www.heymanns.com; Customer Service: phone: +49 2631-801-2222, e-mail: info-wkd@wolterskluwer.de

Bezugspreis: Das Sonderheft kann über den Verlag zum Preis von 79,– € zzgl. Versandkosten bezogen werden. Mitglieder der Deutsch-Japanischen Juristenvereinigung e.V. können das Sonderheft zum Vorzugspreis von 69,– € zzgl. Versandkosten beziehen.

Subscription price: The special issue can be purchased from the publishers for € 79 plus postage. Members of the German-Japanese Association of Jurists may buy the special issue for the preferential price of € 69 plus postage.

Anzeigenverkauf /Advertisement Sales: Gabriele Wieneber, Phone: +49 2233 3760-7608, e-mail: Gabriele.wieneber@wolterskluwer.com

Anzeigendisposition / Advertisement Disposition: Wolters Kluwer Germany, Advertisements, Karin Odening, Wolters-Kluwer-Str. 1, D-50354 Hürth, phone: +49 2233 3760-7760, e-mail: anzeigen@wolterskluwer.com. Price list No. 19, 1 January 2026.

Druckerei / Printed by: rewi Druckhaus, Reiner Winters GmbH, Wissen

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The open access publication of this work was supported by funding from the Max Planck Institute for Comparative and International Private Law in Hamburg.

ISBN 978-3-452-30674-6
DOI 10.71163/zjapanr.sh.18.2026
www.ZJapanR.de

Preface

The system of corporate governance has undergone significant changes across major jurisdictions over the past decade. On the European continent and in Japan, the system of stable shareholdings is now largely gone. Correspondingly, investment funds have become more active in participating in the management of listed companies. Especially in Japan, the operation of activist funds has become conspicuous since the late 2010s. The country is a fertile ground for activist funds presumably for various statutory reasons and, arguably, also because the stock of many Japanese companies is considered undervalued. Multiple disputes between activist funds, target companies, and existing shareholders have reached the Japanese courts.

In theory, shareholder activism has a positive effect on corporate governance by increasing corporate value as reflected in higher share prices. But, at the same time, it may bring 'short-termism' to corporate governance, affecting the long-term strategy of companies. The goal of the contributions assembled in this volume is to examine the situation regarding activist funds in Japan from a comparative perspective and thereby to identify an optimal balance based on experiences in the selected jurisdictions.

The contributions assembled here are enlarged, edited versions of the lectures given at the comparative conference "Shareholder Activism in Japan, the EU, the UK and the US," convened at Goethe-University Frankfurt on 13 March 2025. The conference was jointly organized by the University College London (UCL) and Goethe University Frankfurt, in cooperation with the German-Japanese Association of Jurists (DJJV) and the Max Planck Institute for Comparative and International Private Law in Hamburg (MPI). The event, initiated by Hiroshi ODA of UCL, was held at Goethe University's House of Finance, with Moritz BÄLZ serving as the local host. The symposium received additional support from the Association of Friends and Supporters of Goethe University. The various contributions combine practical, theoretical, and critical perspectives and provide many insights into the origins of activist investing and its integration into different economic, cultural, and political contexts.[1]

The book is organized as follows: It first addresses the current situation in Japan from different perspectives. Hiroshi ODA (Professor, Sir Ernest Satow Professor of Japanese Law, University College London) starts with an overview of the changing structure of shareholding and corporate gov-

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1 For an evaluation of the conference's achievements, see the report by F. DRÖLL in ZJapanR/J.Japan.L. 59 (2025) 247–250.

ernance in Japan and Europe. Sadakazu OZAKI (Adjunct Professor, The University of Tokyo; Senior Research Fellow, Nomura Research Institute, Tokyo) traces the historical development of institutional shareholder funds and activist funds in Japan. In his assessment, corporate governance in Japan has increasingly moved beyond the Anglo-Saxon models. Although the Japanese legislature initially sought to assimilate the American corporate governance system in the early 2000s, the UK system and the European continental (German and French) systems are attracting greater interest in Japan today. Hidefusa IIDA (Professor, University of Tokyo) highlights Japan's resulting unique approach to M&A and its impact on shareholder activism and sustainability. The picture of Japan is completed with some Japanese case studies analyzed from a practitioner's perspective by Ryo OKUBO (Co-Head, Nagashima Ohno and Tsunematsu New York LLP).

The second half of the volume focuses on comparative perspectives and provides overviews of shareholder activism in the US, Germany, France, and the UK. It starts with a detailed comparative analysis of the "new" shareholder activism from a "Western" perspective by Georg RINGE (Professor of Law and Finance, University of Hamburg), focusing on its development, institutional framework, and regulation in the US, the UK, and Germany. Thereafter, Nobuhisa ISHIZUKA (Executive Director of the Center for Japanese Legal Studies, Columbia Law School, New York) more intensively explores the development of activist funds in the US. France is today home to a lively scene of activist shareholders, and Mai ISHIKAWA (Associate Professor, Tohoku University) highlights the current prospects for French reform. The volume concludes with an in-depth analysis of shareholder activism in the UK by Dionysia KATELOUZOU (Reader, King's College London).

The contributions in this special issue highlight that shareholder activism has become a relevant factor throughout major economies. Across jurisdictions, the debate about the advantages and disadvantages of activist investors shows striking similarities, oscillating between hoped-for increases in company profitability and concerns about feared short-termism. However, the broad comparison undertaken in this issue also reveals that activist investment takes place in a dynamic environment, one that is highly dependent on the specific legal, political, and cultural framework, thus offering rich opportunities for future research.

Hiroshi Oda London
Moritz Bälz Frankfurt a. M.
Harald Baum Hamburg
December 2025

Contents

Preface iii
Contents v

Japanese Perspectives

Current State of Shareholder Activism in Japan
Hiroshi O*DA* 3

The Development of "Institutional Investors" and Activist Funds in Japan
Sadakazu O*SAKI* 21

Beyond Anglo-American Models. Japan's Unique Approach to M&A and Its Impact on Shareholder Activism and Sustainability
Hidefusa I*IDA* 35

Some Recent Cases of Shareholder Activism in Japan
Ryo O*KUBO* 77

Western Perspectives

The "New" Shareholder Activism. A Western Perspective
Wolf-Georg R*INGE* 89

U.S. Shareholder Activism: Convergence with Japan
Nobuhisa I*SHIZUKA* 113

Shareholder Activism in France. Current Debates and Reform Prospects
Mai I*SHIKAWA* 133

Shareholder Activism in the UK. The Past, Present, and Future.
Dionysia K*ATELOUZOU* 147

List of Contributors 163

Japanese Perspectives

Current State of Shareholder Activism in Japan

Hiroshi ODA*

I. Introduction
II. Changing Environment
 1. Decline of Cross-Shareholding
 2. Defensive Measures
III. The "Revitalisation Programme" of 2014
IV. Activists Returned
V. Shareholders' Proposal Rights
VI. 2023 TSE Appeal to Listed Companies
VII. Management Buy-Out
VIII. Possible Restraint on Shareholder's Proposal Rights
IX. Concluding Remarks

I. INTRODUCTION

Since the "burst of the bubble" in 1991, despite attempts by the successive governments, Japanese economy has been slow to recover. It was only in 2024 that the 1990 level of share prices was recovered. The interim period is often referred to as the "lost decades".

There has been a series of attempts to reform corporate governance in Japan. After all, corporate governance had been ineffective in Japan for many years. Shareholders' meeting was a mere formality since the primary concern of the companies was to fend off extortionist shareholders ("special shareholders"). The board was insiders only and too large to have any meaningful discussion. A small number of directors ran the company without any effective external or internal control. Efforts were made to strengthen control over the management, mainly by the board reform and the strengthening of shareholders' rights. Shareholders' right to propose a matter to be put on the agenda of the shareholders meeting (hereinafter, "shareholder's proposal right") was introduced in 1981. Shareholders' derivative action was made easier in 1993.

After piecemeal legislative changes, a comprehensive Companies Act was adopted in 2006. However, the reform of corporate governance was still halfway. Introduction of outside directors met resistance; there was no statutory requirement of outsider directors, and as the result, the ratio of outsiders

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* The links given were last checked on 11 November 2025.

in the board of listed companies remained low. Furthermore, institutional shareholders were complacent. Banks and insurance companies as well as business companies which held substantial number of shares of the company were denoted "stable shareholders". They tended to vote in favour of the company at the general shareholders meeting. They did not work as a constraint on the corporate management.

The situation surrounding Japanese companies started to change in the late 1990s. The first wave of foreign activist funds arrived in Japan. Activist funds attempted hostile takeover of medium-sized companies which had been undervalued in the market. In one case, a foreign fund initiated a TOB against a medium-sized company, but the company managed to fend off the fund by announcing a substantial increase of dividends. Such moves triggered discussion on the introduction of defensive measures against hostile takeovers in Japan. Large companies introduced defensive measures against hostile takeovers, which could be implemented by the board. At one stage, more than 400 companies put such measures in place. For instance, a foreign investment fund initiated a TOB against Bulldog Sauce Co. but was prevented by the defensive measures which had been put in place by the company. The fund contested the validity of such measures in court, but the Supreme Court dismissed the argument of the fund on the ground that in this case, the measures in this case have been endorsed by the shareholders meeting.[1]

In the 2000s there was no successful hostile takeover of a company listed in the then first division of the Tokyo Stock Exchange (TSE). There were two reasons for this: one was the existence of the cross-shareholding system, and the other was the newly developed defensive measures imported from the US. There was no surprise that most foreign investment funds which arrived in Japan earlier left Japan. According to the statistics, the amount of M&A by foreign investment companies (including funds) against Japanese companies was 520 hundred million yen in 2000, increased to 10,049 hundred million yen in 2007, but sharply fell to 2,450 hundred million yen in 2008.[2]

II. Changing Environment

1. *Decline of Cross-Shareholding*

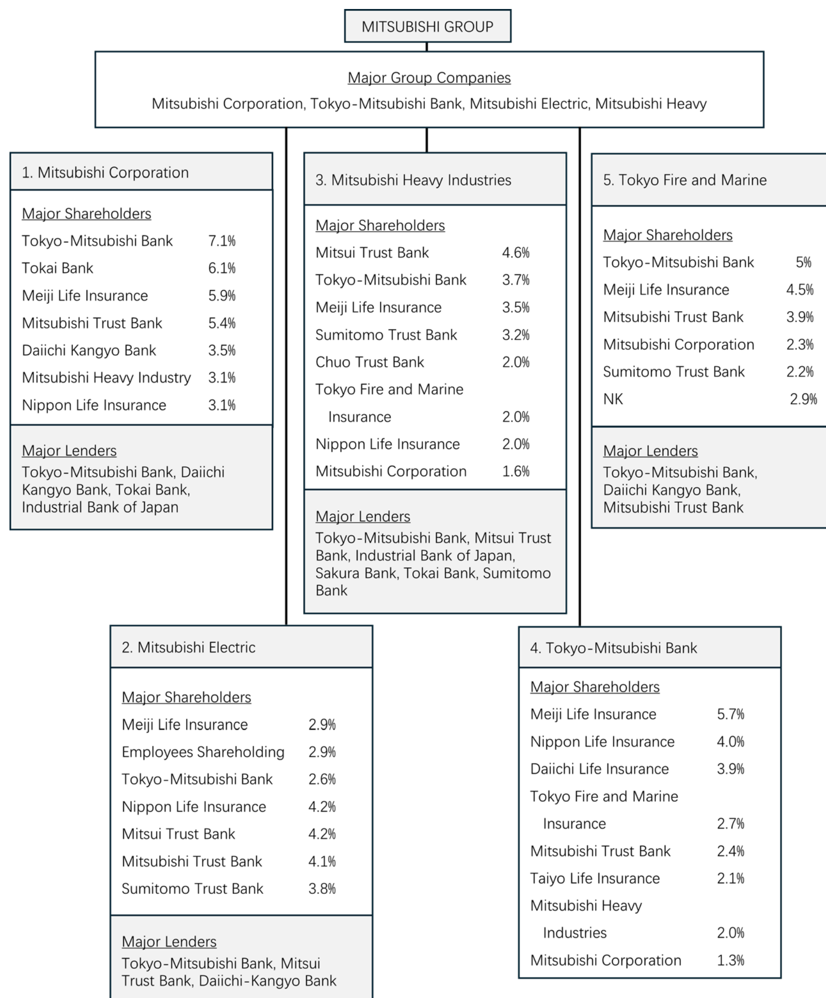
Cross-shareholding is a network of shareholding between companies (business companies, banks and other financial institutions). In cross-shareholding, a company holds shares not solely for investment, but for other

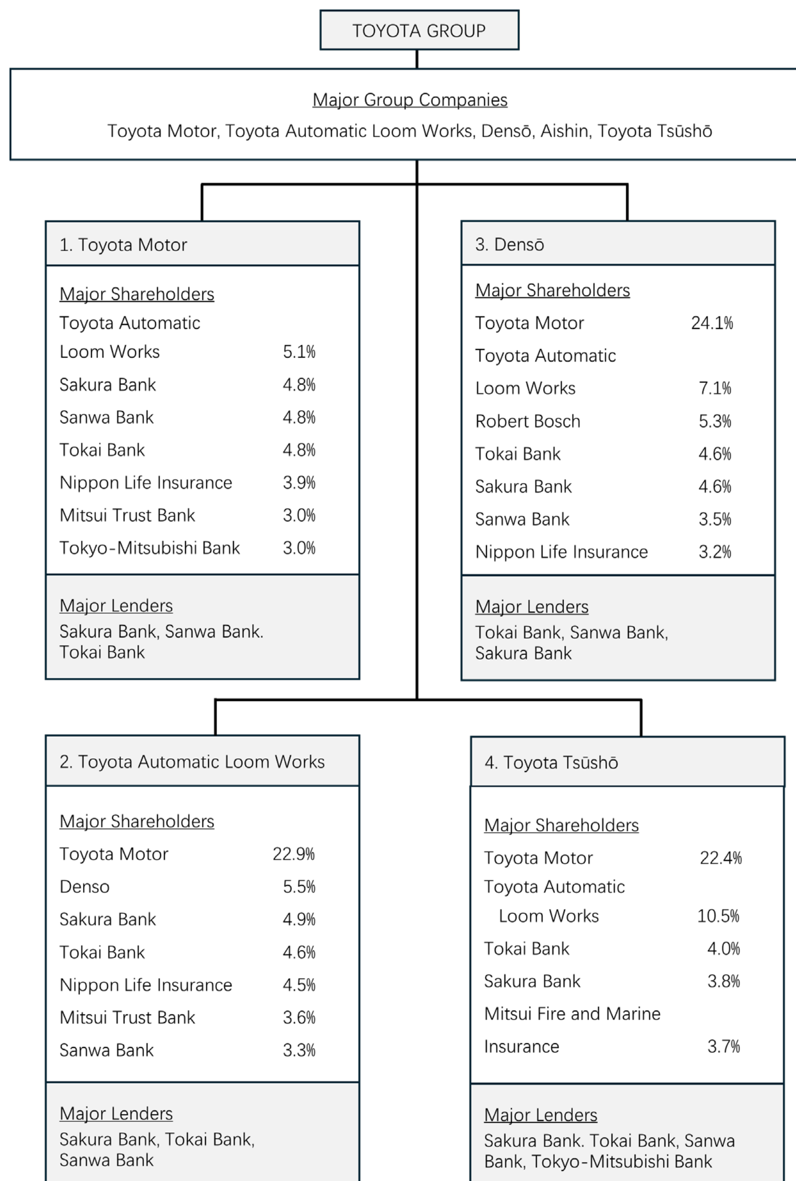
1 Decision of the Supreme Court, 7 August 2007.

2 Recof Corporation, Merger and Acquisition Research Report (MARR) (June 2012) 26.

reasons such as the formation and/or the consolidation of a company group, cementing of business relationship, or the securing of stable shareholders. In the 1990s, a term "stability rate" was often used in statistics. This rate denominated the percentage of shares held in "friendly hands", which meant that whatever the economic benefit or its absence, the shareholder will not dispose of the shares against the intention of the issuing company. In some companies, the rate reached almost 70%.[3]

Cross-Shareholding: Mitsubishi Group and Toyota Group 1998





3 Nikkei Kaisha Jōhō (Nikkei Company Information) 1998 Summer Edition, CD ROM (1998).

Companies with a high stability rate could rest assured that in the event of a hostile takeover, these shareholders would support the company. Traditionally, banks and other financial institutions held a substantial number of shares in the market. They were the largest holders of shares in the market, followed by business companies. They comprised the core of the stable shareholders.[4] According to the TSE share ownership survey, over the years, shares held by financial institutions and business companies continuously fell, while the percentage of shares held by foreign investors increased.[5]

Cross-shareholding system came under criticism already in the 1990s. First of all, if a substantial number of shares are "stable", it meant that these shareholders will vote for the company management regardless of the performance of the company and the share prices. Minority shareholder's views were left unheard. It also meant that the number of shares actually traded in the market was reduced. Furthermore, by cross-shareholding, assets of the company which could otherwise be invested for the furtherance of business of the company remain in the form of shares without good use.

After the financial crisis of 2007 and the subsequent accounting reform, companies were unable to hold on to the shares which were not performing solely for strategic purposes anymore. The size of cross-sharing was gradually reduced.

Thus, shares held by "stable shareholders" have been in decline, while the ratio of shares held by institutional shareholders has substantially increased in the recent years. As we shall see later, since the introduction of the Stewardship Code in 2015, institutional shareholders have become more actively engaged in the companies' business and often vote against the company.

2. *Defensive Measures*

As a result of the successive corporate law reforms, defensive measures against hostile takeovers practised in the US were made available in Japan. In 2007, 6.9% of the companies listed in the then First Division of TSE reportedly had such measures in place.[6] While some companies introduced

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4 Previously, the term mutual shareholding was commonly used, but since the Corporate Governance Code, the term cross-shareholding is widely used. As the Code explains, there are cases where listed companies hold the shares of other listed companies for reasons other than pure investment purposes, for example, in order to strengthen business relationships. Cross-shareholdings here include not only mutual shareholdings but also unilateral ones.

5 TSE, *http://www.jpx.co.jp/English/markets/equities/index.*

6 TSE, Whitepaper on Corporate Governance 2007, *https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/white-paper07e.pdf.*

the trust type system, a majority of companies introduced an advanced warning type measures. 68.72% of companies refer the decision to activate the scheme to the general meeting of shareholders, while in some companies, the matter was left to an independent committee or outside directors. Companies put in place in advance the procedure which should be followed by the acquirer in the event that they initiate the takeover process. If the acquirer fails to follow this procedure, the takeover is regarded as an abusive acquisition that damages corporate value, and the company may decide to activate the rights plan issue new share subscription rights. The number of companies which introduced defensive measures increased from 126 in 2006 to 497 in 2015.[7]

Defensive measures were at first welcomed by companies. However, there was a growing concern among the companies that introduction of defensive measures might, in the view of investors, have a negative effect on corporate governance. The TSE White Paper of 2013 had already warned as follows:[8]

> "These measures have a large impact on the rights of shareholders and investors, and they have a potential of being abused to serve the interests of officers".[9]

The Corporate Governance Code which was introduced in 2015 recommended companies to disclose the scheme and explain its appropriateness.[10] Furthermore, it provided as follows:

> "Principle 1.5 Anti-Takeover Measures
>
> Anti-takeover measures must not have any objective associated with entrenchment of the management or the board. With respect to the adoption or implementation of anti-takeover measures, the board and the corporate auditor should carefully examine their necessity and rationale in light of their fiduciary responsibility to shareholders, ensure appropriate procedures, and provide sufficient explanation to shareholders."

The view of the TSE was:

> "Most companies that have not adopted anti-takeover measures and have provided an explanation for this mentioned that the maximisation of corporate value (stock

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7 TSE, White Paper on Corporate Governance 2015, 84, *https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/2015.pdf.*

8 TSE White Paper 2013, *https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/b7gje60000024usu.pdf.*

9 Ibid., 95.

10 Ibid.

> price) is the most effective anti-takeover measure and that they did not plan to introduce anti-takeover measures at the time."[11]

There were indeed some instances where activist funds proposed to cancel such measures at the general shareholders meeting. By 2023, the number of companies with defensive measures in place fell to 264.[12]

III. The "Revitalisation Programme" of 2014

After a series of abortive attempts by the successive governments to reinvigorate the economy, the Abe administration which regained power from the opposition party in 2013 produced a programme for the revitalisation of the economy. The Programme was entitled "Revitalisation of the Economy—Enhancement of Mid-/Long Term Corporate value by further Reform of Corporate Governance". Strengthening of the earning power of companies reflected in the ROE was set as a goal.[13]

In this programme, the improvement of corporate governance was directly linked to the economic growth and revitalisation of the economy. The Programme addressed the "enhancement of corporate governance, promotion of the supply of risk money, and the improvement of the investment chain". Board reform and engagement of institutional shareholders were specifically referred to in the programme. Board reform in this context primarily meant the increase of external control of the board, namely the enhancement of outside directors. Already the Companies Act was amended in 2014 and mandated the companies which do not have outside directors to explain why the company does not need an outside director. Review of the management policy on the use of assets was also encouraged. Supply of risk money and the improvement of the investment chain were something which had previously not been taken up as a government policy.

This strategy was based on the view that in Japan, companies were underperforming and have not been using their assets in an efficient manner. ROE of Japanese companies had been low. In 2014, the average ROE in Japan was poor in comparison to the US and EU member countries. Even as late as 2023, approximately half of the listed companies on the Prime Market and 60% in the Standard Market of the TSE have ROE below 8% and PBR below 1.0, indicating that there are continuing issues in terms of the earning power of Japanese companies.

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11 Ibid., 101.

12 TSE, White Paper on Corporate Governance 2023, 208–209, *https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/uorii50000003gfb.pdf.*

13 Japan Revitalisation Strategy, revised 24 June 2014.

The argument in 2014 was that companies were not earning enough or not making use of their assets for the growth of the company and ultimately to the growth of the economy, more or less sitting on their assets. In other words, companies were being complacent, shielded by the existing corporate governance system and cross-shareholding. In order to revitalise the economy, it was understood that a "market for corporate control", which had not existed in Japan had to be introduced.

In order to develop a "market for corporate control", one perceived obstacle was cross-shareholding. The Corporate Governance Code which was introduced in 2015 provided as follows:

> "Principle 1.4 Cross-Shareholdings
>
> When companies hold shares of other listed companies as cross-shareholdings, they should disclose their policy with respect to doing so. In addition, the board should examine the mid- to long-term economic rationale and future outlook of major cross-shareholdings on an annual basis, taking into consideration both associated risks and returns. The annual examination should result in the board's detailed explanation of the objective and rationale behind cross-shareholdings. Companies should establish and disclose standards with respect to the voting rights as to their cross-shareholdings."

The intention of discouraging cross shareholding is apparent here. While cross-shareholding shielded the companies from hostile takeovers, in terms of capital policy and corporate governance, it also had a negative effect. If companies disposed of the cross-held shares and make good use of the proceeds, ROE and PBR should improve. The Corporate Governance Code chose to reduce cross-shareholding in order to encourage companies to make more efficient use of the capital and to promote the market for corporate control.

As a result, cross-shareholding was significantly reduced.[14]

IV. Activists Returned

The 2014 Strategy of the government intended to create a market for corporate control and thus put pressure on companies to make better use of their capital. It was envisaged that institutional shareholders would play a major role in this process. Since the early 2000s, companies had been encouraged to improve communication and engagement with shareholders. With the adoption of the Stewardship Code in 2014, institutional shareholders be-

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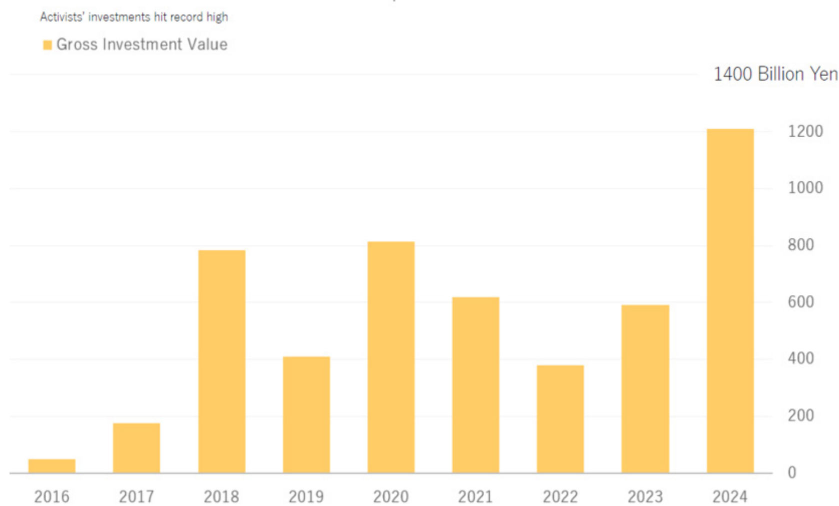
14 The ratio of cross-held shares of listed companies fell in the FY 2024 by 20% from 2023. Nikkei 4 November 2025.

came more actively engaged in corporate management. They are not complacent anymore; instead, if need arises, they do not hesitate to vote against the company. For example, if the performance of the company stays poor for several years, institutional shareholders may vote against the company's nomination of the board members.[15] However, institutional shareholders in Japan are not "activists". They opt for passive investment. There was a limit to the role they could play in the market for corporate control.

What has happened is that foreign activist funds returned to the Japanese market and become involved in this business of "efficient use of assets" by Japanese companies. As late as December 2024, there were 70 activist funds operating in Japan as compared to less than 10 in 2014.[16] After all, it was those "low performing" Japanese companies which foreign activists targeted unsuccessfully in the early 2000s.

Since 2018, activities of foreign investment funds have significantly increased.

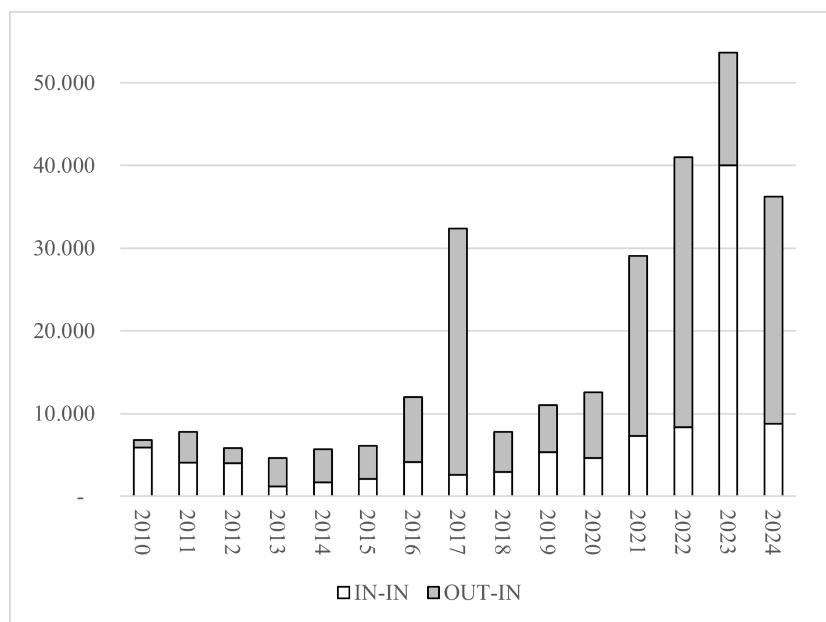


Increasing Activity of Activists Funds—Activist Investors Flock to Japan
Source: Bloomberg Intelligence; note: based on disclosed figures only

15 T. SHIRATORI/K.WATANABE, The Trend of Votes by Institutional Shareholders, Shōji-Hōmu 2373 (5 November 2024) 32.

16 Nikkei, 27 December 2024.

Amount of M&A Investment vis à vis Japanese Companies by Foreign Investment Companies



V. Shareholders' Proposal Rights

By the 1981 amendment to the company law, shareholders with 5% or more of voting rights or 300 votes were given the proposal rights. While this right had not widely utilised for many years, the number of occasions where shareholders made such a proposal increased since 2018. In 2018, there were 40 companies which received a shareholder's proposal, of which 17 cases involved activists. In 2025, 120 companies received such proposals, of which over 50 proposals were brought by institutional shareholders including activist funds. In comparison to the period of 2014–2018 with that of 2019–2023, the number of proposals significantly increased from 48 cases to 278 cases.[17] According to a recent report, 50 companies received proposals from activist funds for the General Shareholders Meeting to be held in late June 2025.[18]

17 S. Ohkuma, Shareholder Activism and Market for Corporate Control (2024) 46.
18 Nikkei, 10 June 2025.

The breakdown of the subject matter of such proposals is as follows:

Proposal of activists 2019–2023 (in comparison to 2014–2018)

Topics	2014–2018	2019–2023
Increase of returns to shareholders	31	81
Sell-off/withdrawal of business	16	61
Improvement of Business Management	1	30
Remuneration of Directors	6	35
Nomination of Directors	9	27
Dismissal of Directors	3	21
MBO and other strategic proposals	20	5
Total	55	278

At the General Shareholders Meetings held in June 2024, following proposals were made by institutional shareholders (including activists):[19]

Topics	2021	2024
Change of the Articles of Incorporation	20	62
Disposal of the Surplus	8	28
Share buy-back	8	14
Dismissal of a director	3	7
Dismissal of a corporate auditor	2	0

Change of articles of incorporation included, for example, the change of the composition of the board with a majority outside directors, amendment of the articles of incorporation in order to shorten the term of directors to one year and the disposal of cross-held shares. There are also cases where activist funds propose nomination of directors or removal of current directors. Oasis proposed a list of five outside directors to Kao, which was rejected by the company.

Proposals for share buy-back and higher return to shareholders represent the largest portion of these proposals.[20] For example, in 2025, Elliott criticised Sumitomo Realty and Development for the low level of return and the slow speed of reduction of cross-shareholding and declared its intention to

19 A. USHIDA/K. MARUYA, Shōji Hōmu 2372 (25 October 2024) 25.
20 Ibid., 24; Nikkei, 22 August 2024.

vote against the nomination of the board by the company.[21] Elliott also proposed Mitsui Realty to dispose of the shares of Oriental Land which runs Tokyo Disney Land and buy back shares worth one trillion yen. Dalton proposed share buy-back of worth 27 billion yen to Ezaki Glico.[22] Mitsubishi Pencil, Ryobi, and Noritz received a proposal from activists to increase the dividend and to buy back shares.[23]

There are also proposals by activists on the company's business strategy. 3D Investment Partners has accumulated 19.5% of shares of Sapporo Holdings and became its largest shareholder. Sapporo's original business is brewing while it holds a substantial amount of real estate. In the early 2000s, the company was targeted by Steel Partners which proposed the company to concentrate on brewing business, but managed to fend them off. Now 3D Investment Partners and the company are in disagreement on the disposal of the property; the fund is proposing appointment of an outside director.[24]

The shareholder's right of proposal originated in the US. Although company law is left to the states, at the Federal level, according to the SEC Rule 14a-8, the scope of matters to be covered by the proposal is not unlimited. The Rule provides as follows:

Substantive grounds for exclusion include:

– The proposal relates to a personal claim or grievance against the company or others or is designed to benefit that particular shareholder to the exclusion of the rest of the shareholders;
– the proposal relates to immaterial operations or actions by the company in that it relates to less than 5% of the company's total assets, earnings, sales or other quantitative metrics;
– the proposal requests actions or changes in ordinary business operations, including the termination, hiring or promotion of employees – provided, however, that proposals may relate to succession planning for a CEO;
– the proposal seeks to disqualify a director nominee or specifically include a director for nomination;
– the proposal seeks to remove an existing director whose term is not completed;
– the proposal questions the competence, business judgment or character of one or more director nominees;
– the proposal seeks to require the payment of a dividend; or

21 Nikkei, 9 June 2025.
22 Nikkei, 13 February 2025.
23 Ibid.
24 Tōyō Keizai, 21 March 2025.

– the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting.

As above, in the US, the scope of matters which can be proposed is much narrower than in Japan where there is no limit to the scope of matters to be proposed. Proposals such as the increase of dividends and the composition of board are not allowed in the US. It is said that in the US, the general view is that the business strategy should be left to the company management.[25]

Since activist funds generally hold much less than a majority of shares, their proposals fail to be adopted at the general shareholders meeting. When cross-shareholding was at its height, this was only natural, but even in recent years, proposals by activists are seldom adopted at the general shareholders meeting. On average, such proposals have only 10–30% support at the general shareholders meeting.[26]

However, in recent years, some cases where the proposal by the shareholder was endorsed at the general shareholders meeting was adopted at the general shareholders meeting have been reported. In 2024, according to a survey of general shareholders meeting held in June which is normally the case, a proposal to replace some of the board members was approved by shareholders.[27] Strategic Capital proposed the removal of six directors, of which three were actually removed. The proposal was supported by just over 50% of shareholders.[28] There was even a case in 2025 where a director/CEO failed to secure support of shareholders in the face of a proposal by an activist fund.[29]

VI. 2023 TSE Appeal to Listed Companies

In 2023, the TSE published a document entitled "Action to Implement Management that is Conscious of Cost of Capital and Stock Price". TSE, quoting the Corporate Governance Code, pointed out as follows:

"The company management should act with sufficient consideration of cost of capital and profitability. This was important for the companies to meet the expectations of investors and other stakeholders and to achieve sustainable growth and enhancement of corporate value in the mid- to long-term. However, approximately half of the listed companies on the Prime Market and 60% in the Standard Market have ROE below 8% and P/B ratios below 1.0, indicating that there are issues in terms of profitability and growth potential.

25 Nikkei, 3 December 2024.
26 Daiwa Asset Management, Daiwa Market Letter, 16 July 2025.
27 Ushida/Maruya, *supra* note 19, 20; Nikkei, 25 April 2025.
28 Nikkei, 2 June 2025.
29 Nikkei, 21 June 2025.

There is a need for a change in the thought processes of management to be more conscious of cost of capital and stock prices in order to improve the corporate value of each company in the future. The management is expected to take the lead in appropriately allocating resources with sufficient consideration of cost of capital and profitability by pushing forward initiatives such as investment in R&D and human capital that leads to the creation of intellectual property and intangible assets that contribute to sustainable growth, investment in equipment and facilities, and business portfolio restructuring."[30]

The intention of the 2014 government Strategy and the 2023 TSE appeal was to enhance the awareness of the companies to make good use of the capital by 1) reducing cross-shareholding, i.e. selling shares held by cross-shareholding and invest the proceeds in a mid-/long term projects such as e.g. investment in the production facilities and M&A, 2) increase returns to shareholders in order to make the stock market attractive to investors. If companies sell the shares which they are cross-holding, this would lead to the increase of the ROE and PBR.

However, while companies did dispose of shares held in cross-shareholding, the proceeds from the sale were not always used for medium-/long term goals such as R&D and M&A, and did not help improve ROE. Instead, companies used the proceeds for share buy-back and increased payout of dividends. In some cases, such payouts even exceeded the proceeds of the sale. In this way, companies intended to appease activist funds.[31] A shipping company in which Efissimo Capital Management has been holding shares, the amount of the return to shareholders according to the company's Mid-Term Business Plan is about the same as the planned amount of investment. In NYK Line, the return to shareholders is about the half of investment. While these companies need more investment, they spend a significant amount in return to shareholders. Actually, ROE has failed to improve after 10 years of the 2013 Programme.[32]

The 2023 TSE initiative was aware of short termism and specifically mentioned that:

While share buybacks and dividend increases are considered effective means of improving profitability, if shown as such by the company's analysis of whether the balance sheet effectively contributes to value creation, TSE is not necessarily expecting companies to use only these or solve issues with a one-off response. Efforts are expected on a fundamental level to attain profitability in excess of cost of capital on a sustained basis and achieve sustainable growth.

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30 *https://www.jpx.co.jp/english/equities/follow-up/uorii50000004sse-att/uorii50000004tcv.pdf.*

31 Nikkei, 20 September 2024.

32 Nikkei, 4 December 2024.

VII. Management Buy-Out

In the face of growing shareholder activism, the number of companies which decided to go private by MBO is increasing.

While the target of activist funds has been medium to large companies in the past, Toshiba, a large heavy electric company, after accepting directors from activists, finally went private in 2021 financed by private equity funds. Toyota Industries was targeted by Dalton Investment and some other funds in 2024.[33] Toyota group has been known for its intricate cross-shareholding which involved Toyota Motor and its major suppliers as well as trading houses and car dealers. The core of this network was Toyota Industries, which was actually the origin of the Toyota Group when the company started from manufacturing weaving machines in the early 20th century. Activists including Dalton Investment questioned the appropriateness of this cross-shareholding relationship. The company disposed large portion of shares of group companies, but in the end, chose to go private.

VIII. Possible Restraint on Shareholder's Proposal Rights

Shareholders' proposal right was introduced in the Japanese company law in 1981. According to the current Companies Act, a shareholder who has held one percent or more of shares or 300 votes or more for six months are entitled to this right. There is no limit on the scope of matters to be included in the proposal (Article 303).

There was a case where a shareholder placed multiple proposals of an identical content. The appellate court found this to be an abuse of the right.[34] In the light of such abuses, introduction of some restriction such as the denial of such rights in cases where the shareholder intends to obstruct the appropriate proceeding of the shareholders meeting and harms (or substantially harms) the common interest of shareholders was discussed at the time of the amendment of the Companies Act in 2019, but was not accepted in the end.[35]

Currently, there is a view that in Japan, shareholders' proposal right is too easily available as compared to other jurisdictions. Proposals for the introduction of some restraints have been made by business organisations.[36]

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33 Nikkei, 4 December 2024.

34 Decision of the Tōkyō Appellate Court, 19 May 2015.

35 Japan Federation of Bar Associations (ed.), Practical Guide to the Revised Companies Act (2nd ed., 2020) 393–394.

36 On different views, see J. Saki/A. Tokutsu, The Possibility of Restraining the Shareholder's Proposal Rights Based Upon the Data of the Exercise of Such Right in Listed Companies, Shōji Hōmu 2396 (2025) 28–29.

First, the threshold of 300 votes should be removed, or raised, since the price for a unit of a share has significantly fallen in recent years. It has become too easy to exercise shareholder's proposal right. According to Nikkei, in order to secure 300 votes of Deutsche Telecom, 80 million yen is required, while for NTT, 4.6 million yen is sufficient.[37]

Secondly, the one percent threshold is much lower than that in most European jurisdictions where five percent is the norm. It is no surprise that with the depreciation of yen and the low threshold, foreign activist funds targeted Japanese companies.

In the recent interim programme on the amendment of the Companies Act of METI there was a view that there should be some restraint on the content/purpose of the proposal, but this was not accepted. Only the proposal to scrap or raise the 300 votes requirement is now being considered.

IX. Concluding Remarks

The 2014 revitalisation programme was intended to galvanise the stagnating economy by creating a "market for corporate control". It was thought that indices such as PER/PBR were palpably low in Japan in comparison to other jurisdictions and needed to be improved. The idea was to encourage the company management, hitherto seen to be complacent, to make better use of the capital and thus increase the earning power of the company under pressure from the market.[38]

The problem is whether or not the market for corporate control has developed as had been envisaged at the outset. With the improvement of shareholder engagement since the introduction of the Stewardship Code in 2015, company management has become more conscious of the views of such shareholders. There is now a solid body of institutional investors, namely insurance companies and pension funds. They closely monitor the performance of the companies and if necessary, consider voting against the companies. However, these institutional shareholders are usually not the main actors in the market for corporate control in Japan. The M&A activities among Japanese companies are still at a low level, while the volume of out-in cases has significantly increased. In 2024, the volume of M&A between Japanese companies was merely 33% of the volume of foreign M&A investment into Japan.[39] Investors who were supposed to vitalise the market and pressurise the corporate management for reforms turned out to be for-

37 Nikkei, 3 December 2024.

38 Comment by Y. SHIOZAKI, Nikkei, 10 December 2024.

39 Merger and Acquisition Research Report (MARR) 2 (2025).

eign activist funds and not institutional shareholders or other business companies in Japan.

As can be seen in their proposals, short term goals such as share buyback, increase of dividends etc. are often sought by these activist funds. It should be remembered that the interest of activist funds does not necessarily coincide with that of the company. It was pointed out that in the Stewardship Code, it was assumed that the interest of funds is identical to that of shareholders in general. However, funds owe a fiduciary duty to their financiers, but their interest is not necessarily the same as the interest of the company, or the interest of shareholders in general.[40]

The positive outcome of the 2014 Programme was that companies have become more conscious of the efficiency of the use of capital and came to consider a better use of the assets. However, the view on whether the involvement of activist funds has actually improved the performance of the target companies or not is divided. A study by W. TANAKA and G. GOTO on the long-term effect of activism in Japan is based on the view that shareholder activism increases corporate value by mainly the return of free cash flow to shareholders. While Tobin's Q improved in these companies, ROA did not show any improvement.[41] Another study conducted by Q. TAI and Y. MIWA analysed campaigns by activists which took place between 2003 to 2021. Their conclusion was that activists cause the increase of return to shareholders, but the target company's ROS falls and the company's investment is reduced.[42]

The 2014 government programme in reality opened the floodgate for foreign activist funds. Whether these activist funds function as a catalyst for the improvement of the performance of Japanese companies and the revitalisation of the economy is yet to be determined.

SUMMARY

Shareholder activism has become conspicuous in Japan in recent years. In 2025, 120 companies received shareholder proposals, 50 of which were from institutional shareholders, including activists. In terms of numbers, this is second only to

40 T. KATO, Basic Theory of Stewardship Activities, Shōji Hōmu 2371 (5 October 2024) 13, 19.

41 W. TANAKA/G. GOTO, The long-term effects of shareholder activism in Japan, JSDA Capital Markets Forum, 2. Series Collection of Papers (2020).
The survey covers companies in which activists were involved between 2000 to 2011.

42 Q. TAI/Y. MIWA, The Impact of Shareholder Activism on the Long-Term Performance of Firms in Japan (25 July 2023), *https://ssrn.com/abstract=4530252*.

the United States. The largest portion of the proposals have been for share buy-backs and higher returns for shareholders. Japanese companies, which had been more or less free of external control, have come under growing pressure from the market to use capital efficiently to grow the company and increase shareholder value.

The decline of cross-shareholding in the last couple of decades has made companies vulnerable to pressure by activist funds. A major change in corporate governance was triggered by the adoption of the Stewardship Code and the Corporate Governance Code in 2014 and 2015 respectively. The intent was to galvanize the economy by empowering institutional shareholders, who had been complacent in Japan. However, activist funds turned out to be major players in the market for corporate control. In some cases, they took quite short-term views and sought quick returns. Some companies chose to exit the market by means of management buyouts. Compared to other jurisdictions, Japan makes it easy for shareholders to submit proposals, but currently there is a push to introduce certain restrictions on these rights.

The Development of "Institutional Investors" and Activist Funds in Japan

Sadakazu OSAKI*

I. The Pre-1990s Landscape
1. Absence of True Institutional Investors
2. Regulatory Reforms: Laying the Groundwork
II. The Emergence of Activists
1. Early Outsiders: Raiders and "Shite-Suji"
2. Changing of the Guard: New Shareholders, New Norms
3. The First Wave of Shareholder Activism: Murakami and Momentum
III. Corporate Governance Reform and the Second Wave
1. Corporate Governance Reform as a Growth Strategy
2. Skepticism Toward Institutional Investors
3. Second Wave of Activism
IV. The Third Wave and Beyond
1. Evaluating Current Activism
2. Future Prospects of the Activism in Japan

In recent years, the Japanese stock market has experienced a notable surge in activist campaigns, where activist hedge funds acquire stakes in companies to push for changes they believe will enhance shareholder value. To be sure, the rise of shareholder activism is not unique to Japan but is a global phenomenon. However, the most recent surge in activist activity is largely concentrated in the Asia-Pacific region, particularly in Japan.[1] Today, Japan is considered the second-largest market for shareholder activism, trailing only the United States.[2] This "activist boom" is, however, a relatively recent development. Historically, activist interventions were rare in Japan, and even mainstream institutional investors were reluctant to exercise their voting rights against the incumbent management of investee companies. This article explores the evolution of shareholder activism in Japan, beginning with the landscape before the 1990s.

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* The links given were last checked on 7 July 2025.

1 V. PAU, Activist Investor Campaigns Hit Record High, Driven by Japan, The Japan Times, 2 July 2024.

2 N. HANSEN/J. USAMI, Land of the Rising Dissension: Japanese Shareholder Activism in Focus, White & Case M&A Explorer 2025.

I. THE PRE-1990S LANDSCAPE

1. Absence of True Institutional Investors

While institutional shareholders—entities other than natural persons—have long existed in Japan, they did not function in the way that "institutional investors" are understood today: as professional asset managers or asset owners entrusted with maximizing financial returns for clients or beneficiaries. This modern conception began to emerge in Japan only in the 1990s.

In the 1960s, the Japanese government started to liberalize capital movement regulations. In 1964 Japan joined the Organization for Economic Cooperation and Development (OECD), committed to undertaking capital liberalization. Meanwhile, Japanese listed companies began establishing cross-shareholding arrangements with one another, as well as with commercial banks and life insurance companies. These arrangements served as a defense mechanism against possible hostile foreign takeovers. Accordingly, the cross-held shares were not intended for profit-driven investment, but rather to create a stable shareholder base that would support company management regardless of performance.

From the perspective of the shareholders involved—particularly banks and insurers—this system had its advantages. For banks, cross-shareholding often secured the role of "main bank," a lucrative position at that time due to companies' constant need for external financing. Life insurers, meanwhile, gained marketing access to employees of the issuer companies of cross-held shares. They could comfortably achieve profitability thanks to tightly regulated assumed interest rates and high long-term yields, even without chasing stock market returns; thus they did not have to make serious investment decisions when they formed cross-shareholding arrangements.

Mutual funds played a much more limited role in pre-1990s Japan than in the U.S. Though Japanese investment trusts (akin to American mutual funds) were introduced in 1951, they were heavily controlled by securities brokers. At that time, securities brokers were trying to secure a better position in the individual savings market dominated by commercial banks. To compete with bank deposits, they were pushed to offer "unit-type" investment trusts, which typically had an effective two-year term.[3] As a result, it was infeasible for investment trust to employ long-term investment strategies that included an active commitment to investee companies' management.

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3 A typical "unit type" investment trust had a four- or five-year term with a two-year "closing period". When the closing period had expired, the securities broker who sold the product had a strong incentive to persuade the customer to sell off the product and purchase another newly launched "unit type" investment trust in order to earn additional sales commission.

Public and private pension funds —major institutional investors in other markets—also had limited roles. Public pension reserves were primarily funneled into the Fiscal Investment and Loan Programme (FILP), and only a small portion was managed independently. Private pension funds, meanwhile, operated under strict regulations. Only trust banks and life insurers could manage them, and the 5/3/3/2 rule severely restricted equity exposure, mandating that more than 50% of assets be allocated to public bonds and no more than 30% to equities.

2. *Regulatory Reforms: Laying the Groundwork*

This began to change in the late 1980s. The 1986 Investment Advisors Act introduced the concept of discretionary investment management business, allowing authorized investment advisors to manage assets on behalf of institutional clients, including pension funds. Although the primary objective of the Act was to regulate businesses providing investment advice, particularly to individual investors, in light of incidents such as the large-scale fraud case known as the "Toshi Journal Incident", the new Act contributed to a transformation of institutional investment in Japan.

Initially, only a small portion of public pension funds—mostly bond portfolios—was entrusted to authorized investment advisors. This changed with the 2001 abolition of the FILP loan system. The newly formed Government Pension Investment Fund (GPIF) began allocating substantial funds to authorized investment advisors. Many investment trust companies affiliated with securities brokers entered this new business.

In parallel, the 1990 amendment to the Employees' Pension Insurance Act enabled authorized investment advisors to manage private pension assets. Though initially limited to "new money" deriving from new contributions and a third of total assets, these restrictions were lifted entirely with the 1999 repeal of the 5/3/3/2 rule, opening the door for competition and more active management.

II. THE EMERGENCE OF ACTIVISTS

1. *Early Outsiders: Raiders and "Shite-Suji"*

Even before the 1990s, Japan's market had its share of aggressive investors, such as corporate raiders and "shite-suji"—speculative individuals seeking to accumulate large stakes in mainly small-cap companies. However, these actors did not qualify as institutional investors, as they were not managing assets on behalf of others with the aim of securing long-term financial returns.

Corporate raiders and "shite-suji" investors often expressed themselves vocally at Annual General Meetings (AGMs). Their behavior was often dis-

ruptive during AGMs, but it was focused on short-term gains rather than constructive engagement with management. Similarly, “sokaiya” gangsters, who posed as corporate governance advocates, used AGMs to extort companies by threatening to expose scandals—often receiving hush money in return. These payments persisted until they were effectively prohibited by an amendment of the Corporation Act in 1997.[4]

The first bona fide foreign activist shareholder in Japanese stock market appeared in 1989: T. Boone Pickens, who acquired a significant stake in Koito Manufacturing, a Toyota Group firm.[5] Pickens pushed for board representation, but his approach—colored by his reputation as an American corporate raider—triggered a defensive backlash from Japanese corporate circles. This initial experience with an activist left many Japanese corporate executives with the impression that activist shareholders were akin to corporate raiders or even “sokaiya”. Pickens’ entry only reinforced the belief that any shareholder opposition to company management was inherently hostile or illegitimate.

2. *Changing of the Guard: New Shareholders, New Norms*

The Japanese stock price bubble reached its peak in December 1989, when the Nikkei 225 index closed at 38,915.87 yen. Its collapse and financial crisis in 1990s led to the gradual unwinding of cross-shareholdings. Institutional players—banks, insurers, and conglomerates—offloaded shares throughout the 1990s, and foreign institutional investors stepped in to fill the gap.

These new shareholders brought a different attitude towards corporate managers to the Japanese market. In the U.S., the Department of Labor’s 1988 “Avon Letter” clarified that ERISA fiduciaries had a duty to exercise proxy voting power responsibly.[6] The era of the “Wall Street Rule”, where institutional investors would simply sell their shareholdings if they disagreed with company management, was already over outside Japan. By the 1990s, foreign institutional investors no longer passively rubber-stamped management proposals; they assessed them critically and sometimes voted “no.”

This trend finally reached Japan. Increasingly, Japanese listed companies faced “no” votes on their proposals not only from “sokaiya” and corporate raiders but also from serious professional institutional investors. The per-

4 As part of this amendment, the penalty for making such payments was increased from imprisonment of up to six months to imprisonment of up to three years, and the action of demanding such payments was newly prohibited.

5 J. BUCHANAN/D. H. CHAI/S. DEAKIN, Hedge Fund Activism in Japan: The Limits of Shareholder Primacy (2012) 128–130.

6 Letter to Helmuth FANDL, Chairman of the Retirement Board, Avon Products, Inc. 1988 WL 897696 (23 February 1988).

centage of foreign investors voting against company proposals rose steadily each year, reaching 29.7% of the listed companies holding AGMs or 585 companies during the period from July 2001 to June 2002.[7]

Following the model shown by their foreign peers, domestic institutions also began to adopt more proactive governance stances, taking their voting rights as shareholders more earnestly. In April 2002, the Japan Investment Advisors Association, a self-regulatory organization for authorized investment advisors, published a report emphasizing that proxy voting was a fiduciary duty.[8] It recommended that member firms utilize proxy voting to enhance shareholder value of the investee companies. This was followed by the 2003 publication of proxy voting principles and guidelines by the Pension Fund Association,[9] which was one of Japan's largest pension fund. These principles included provisions linking the re-election of directors to company performance. For instance, the principle stated that if a company had reported losses with no dividend payouts for each of the past three years, or if it had accumulated after-tax losses over the past five years, the PFA would either vote against the proposal or abstain.[10]

3. *The First Wave of Shareholder Activism: Murakami and Momentum*

Against this backdrop, the first true wave of activism began in 2000, when the so-called Murakami Fund launched a hostile takeover bid for Shoei Co., a former textile firm turned real estate investor. Founded by a former MITI (now METI) official, Yoshiaki Murakami, the Murakami Fund was the first to adopt activist tactics, including public confrontation, as part of its strategy to engage with management in the Japanese market.[11]

At the time of the Murakami Fund's bid, the market capitalization of Shoei was approximately 5 billion yen, despite holding large amounts of listed stocks and rental properties valued significantly higher than its market capitalization. Presumably, the objective of the takeover bid by the

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7 M. IWATANI, The Exercise of Voting Rights in Japanese Companies by Foreign Shareholders, Capital Research Journal 6-2 (2003) 34–44.

8 The Japan Investment Advisors Association [日本投資顧問業協会], 投資一任会社の議決権等株主権の行使について [On the Exercise of Shareholder's Rights Including Proxy Voting by Discretionary Investment Management Business Providers] (2002).

9 The PFA manages the assets of employee pension fund schemes that have been wound up as well as assets that will be needed to pay benefits to short-term members who have left an individual fund as a result of early retirement or job-change.

10 M. HASHIMOTO, The Pension Fund Association's Recently Released Proxy Voting Principles, Capital Research Journal 6-2 (2003) 26–33.

11 BUCHANAN/CHAI/DEAKIN, *supra* note 5, 154.

Murakami Fund was to pressure Shoei's management to establish an effective plan for utilizing its idle assets.

Though the bid failed—being opposed by major shareholders such as Canon and Fuji Bank—the fund profited from the post-announcement share price rise. Between 2000 and the founder's 2006 arrest for alleged insider trading,[12] the Murakami Fund undertook over 40 interventions in listed companies, namely acquiring more than 5% of the outstanding shares in all listed companies.[13]

The Murakami Fund had demonstrated that a public and even confrontational style of shareholder activism could yield significant financial returns in Japan.[14] Other activist funds from abroad followed, including Steel Partners, TCI, Dalton, Silchester, and Perry. This first wave ended in 2007 when the Supreme Court upheld Bull-Dog Sauce's defensive measures against Steel Partners.[15] Regulatory pushback followed in 2008, with the Ministry of Finance and METI blocking TCI's bid to increase its stake in J-Power beyond 10% on national security grounds. The 2008 global financial crisis then drove many activists from the market, at least temporarily.

III. Corporate Governance Reform and the Second Wave

1. *Corporate Governance Reform as a Growth Strategy*

The first wave of shareholder activism, marked by the confrontational approaches adopted by activist funds, raised the profile of several such funds and had a significant psychological impact on Japanese corporate society. However, it did not necessarily result in increased corporate value or higher stock prices of Japanese listed companies.[16] Furthermore, it failed to transform the corporate practices of Japanese "community firms," which are not primarily managed for the benefit of shareholders.[17]

That said, the first wave laid the groundwork for relevant institutional changes. Media attention and public debate surrounding annual general meetings (AGMs), shareholder voting, and corporate accountability intensified.

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12 S. OSAKI, The Murakami Fund Incident and the Regulation of Collective Investment Schemes, ZJapanR / J.Japan.L. 25 (2008) 89–103.

13 BUCHANAN/CHAI/DEAKIN, *supra* note 5, 158.

14 BUCHANAN/CHAI/DEAKIN, *supra* note 5, 165.

15 S. OSAKI, The Bull-Dog Sauce Takeover Defense, Nomura Capital Market Review 10-3 (2007) 2–20.

16 M. BECHT/J. FRANKS/J. GRANT/H. F. WAGNER, Returns to Hedge Fund Activism: An International Study, The Review of Financial Studies 30 (2017) 2933–2971; BUCHANAN/CHAI/DEAKIN, *supra* note 5, 210-211.

17 BUCHANAN/CHAI/DEAKIN, *supra* note 5, 295–296.

In response, the Tokyo Stock Exchange (TSE) and the government introduced a series of reforms. In 2009, the TSE began urging companies to disclose AGM voting results. Although this was not a formal obligation under TSE rules at the time, the requirement became mandatory in 2010 through amendments to the Cabinet Office Ordinance on the Disclosure of Corporate Affairs.

Following the Liberal Democratic Party's return to power in 2012 under Prime Minister Shinzo Abe, a new economic policy known as "Abenomics" was launched. Built around three key strategies—referred to as the "Three Arrows"—Abenomics aimed to revitalize the Japanese economy after the "Lost Decades" resulting from the collapse of "bubble" economy. The Three Arrows comprised: (1) bold monetary policy, including aggressive quantitative easing; (2) flexible fiscal policy with significant public spending; and (3) a growth strategy. Corporate governance reform emerged as a central element of the Abenomics growth strategy.

Among other objectives, the reform sought to boost corporate productivity by aligning governance practices with global standards. Two key frameworks—often described as the "two wheels of a car"—were introduced: the Stewardship Code, adopted by the Financial Services Agency (FSA) in 2014, and the Corporate Governance Code, adopted by the TSE in 2015 under the auspices of the FSA.

The Stewardship Code was addressed to institutional investors, such as investment advisors, life insurance companies, and pension funds. It urged these investors to fulfill their stewardship responsibilities—namely, to engage actively with investee companies in order to enhance shareholder value. The Corporate Governance Code, by contrast, was directed at listed companies, encouraging them to improve governance practices by enhancing board independence and transparency. It also called for increased shareholder engagement.

Notably, both codes are considered forms of "soft law," meaning they lack legally binding force. They are neither statutes enacted by the National Diet nor government orders or Cabinet Office ordinances grounded in specific legal provisions. The Stewardship Code, in particular, serves as a voluntary standard for institutional investors who choose to adhere to its principles. The FSA publishes an annual list of entities that have signed up for the Code, although there is no formal obligation to do so under any relevant legislation. The Corporate Governance Code, while also non-binding in the legal sense, possesses greater authoritative weight: the TSE requires listed companies to disclose how they comply with the Code's principles, although this disclosure requirement is not codified in law.

Furthermore, both codes operate under a "comply or explain" principle, which affords companies and institutional investors the flexibility to devi-

ate from the standards provided they offer credible justifications. While non-binding, these codes have nonetheless reshaped expectations and norms surrounding corporate governance in Japan.

2. *Skepticism Toward Institutional Investors*

The Stewardship Code—one of the "two wheels of a car"—was modeled on the UK Stewardship Code introduced in 2010. While the current UK and Japanese Stewardship Codes differ in many respects, particularly following the major revision of the UK Code in 2020, the Japanese Code adopted in 2014 closely resembled the UK version at that time even without any detailed analysis.[18] In fact, several principles of the Japanese Code were almost direct translations of their UK counterparts. For example, the official translations of Principles 1 and 2 in the Japanese Code were virtually identical to those in the UK Code, aside from a few wording differences.

Nevertheless, there were several notable distinctions between the two Stewardship Codes. Most significantly, the primary objectives of the Codes differed markedly. The UK Stewardship Code aimed to curb excessive risk-taking and short-termism among listed companies—which were arguably factors in the global financial crisis that began in 2008—by encouraging institutional investors to act more responsibly in the public interest. In contrast, the Japanese Code sought to promote shareholders' interests by encouraging domestic institutional investors to become more active and exert pressure on entrenched management.[19]

Another noteworthy difference was Principle 7 of the Japanese Code, which states: "To contribute positively to the sustainable growth of investee companies, institutional investors should have in-depth knowledge of the investee companies and their business environment, as well as the skills and resources needed to appropriately engage with the companies and make proper judgments in fulfilling their stewardship activities." No similar principle or guidance exists in the UK Code.

The inclusion of Principle 7 was proposed and supported by several experts involved in the drafting process, particularly those representing listed companies. For instance, during a meeting of the expert panel for drafting the Japanese Stewardship Code, Junichi Kawada, then Managing Director of JX Holdings Co., voiced skepticism about the competence of some institutional investors. He noted that certain investors requesting engagement

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18 S. OSAKI, The New Stewardship Code in Japan. Comparison with UK Code and its Implementation, in: H. ODA (ed.), Comparative Corporate Governance, The Case of Japan, ZJapanR/J.Japan.L. Special Issue 12 (2018) 101.

19 G. GOTO, The Logic and Limits of Stewardship Code: The Case of Japan, Berkeley Business Law Journal 15 (2019) 365, 396.

with companies lacked even a basic understanding of the businesses of the issuer of the stock they were investing in.[20]

When corporate executives expressed concerns and skepticism about institutional investors, it was most likely driven by negative perceptions of short-termism observed in some foreign institutional investors. Japanese companies have been frequently criticized by foreign institutional investors for their overly long-term-oriented management style, which tends to disregard the current level of ROE and other indicators of profitability. From the viewpoint of Japanese corporate executives, those foreign investors who do not understand a long-term-oriented management style are falling into the pitfalls of short-termism. Although the aforementioned Principle 7 was not directly related to activist funds, it could potentially be used as an excuse to avoid engagement with activists who place greater emphasis on short-term performance.

3. *Second Wave of Activism*

Encouraged by the essentially government sponsored Stewardship Code, activist funds returned to the Japanese market. The second wave of shareholder activism had arrived, and since 2014 the number of activists engaged in the Japanese market has grown each year (Figure 1).

Foreign activist funds already active in the first wave, such as Dalton and Silchester, returned to the stage, along with new players such as Oasis Management from Hong Kong and ValueAct Capital from the US. The best known domestic activist fund, the Murakami Fund, was dissolved in 2006 after the arrest of Yoshiaki Murakami on allegations of insider trading. However, new funds such as Effissimo Capital Management, Reno, C&I Holdings, and Strategic Capital—led by Murakami himself, a family member, or a former colleague—entered the market in the second wave. Funds established abroad by Japanese activists, such as 3D Investment Partners and Hibiki Path Advisors also began actively engaging with Japanese listed companies.

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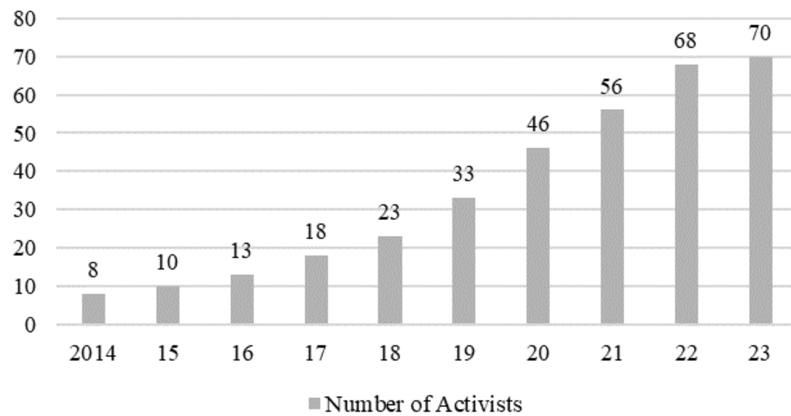
20 The Minutes of the 18 September 2013 Meeting of the Panel of Experts on the Stewardship Code, Japanese Version [日本版スチュワードシップ・コードに関する有識者検討会], available in Japanese at *https://www.fsa.go.jp/singi/stewardship/gijiroku/20130918.html*.



Number of Activists Active in Japanese Market (as of end of the CY)
Source: Daiwa Institute of Research, based on the material prepared by IR Japan Holdings Ltd.

Unlike the first wave—when mainstream domestic institutional investors were generally reluctant to support activist proposals and claims—hedge fund activists in the second wave were more frequently able to rely on their votes. This shift can be attributed to two main factors.

First, as mainstream investors expanded their passive Japanese equity portfolios tracking the TOPIX index, they became increasingly reliant on proxy advisory firms such as Institutional Shareholder Services (ISS) and Glass, Lewis & Co. As strong advocates of "Western"-style, shareholder-oriented corporate governance, these proxy advisors were more inclined to support activists in opposition to incumbent management.

A prominent example of this trend was ISS's recommendation in August 2015 to support a shareholder proposal submitted by activist funds that sought to appoint the well-known activist Yoshiaki MURAKAMI as a board director of Kuroda Electric. In this instance, had ISS mechanically applied its Proxy Voting Guidelines, it would have recommended voting against MURAKAMI, who failed to meet ISS's independence criteria and who had a prior conviction for illegal insider trading.[21] Although the proposal was ultimately rejected, it nevertheless received approximately 40% of the vote. The activist fund that had supported the proposal continued to hold shares in Kuroda Electric and, in June 2017, successfully secured a board seat for its nominee—this time not MURAKAMI—with the support of ISS.

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21 S. OSAKI, Time to Look at Regulating Proxy Advisory Firms, Nomura Research Institute Lakyara 224 (2015) 2.

Second, following the 2017 revision of the Stewardship Code—which mandated the detailed disclosure of voting outcomes—domestic institutional investors began to exercise their voting rights more mechanically, in accordance with their publicly disclosed proxy voting guidelines. In particular, when they had capital ties or well-known close business relationships with investee companies, they increasingly sought to demonstrate to the public that they were not taking an excessively conciliatory stance toward management.

Even the most conservative domestic institutional investor—Nippon Life, the largest life insurer in Japan—began disclosing its proxy voting results, albeit not immediately after the 2017 revision, but in 2019.

From a stewardship responsibility perspective, domestic institutional investors are no longer dismissing activist claims outright simply because they oppose management. Activist arguments are expected to receive more support than in the past from conservative institutional investors who still maintain a close relationship with established listed companies.

IV. The Third Wave and Beyond

1. *Evaluating Current Activism*

As mentioned in the introduction to this paper, Japan is currently considered the second-largest market for shareholder activism. The present vigorous expansion of activism represents a continuation of the second wave, yet it should more appropriately be characterized as a third wave. This classification is warranted by a major new surge in activity triggered by the Tokyo Stock Exchange's (TSE) March 2023 request that companies listed on the Prime and Standard Markets take measures aimed at "achieving management that is conscious of cost of capital and stock price."[22]

This request reflected the TSE's concern that many listed companies had stock prices falling below their "liquidation value," resulting in a price-to-book ratio (PBR) below 1.0. Notably, encouraging companies with low PBRs to make more effective use of their assets to boost stock prices has long been a central strategy of activist investors. In this respect, the perspectives of activists and the TSE were aligned. Indeed, the prominent activist firm Dalton Investments noted in its newsletter: "We recognize and applaud the TSE as Japan's most powerful activist, serving as the primary catalyst for reform."[23]

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22 TSE, Action to Implement the Management that is Conscious of the Cost of Capital and Stock Price (2024).

23 S. Hayashi and M. Nishida, Tokyo Stock Exchange (TSE) Reform Continues, posted on Dalton Insights, *https://www.daltoninvestments.com/tokyo-stock-exchange-tse-reforms-continue/* (2024).

An empirical study focusing on the second wave of activism, which occurred between 2014 and 2019, found that the stock prices of targeted firms responded positively to activist interventions.[24] The study also revealed that, unlike in the first wave, activist funds in this period did not necessarily concentrate on low-margin or undervalued companies.

It appears that activist funds have broadened their range of targets. Activists are now engaging not only with small- and mid-cap companies with underperforming stock prices but also with a wide array of large-cap listed firms. In terms of strategy, activist investors are evolving. They likely recognize that merely adopting a confrontational stance toward management or exploiting legal loopholes will not garner widespread support. Instead, they appear to be shifting toward approaches that seek to apply pressure through engagement with institutional investors and the broader public. Accordingly, some funds are moving beyond simplistic demands for balance sheet restructuring and are instead offering highly tailored proposals grounded in detailed financial, operational, and environmental analysis.

From another perspective, activist shareholders may be seen as offering the services of unpaid management consultants or talent scouts for listed firms. Rather than reflexively rejecting activist engagement or responding with hostility, companies would benefit from seeking common ground through constructive dialogue. In today's environment, what is required is the strategic acumen to leverage the rise of activism to enhance long-term corporate value.

That said, many corporate executives continue to associate activists with investors who aggressively push for measures such as share buybacks, large dividend increases, or the sale of real estate and securities holdings, often with a view to short-term stock price gains. Concerns also persist regarding hostile takeovers and "wolf pack" tactics, where multiple activist funds coordinate informally behind the scenes.

Such skepticism is not entirely unfounded. There are documented cases where activists quickly divest their holdings even after their proposals are adopted, exemplifying short-termist behavior. A notable example is the intervention in Didoh Limited Group by Strategic Capital (SC), an activist fund led by Tsuyoshi MARUKI, co-founder of the Murakami Fund.

SC submitted a shareholder proposal to nominate directors at Didoh's AGM in June 2024. The proposal was partially approved, and three SC-supported candidates were appointed to the board. In July 2024, Didoh announced a significant dividend increase—from 5 yen to 100 yen per share—for three consecutive years starting in 2025.

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24 H. MIYACHI/F. TAKEDA, Hedge Fund Activism in Japan under the Stewardship and Corporate Governance Code, International Advances in Economic Research 27 (2021) 119, 129.

The day after this announcement, SC sold all of its shares in Didoh. Four days later, one of the newly appointed directors backed by SC resigned, citing "personal circumstances."

2. Future Prospects of the Activism in Japan

In 2024, amendments to the Financial Instruments and Exchange Act introduced significant changes to the regulatory framework governing takeover bids (TOBs) and large shareholding disclosures. Notably, the revised provisions expanded the mandatory TOB requirements so as to include transactions executed through exchange markets and lowered the threshold from one-third to 30%. These modifications are expected to impose greater constraints on activist investors seeking to discreetly accumulate shares of target companies within the market. However, the reforms are unlikely to deter activist funds from engaging with Japanese publicly traded companies. In addition, discussions are ongoing regarding a potential amendment to the Corporation Act aimed at enhancing transparency in the disclosure of beneficial ownership in listed companies. Nevertheless, it is similarly anticipated that this prospective legislative change will not serve as a deterrent to activist investor interventions.

On the other hand, ongoing regulatory changes in the US market might deter activist funds to some extent.

In February 2025, the US Securities and Exchange Commission (SEC) published two significant documents that may negatively impact the aggressive engagement strategies pursued by certain institutional investors, including activist funds. The Staff Guidance on Regulation 13 D-G Beneficial Ownership Reporting, released on 11 February, redefines the circumstances under which investors engaging with companies on executive compensation, corporate governance, or social and environmental policies may no longer be allowed to report beneficial ownership using the Schedule 13G "short-form" and may instead be required to report via the Schedule 13D "long-form".[25]

The following day, the SEC staff issued Staff Legal Bulletin (SLB) 14M, which addresses several aspects of Rule 14a-8 and the SEC's no-action letter process. Most notably, SLB 14M rescinds SLB 14L in its entirety, reinstates guidance that SLB 14 L had previously rescinded, and provides clarifying views on the scope and application of the "economic relevance" exclusion provided by Rule 14a-8(i)(5) as well as the "ordinary business" exclusion under Rule 14a-8(i)(7).[26] In sum, the new guidance broadens the

25 "SEC Staff Adopts Significant New Guidance Affecting Shareholder Proposals and Engagement", Cooley alert, 14 February 2025.

26 Cooley alert, *supra* note 25.

circumstances in which a company may exclude a shareholder proposal from proxy materials prepared by management.

Although both documents are highly technical in nature, they could significantly impact activist engagement strategies and increase the costs associated with activist involvement. Moreover, additional regulatory changes imposing further burdens on activists may follow.

While it is still too early to make a definitive assessment, there is a possibility that Japan could emerge as the largest market for activist activities, surpassing the US, should the SEC indeed take a more restrictive stance toward activist investors under a second-term Trump administration.

SUMMARY

In recent decades, Japan has undergone a dramatic transformation in shareholder activism, evolving from a market dominated by passive cross-shareholding structures to one of the most active arenas globally. Before the 1990s, institutional investors such as banks, insurers, and pension funds prioritized stability over profit, often supporting management regardless of performance. Regulatory reforms in the late 1980s and 1990s—such as the Investment Advisors Act and the repeal of restrictive pension rules—opened the door for professional asset managers and more active investment strategies.

The first wave of activism emerged in the early 2000s, led by Yoshiaki Murakami's fund, which pioneered confrontational tactics. Foreign hedge funds soon followed, but regulatory pushback and the 2008 financial crisis curtailed their influence. A second wave began in the mid-2010s, fueled by corporate governance reforms under "Abenomics." The introduction of the Stewardship Code (2014) and the Corporate Governance Code (2015) encouraged institutional investors to engage more actively with companies, while proxy advisors like ISS and Glass Lewis bolstered activist campaigns. Domestic institutions, once reluctant, increasingly exercised voting rights in line with fiduciary duties.

Today, Japan is considered the second-largest market for activism, trailing only the U.S., and a third wave is presently underway, catalyzed by the Tokyo Stock Exchange's 2023 call for companies to improve capital efficiency and stock valuations. Activists now target both small- and large-cap firms, often presenting detailed financial and operational proposals rather than relying solely on confrontation. While skepticism persists—particularly regarding short-termist behavior—the broader trend suggests activism is reshaping corporate governance norms. With evolving regulations in Japan and potential restrictions in the U.S., Japan may soon become the world's leading market for shareholder activism.

Beyond Anglo-American Models

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

Hidefusa IIDA*

I. Introduction
II. Relationship between Corporate Value Standards and Respect for Shareholders' Intent
  1. Corporate Value Standard
  2. Principle of Shareholders' Intent
  3. Relationship between Corporate Value and Acquisition Price
  4. Should the defensive measure be legal without shareholders' express approval if the best acquisition price offer does not coincide with maximizing corporate value?
III. Partial tender offers and corporate value
  1. Prevalence and Characteristics of Partial Offers in Japan
  2. Overview of Japanese Takeover Bid Regulations
  3. Discussion of Partial Tender Offers
  4. The Advantages
  5. The Disadvantages
  6. Empirical analysis
IV. The Impact of Corporate Value Standards and the Principle of Shareholder Intent on Activism and Sustainability
  1. Anti-activist pills
  2. Sustainability Impact
V. Conclusion

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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I would like to thank seminar participants at Seoul National University, Goethe-Universität, and the Asian Corporate Law Forum. I submitted expert opinions to Nippo Sangyo, Japan Asia Group, and Tōkyō Kikai Seisakusho in the poison pill litigation discussed in the text. This work was supported by Nomura Foundation and JSPS KAKENHI (Grant Numbers JP 23H00033, 23K17537, 23K01160).
The links given were last checked on 30 June 2025.

scribed as the world's second-largest activist market.[1] 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).[2] These reforms decreased cross-shareholdings and relational shareholdings.[3] Institutional investors have increased their search for investment returns.[4] These changes have enabled proposals to replace the current management teams to gain the support of many shareholders.[5]

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.[6] 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.[7]

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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.[8] 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.[9]

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.[10] 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.[11]

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.[12] 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.[13] Third, Japanese law is unlikely to permit anti-

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.[14] 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.[15]

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.[16] 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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14 See *infra* Part IV.1.
15 See *infra* Part IV.2.
16 See *infra* Part II.3.

tion as it is generally unclear to courts whether a specific acquisition is desirable from a corporate value standpoint.[17]

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.[18] 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)[19]) 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.[20] The Supreme Court held that such a pill with discriminatory[21] 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.[22]

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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.[23] 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.[24] In 2023, METI published the "Guidelines for Corporate Takeovers",[25] 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.[26] 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://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."[27] 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.[28]

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.[29]

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."[30]

The guidelines state that corporate value is "a quantitative concept,"[31] a clarification made with the awareness that the term "corporate value" is used in multiple ways in public discourse.[32] 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."[33] 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."[34] 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.[35] 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%.[36]

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://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://perma.cc/F3U5-XQBL*].

ver offer, as in the *Delaware* case of Revlon v. MacAndrews.[37] 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.[38] 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."[39]

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."[40]

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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.[41] 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.[42] 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:[43] 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.

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.[44] 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.[45] 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, 買収防衛策イン・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.[46]

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.[47] 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.[48] 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.[49]

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.[50]

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.[51]

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.[52] 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.[53]

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.[54] 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.[55] The target company's board has no effective countermeasures against rapid market purchases before the record date of shareholder meetings.[56] 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

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] (26th 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.[57]

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[58] approved the injunction against the defensive measure, upholding the Ōsaka High Court's[59] finding—despite affirming an inference of necessity—that the measure was not reasonable (too excessive[60]).

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.[61]

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.[62] 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 enjoinment 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."[63]

Furthermore, the Takeover Guidelines attempt to logically organize defense measures from the perspective of shareholder intent.[64] 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.[65] 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.[66] 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."[67] 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

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.[68] In this respect, the Takeover Guidelines entertain a theoretical rationale.[69]

Furthermore, unlike the 2005 version, the 2023 Takeover Guidelines state that passive confirmation of shareholder intent is insufficient.[70] 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)."[71] 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."[72] 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[73] 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.[74]

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://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;[75] 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.[76] 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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75 W. TANAKA, 企業買収と防衛策 [Corporate Takeover and Defense Measures] (2012) 247.

76 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.[77]

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.[78] 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.[79]

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.[80]

Third, the acquisition might harm stakeholder interests (e.g., those of employees) and increase shareholder value.[81]

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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)[82] naturally contemplates expressing dissent in the target company's opinion report.[83]

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.[84] Outside such exceptional circumstances, triggering countermeasures based solely on the board's judgment is not permitted.[85]

In brief, inefficiencies in shareholder intent can sometimes result in takeovers that damage corporate value.[86] 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.[87] 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.[88] 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.[89] 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.[90] Partial tender offers are often used for various strategic

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.[91]

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.[92] 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.[93] 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.[94] 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.[95]

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.[96]

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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://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.[97]

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.[98] Tender offerors violating the pro-rata rule faced liability for damages to shareholders whose tendered shares were not purchased.[99] 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.[100]

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."[101]

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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.[102] 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.[103]

Purchasing such controlling blocks is considered to significantly affect other shareholders by changing control of the target company.[104] 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.[105] 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),[106] 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.[107] 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.[108]

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.[109]

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.[110]

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] (2nd 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.[111] 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.[112]

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%.[113] 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.[114] 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 HŌRITSU JIMUSHO [森・濱田松本法律事務所], M&A 法大系 [Comprehensive Analysis of M&A Laws of Japan] (2nd 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.[115]

It can also be argued that financially constrained acquirers can use their own shares as consideration (exchange tender offers).[116] 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.[117]

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.[118] 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.[119]

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

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] (3rd 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] (3rd 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.[120] 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.[121]

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.[122]

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://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.[123] 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.[124]

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.[125] 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.[126]

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
A. All Samples						
ROE_t	80	0,029	0,052	0,396	-1,994	1,733
ROE_{t+1}	80	0,050	0,069	0,255	-1,164	0,805
ROE_{t+2}	80	0,017	0,071	0,275	-1,551	0,625
ROE_{t+3}	80	0,085	0,079	0,221	-0,825	1,111
ROA_t	80	0,013	0,023	0,156	-0,778	0,728
ROA_{t+1}	80	0,023	0,028	0,115	-0,649	0,433
ROA_{t+2}	80	0,013	0,025	0,118	-0,640	0,323
ROA_{t+3}	80	0,042	0,038	0,105	-0,569	0,444
B. Pro-rata Settled Cases						
ROE_t	50	0,063	0,060	0,325	-0,931	1,733
ROE_{t+1}	50	0,041	0,069	0,209	-0,809	0,688
ROE_{t+2}	50	0,045	0,074	0,218	-0,817	0,625
ROE_{t+3}	50	0,080	0,078	0,170	-0,662	0,601
ROA_t	50	0,015	0,025	0,128	-0,778	0,226
ROA_{t+1}	50	0,016	0,025	0,111	-0,649	0,281
ROA_{t+2}	50	0,016	0,025	0,114	-0,640	0,273
ROA_{t+3}	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.[127]

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-

127 See DAVIES, *supra* note 107, 24.

holder structure and corporate profitability.[128] 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.[129] 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.[130] 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.[131] This raises the question: Will anti-activist pills similar to those used in the United States be employed in Japan?[132]

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.[133] 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 70th 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.[134] 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.[135] In other words, it is impermissible for boards of directors to introduce defensive measures to protect stakeholder interests separately from common shareholder interests.[136]

Shareholders remain free to make triggering decisions if they believe that their common interests are affected by employee treatment or other factors.[137] 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.[138]

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.[139] The court also held that disproportionate donations beyond the appropriate scope violated a director's duties.[140] 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.[141]

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

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] (8th 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 share-holder 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.

Some Recent Cases of Shareholder Activism in Japan

Ryo OKUBO*

I. Introduction
II. Japan's Global Position in Shareholder Activism
  1. Overview of Activism in Japan
  2. Driving Forces of Activism in Japan
III. Case Study 1: Going Private Driven by Activist – Fuji Soft
  1. Facts of the Case
  2. Key Takeaways
IV. Case Study 2: Takeover by Activist – Sun Electronics
  1. Facts
  2. Key Takeaways
V. Case Study 3: Takeover by Activist – Tohokushinsha Film Corporation
  1. Facts
  2. Key Takeaways
VI. Case Study 4: Defensive Going Private – Trancom
  1. Facts
  2. Key Takeaways
VII. Conclusion

I. Introduction

Over the past few years, we have witnessed how activism, which was once a relatively foreign concept in Japanese boardrooms, has taken root and evolved into a powerful force, reshaping how companies respond to their shareholders and how management teams make strategic decisions. In this paper, we'll explore some recent, real cases that illustrate the current climate.

II. Japan's Global Position in Shareholder Activism

1. Overview of Activism in Japan

To begin with, I would like to illustrate Japan's current position on the global stage.

Japan now ranks second in the world for shareholder activism, accounting for about 11% by number of cases and 10% by number of target companies of all activism cases globally, next to the U.S., which accounts for

* The links given were last checked on 18 July 2025.

64% and 61% respectively (see Figure 1). Global activists active in Japan include players from the U.S. (e.g., Dalton Investments), the UK (e.g., Silchester International Investors), Hong Kong (e.g., Oasis Management Company) and Singapore (e.g., 3D Investment Partners). In addition, domestic activists, most of them originating from the former Murakami Fund, have also actively invested (see Figure 2).

Figure 1: Japan Ranks 2nd Globally in Activism[1]

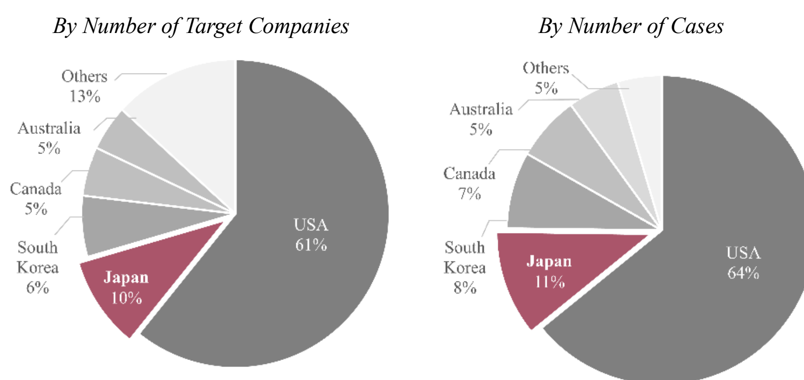

Figure 2: Major Activists in Japan[2]

Activists	Country	Invested Companies (holding)	Invested Companies (exited)	Average Holding Period (Year)	Stock Price Increase during Holding
Oasis Management Company	Hong Kong	29	1	2.14	78.09%
Silchester International Investors	UK	38	6	4.29	54.11%
Dalton Investments	USA	6	12	5.40	28.76%
Brandes Investment Partners	USA	1	0	14.90	–
ValueAct Capital	USA	2	0	2.41	36.62%
Taiyo Pacific Partners	USA	1	0	8.10	2.81%

1 Created from data on page 22 of the Shōji Hōmu No. 2372.
2 *https://www.thecode-online.com/activists*. fMF = former Murakami Fund.

Activists	Country	Invested Companies (holding)	Invested Companies (exited)	Average Holding Period (Year)	Stock Price Increase during Holding
レノ	Japan (fMF)	4	1	3.72	23.88%
C&I ホールディングス	Japan (fMF)	1	0	8.12	127.98%
Office Support	Japan	4	0	6.39	9.60%
シティインデックスイレブンス	Japan (fMF)	18	7	1.74	29.22%
南青山不動産	Japan (fMF)	10	0	1.29	4.00%
エスグラントコーポレーション	Japan (fMF)	11	0	2.07	5.07%
ストラテジックキャピタル	Japan (fMF)	17	3	3.73	304.81%
Effissimo Capital Management	Singapore (fMF)	25	2	5.56	203.75%
Asset Value Investors	UK	12	1	2.49	17.10%
Elliott Management	USA	–	–	–	-46.25%
Fir Tree Partners	USA	–	–	–	-44.45%
ひびき・パース・アドバイザーズ	Singapore	3	0	4.15	17.98%
3D Investment Partners	Singapore	7	2	2.70	16.03%
LIM Advisors	Hong Kong	3	0	2.74	–
RMB キャピタル	USA	5	1	4.87	–21.72%
King Street Capital Management	USA	–	–	–	890.04%
Steel Partners	USA	1	0	17.02	–
アルファレオホールディングス	Japan	0	1	3.80	89.83%
Marathon Asset Management	USA/UK/Japan	1	0	5.02	36.04%
Symphony Financial Partners	Singapore/Japan	16	1	5.07	58.38%
Usonian Investments	USA	–	–	–	-22.90%
Cornwall Capital	USA	1	1	4.21	472.07%
MFS Investment Management	USA/UK/Japan	23	4	3.79	14.06%
Artisan Partners	USA	7	2	2.46	-23.34%
タワー投資顧問	Japan	3	12	0.95	5.08%

2. Driving Forces of Activism in Japan

The drivers fueling this trend lie in a convergence of legal and corporate governance reform, economic opportunity, and increased powers of institutional investors and proxy advisers in Japan.

The introduction of the Corporate Governance Code in 2015 and the Stewardship Code in 2014 prompted dialogue between corporations and shareholders, unraveled the cross-shareholding once so common in Japan, and resulted in the abolishment of anti-takeover measures. Separately, in 2023, the Ministry of Economy, Trade and Industry (METI) published the "Guidelines for Corporate Takeovers", which opened the door to a wave of unsolicited takeovers in Japan.

At the same time, activists have identified a unique characteristic of Japanese markets: Many companies are significantly undervalued relative to their intrinsic worth. Japan has a large proportion of publicly listed firms trading below book value. In fact, as many as 45% of TSE Prime companies have a price-to-book ratio (PBR) lower than 1.0. This compares with 3% in the U.S. (U.S. S&P 500) and 17% in Europe (Stocks 600)[3]. This caused global players like Elliott Management, 3D Investment Partners, Dalton Investment, and Oasis Management Company turn their eyes toward Japan. They see a market full of latent value, often tied up in underutilized assets or listed subsidiaries. In 2023, the Tokyo Stock Exchange (TSE) demanded improvements from those companies whose PBR was lower than 1.0 and now requires more disclosure on listed subsidiaries. Such pressure from TSE has made activism easier. Generally low stock prices and a weak Japanese yen are also attractive to global players.

Finally, the power of institutional investors and proxy advisers has increased, and they have sometimes supported activists' proposals.

Due to these driving forces of activism, there's the rise of M&A activity, both driven by activists and responding to their influence. First, activists are pushing for takeovers, especially of companies that are perceived as undervalued or inefficiently managed. Sometimes these takeovers are direct; sometimes they take the form of acquiring a significant stake and lobbying for change. Second, we're seeing a growing number of going-private transactions, where companies delist from the public markets as a strategic move to avoid future challenges from activists and realign control with management and friendly investors. Further, due to activist pressure or to insulate activists, companies try to increase the corporate value by restructuring or monetizing assets through M&A activities.

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3 "PBR (株価純資産倍率) 1 倍割れ、米欧では少数", Nikkei Newspaper (electronic version), 23 February 2025, *https://www.nikkei.com/article/DGKKZO86923300S5A220C2EA2000/.*

III. Case Study 1: Going Private Driven by Activist—Fuji Soft

1. *Facts of the Case*

The first detailed case study is Fuji Soft. Fuji Soft, a technology company, also held a significant amount of non-core real-estate assets that weren't being fully utilized or monetized.

3D Investment Partners saw this and, acquiring 21.45% of the shares and becoming the largest shareholder, proposed a change of management and the sale of the company's real-estate assets.

In July 2023, Fuji Soft commenced a bidding process towards going private. On 14 June 2024, KKR submitted a binding offer at the proposed tender offer price of 8,800 yen. Soon, on 26 July, Bain Capital submitted a non-binding offer at the higher proposed tender offer price of 9,250 yen.

On 8 August 2024, KKR announced a tender offer plan disclosing that it had entered into a tender agreement with 3D Investment Partners. Fuji Soft's board resolved to support KKR's tender offer and recommended tendering to its shareholders. In response, Bain Capital on 3 September announced a preliminary tender offer plan subject to the support of Fuji Soft's board. The next day, KKR officially initiated a tender offer at a price of 8,800 yen. Bain Capital responded by announcing a tender offer plan at the price of 9,450 yen. The family that founded Fuji Soft, which owned 18.5% of the company, expressed support for Bain Capital while Fuji Soft's board maintained its support for KKR. On 15 November, KKR, after acquiring 35.11% through the tender offer, commenced a second tender offer at the price of 9,451 yen, beating Bain Capital's offer; but then, on 13 December, Bain Capital increased its planned tender offer price to 9,600 yen. On 4 February 2025, KKR went even higher, to 9,850 yen, overtopping Bain Capital's offer.

On 17 February, Bain Capital announced its decision not to proceed with a tender offer, and KKR's second tender offer successfully closed, acquiring 57.92% in total.

2. *Key Takeaways*

This case is emblematic of how activists are targeting firms with hidden value—particularly in real estate.

It is reported that listed companies in Japan have unrealized gains of 22 trillion yen in the aggregate tied up in real estate assets, so similar case may follow. So far, other examples of activists demanding the sale of real estate assets have included Fuji Media Holding (held by Dalton Investments), Sapporo Holdings (held by 3D Investment Partners), Tokyo Gas (held by Elliott Management), and Seibu Holdings (held by 3D Investment Partners).

Also notable in this case is the public reaction of Fuji Soft's founder. He welcomed Bain Capital as a so-called white knight, indicating a closer position to the company and its management team and voiced his discomfort with what he called "the logic of capital"—the idea that shareholder returns should outweigh all other considerations. It also shows the delicate negotiations between management, investors, and PE sponsors.

IV. Case Study 2: Takeover by Activist—Sun Electronics

1. Facts

The second case study involves Sun Electronics, a Japanese electronics firm that held a significant equity stake in Cellebrite, a U.S.-listed tech company, as an affiliated company accounted for by the equity method. The market capitalization of Sun Electronics was 88.5 billion yen while that of Cellebrite was 155.8 billion yen; thus, the market did not reflect the value embedded in Sun Electronics' stock price, creating a valuation gap.

Activist investor TWC saw an opportunity. In mid-2024, TWC launched an unsolicited tender offer. TWC argued that Sun's market capitalization did not reflect the value of Cellebrite, and that, as a strategic investor in Cellebrite who understood its business and had a right to designate a director of Cellebrite, TWC could improve the corporate value of Sun Electronics.

The board of Sun Electronics adopted a neutral position. They didn't support the tender offer, but they didn't oppose it either. As the result of the tender offer, TWC acquired 19.01% of Sun Electronics shares.

2. Key Takeaways

This case highlights how activists use listed subsidiaries or affiliates as a wedge to build their case for intervention. In Japan, as of 2022, approximately 260 companies have listed subsidiaries and approximately 960 companies have listed affiliates, so similar cases may follow.

V. Case Study 3: Takeover by Activist—Tohokushinsha Film Corporation

1. Facts

Our third case study is Tohokushinsha Film Corporation (TFC). In this instance, 3D Investment Partners (3D), which already held 17.65% of the company's shares, proposed a going private transaction. TFC responded by refusing to engage unless the activist signs a very strict non-disclosure

agreement (an NDA). The terms of this NDA, proposed by TFC, was in many aspects far off-market in favor of TFC, such that

(i) only 3D is obligated to maintain confidentiality;
(ii) the representative of 3D is personally liable for damages;
(iii) if TFC notified 3D of its breach of confidentiality obligation, unless 3D can muster sufficient evidence to prove that it had not breached its confidentiality obligation, 3D is liable for damages;
(iv) whether or not 3D could prove it did not breach its confidentiality obligation was to be determined by TFC, not by a court or any other body that ensures fair and equitable procedures;
(v) In case of breach of confidentiality obligation by 3D, 3D is liable for a penalty of 1 billion yen in addition to actual damages; and
(vi) 3D's confidentiality obligation is indefinite.

Ultimately, the activist walked away and then made the NDA markup public, clearly to criticize TFC's unique resistance strategy.

2. Key Takeaways

In the eyes of the board, this case raises a question: What kind of NDA is it appropriate for the company to propose when it receives an acquisition offer, and is it adequate to refuse due diligence by not cooperating on the NDA?

On the other hand, from the eyes of activists, this case highlights some disadvantages of unsolicited takeovers. First, the acquiror cannot conduct sufficient due diligence in this kind of contested situation. Second, without the cooperation of the company, it is difficult to prepare regulatory filings such as antitrust filings and foreign direct investment filings.

Takeovers by activists themselves are not very frequent. But there have been other recent examples in addition to Sun Electronics and TFC. First, in January 2020, Citi Index Elevens launched a tender offer against Toshiba Machinery to acquire up to 43% of its shares. Toshiba Machinery opposed the effort and introduced an anti-takeover measure at an extraordinary shareholders meeting, leading to Citi Index Elevens' withdrawal of its tender offer. Second, in May 2022, Yamauchi Number 10 Family Office (FYO) proposed to launch a tender offer against Toyo Construction. Since Toyo Construction objected, FYO tried to replace its directors in a proxy fight, securing seven seats in June 2023 versus the six seats the company won. However, FYO ultimately withdrew its tender offer proposal in face of opposition by the new board in December 2023.

These cases show how complex and drawn-out activist strategies can become in Japan and how companies are becoming increasingly sophisticated in defending themselves.

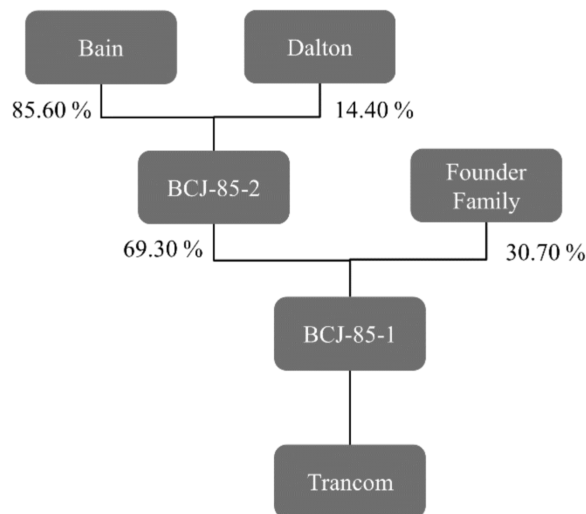
VI. CASE STUDY 4: DEFENSIVE GOING PRIVATE—TRANCOM

1. Facts

The fourth case involves Trancom, a logistics firm. In early 2024, Trancom faced operational stress due to labor regulation changes; specifically, stricter overtime limits for truck drivers had gone into effect. At the same time, Dalton Investments was gradually increasing its holdings in the company's stock to 18.09%.

Rather than waiting for a proxy fight, Trancom acted first, entering into a management buyout transaction sponsored by Bain Capital, with reinvestment from the founding family and even by Dalton Investments (see Figure 3 for the post-closing shareholding).

Figure 3: Going Private to Fend Off Activists—Trancom



This case seems a win-win strategy for both the company and the activist: The company was delisted from the public market, reducing the pressure from activists, while Bain Capital's control structure ensured governance stability and Dalton Investments' influence became clearly limited because Dalton Investments could appoint one director only to Bain Capital's intermediate holding company (BCJ-85-2) but not to Trancom itself. But the Dalton Investments on the other hand could benefit both from the premium of the tender offer and from potential future upside from the re-investment as a further sweetener.

2. *Key Takeaways*

This case shows how Japanese companies recently have used private equity firms as white knights to insulate themselves from activists. Another example is Toshiba's going private, sponsored by JIP in March 2023. The following press release by Toshiba summarizes how it decided to go private:

> "The current situation of multiple major shareholders with different views, repeated changes in management and major changes in management policy, and a series of turmoil surrounding the management of the Company are widely recognized by society.
>
> The risk of the continuation of the current unstable management base is greater than the impact of going private.
>
> It will alleviate the anxiety felt by employees about the direction of the Company."

VII. Conclusion

Cases of activism in Japan are no longer the outlier but instead are becoming part of the norm, with diverse patterns emerging. Meanwhile, Japanese boards are learning to navigate this space with new tools, from partnering with white knights to enacting anti-takeover measures.

Summary

Japan now ranks second globally in terms of shareholder activism. Recent legal and corporate governance reform, the existence of persistently undervalued companies—characterized by a low price-to-book ratio (PBR) and caused by a weak yen—and the rising influence of institutional investors as well as proxy advisers have catalyzed both global and domestic activists.

In this paper, four case studies illustrate how recent activities shape and influence mergers and acquisitions in Japan, providing examples of: (i) extracting hidden value of real estate value (Fuji Soft), (ii) extracting hidden value of listed subsidiaries or affiliates (Sun Electronics), (iii) responding to diligence and filing hurdles in unsolicited approaches (Tohokushinsha/3D), and (iv) private equity sponsoring as a means of fending off activists (Trancom).

Cases of shareholder activism in Japan are no longer the outlier and are instead becoming part of the norm, with diverse patterns emerging. Japanese boards are learning to navigate this space with new tools, from partnering with white knights to adopting anti-takeover measures.

Western Perspectives

The "New" Shareholder Activism

A Western Perspective

Wolf-Georg RINGE*

I. Introduction
II. Shareholder Activism in Regulatory Context
  1. US: Influence of Regulation
  2. UK and Germany: Impact of Ownership Structures
III. The Players: Who are the Activists?
  1. Corporate Raiders and the Takeover Wave of the 1980s
  2. Institutional Investors
  3. Hedge Funds
  4. Private Equity
IV. New Ground: ESG, Cyclicality, and More
  1. Overcoming the Financial Crisis
  2. Sustainability and ESG
  3. Portfolio Engagement
V. Conclusion

I. INTRODUCTION

In its most general form, shareholder activism means nothing more than an active, engaging shareholder who does not simply consider the investment made as purely financial, but as strategic. In reality, however, activism comes in many different shapes and has developed significantly over time. During the 1980s, it appeared in the form of "corporate raiders" dictating company policies, or as leveraged buyout funds taking public companies private to change corporate policy. Also, some pension funds like California Public Employees' Retirement System (CalPERS) have exerted pressure on management in publicly listed companies, often in the form of behind-the-scene negotiations. Since the turn of the century, hedge funds have discovered corporate activism as their business model and have evolved to the forefront of activism. Current activist campaigns are noticeably affected by global macroeconomic events such as the climate crisis, the Covid-19 pandemic, and the 2022 Russian invasion of Ukraine. In this context, many activists turned towards impact investing, with an increased focus on im-

* The provided links were last checked on 4 November 2025.

proving environmental, social, and governance (ESG) policies[1] as well as towards coalition-building between different stakeholders.[2]

In any case, it is important to bear in mind that each shareholder activist pursues their own style of trading and methods for engaging with the corporate management, within the relevant legal and regulatory environments.[3] Without doubt these varying facets accord a degree of complexity to the meaning of shareholder activism. This short contribution traces the evolution of activism over time and illustrates how it has changed character over and over again.

II. Shareholder Activism in Regulatory Context

In general terms, early forms of shareholder activism encompassed all forms by which shareholders engaged with targeted corporations on matters of company policy. This broad meaning was subsequently broken down into formal and informal activism.[4] Shareholder activism of a formal nature takes place in the public domain, for example at annual general meetings. Gillan and Starks consider there to be three residual categories to formal shareholder activism: namely, "transacting" shareholders, whereby shareholders voice their views on the performance of the targeted corporation by purchasing or selling shares; "activist blockholders" who focus on influencing decision making by gaining a minority control in the targeted corporation and voicing their views; and finally shareholders who seek to implement their changes by gaining control of the company, availing themselves of a (hostile) takeover.[5] Informal shareholder activism, in contrast, occurs in private, behind closed doors, and away from the prying eyes of the public. It therefore rarely attracts any media attention, rendering it near impos-

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1 C. HOWARTH, Pension funds join impact investing campaign for a better world, Financial Times, 8 July 2019, *https://www.ft.com/content/ecfc64c0-aee6-3458-b9d7-bbcc7895ab96*; M. SAWYER/L. BOEHMKE/S. LINDSAY, 2022 U.S. Shareholder Activism and Activist Settlement Agreements, Harvard Law School Forum on Corporate Governance, 5 January 2023.

2 W.-G. RINGE, Investor-Led Sustainability in Corporate Governance, Annals of Corporate Governance 7 (2022) 93, 121 ff.

3 S. L. GILLAN/L. T. STARKS, The Evolution of Shareholder Activism in the United States, Journal of Applied Corporate Finance 19 (2007) 55.

4 L. TALNER, The Origins of Shareholder Activism (1983), quoted in R. F. BALOTTI/J. A. FINKELSTEIN/G. P. WILLIAMS, Meetings of Stockholders (1996), at para. 5.4; H. SCHÄFER/C. HERTRICH, Shareholder Activism in Germany: Theoretical Considerations and Empirical Evidence (2011), at 5.

5 S. L. GILLAN/L. T. STARKS, A Survey of Shareholder Activism: Motivation and Empirical Evidence, Contemporary Finance Digest 2 (1998) 10.

sible to prove unless one has access to an activist's private database.[6] Although the above goes some way in defining the generalist traits of shareholder activists, the evolution of shareholder structures, regulatory regimes, and stock markets in the UK, US, and continental Europe have played a crucial role in influencing activist engagements. Shareholder activism in other parts of the world has been less pertinent and will be discussed in this paper only occasionally.[7]

1. US: Influence of Regulation

The enactment of regulation by lawmakers and market conditions have often had a twofold impact on shareholder activism; namely either acting as a deterrent, by, for example, erecting obstacles with the purpose of hindering investors from gaining majority holdings in companies, or alternatively facilitating shareholder activism, by for example, deregulating fixed commission rates and thus increasing the incentives for fund managers to maximize returns for investors. If one takes the US as an illustration, it becomes evident that regulation has often been enacted in response to developments on the stock market.[8] For example, the Buttonwood Agreement of 1792[9] was a response to a market crash at the time and the virtual cessation of credit, trading, and liquidity. The agreement itself set minimum stockbroking commissions and was in force until the 1970s upon which commission rates became fully negotiable as fixed commission rates were abolished completely.[10] It has been argued that a combination of the deregulation and the technological advances at the time, such as the arrival of the personal computer, facilitated the ease in which stocks were traded on the stock market for the first time.[11]

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6 See, e.g., W. T. CARLETON/J. M. NELSON/M. S. WEISBACH, The Influence of Institutions on Corporate Governance Through Private Negotiations: Evidence from TIAA-CREF, Journal of Finance 53 (1998) 1335; M. BECHT et al., Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes U.K. Focus Fund, Review of Financial Studies 22 (2009) 3093.

7 For a broader perspective, see R. V. AGUILERA/R. FEDERO/Y. PONOMAREVA, Gone Global: The International Diffusion of Hedge Fund Activism, in: Cumming/Johan/Wood (eds.), The Oxford Handbook of Hedge Funds (2021) 318.

8 R. J. GILSON/J. N. GORDON, The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights, Columbia Law Review 113 (2013) 863.

9 The Buttonwood Agreement in essence led to the investment community on Wall Street and the creation of the New York Stock Exchange.

10 B. R. CHEFFINS/J. ARMOUR, The Past, Present, and Future of Shareholder Activism by Hedge Funds, Journal of Corporation Law 37 (2011) 51, 72.

11 Id. at 71–72.

The enactment of the Glass–Steagall Act in 1933[12] was furthermore a response to market events and in this particular case a direct response to the 1929 stock market crash, a nationwide commercial bank failure, and the Great Depression. The Act itself led to a clear demarcation between the activities of investment and commercial banking as it was considered that the overzealous investment strategies of commercial banks were directly responsible for the 1929 stock market crash. In particular, it has been argued that the Glass–Steagall Act contributed towards a rapid decline in shareholder activism.[13] However, subsequent legislation such as codification of shareholder entitlement by the Securities and Exchange Commission (SEC) in 1942 yet again facilitated shareholder activism. This instance marked the advent of the first shareholder proposal rule.[14] The rule enabled shareholders to submit proposals for vote at (annual) general meetings and facilitated the predominant means by which shareholders could actively participate in postwar company life. The rationale behind the rule was to reincarnate the widely attended meetings that were characteristic of the times when companies were geographically limited and locally owned.[15] This arguably paved the way for shareholder engagement and activism, which is illustrated by the fact that a mere 50 proposals were recorded annually in the 1940s whilst an average of 220 proposals were recorded by 1969, and circa 650 proposals were recorded annually by 1979.[16]

The abolition of the Glass–Steagall Act in 1999 and subsequent deregulations played a prolific role in fueling competition in the American financial landscape and arguably triggered an increase in the exploitation of investment banking opportunities by, inter alia, engaging in risk-averse investment strategies during mergers and acquisitions.[17] However, the Bull Market of the late 1980s and early 1990s saw a downturn in shareholder

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12 The Glass-Steagall Act, also known as the Banking Act of 1933, inter alia created the Federal Deposit Insurance Corporation (FDIC) and imposed conditions on the banks that received its protection.

13 P. SANTELLA/E. BAFFI/C. DRAGO/D. LATTUCA, Legal Obstacles to Institutional Investor Activism in the EU and in the US, European Business Law Review 23 (2012) 257, 258.

14 For (sparse) data on shareholder activism between 1900 and 1950, see J. H. ARMOUR/B. R. CHEFFINS, Origins of "Offensive" Shareholder Activism in the United States, in: Koppell (ed.), Origins of Shareholder Advocacy (2011) 253.

15 B. LONGSTRETH, SEC Commissioner, in a speech entitled The S.E.C. and Shareholder Proposals: Simplification in Regulation, 11 December 1981, www.sec.gov/news/speech/1981/121181longstreth.pdf, at 3.

16 Id.

17 M. GALANIS, Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re) Balancing?, Oxford Journal of Legal Studies 31 (2011) 327.

activism as investors took a step back and relied on the gadflies to uphold shareholder rights.[18] Nevertheless, subsequent financial disasters, such as those seen at Enron and Tyco, in addition to the credit bubble of the mid-2000s, presented the ideal platform for a re-emergence of shareholder activism as hedge funds took center stage.[19] With an availability of cheap debt, market conditions were ripe for activists to lobby their targeted corporations for the distribution of cash to shareholders or for the sale of the corporation itself.[20] Paradoxically, the financial crisis that plagued the global economy from 2007 to 2011 marked a downturn in shareholder activism. This also stands in contrast to the more recent macroeconomic developments, including the continuing impacts of Covid-19 such as global supply chain issues and the 2020 stock market crash.[21] In this environment, activists saw depressed stock prices and struggling companies as an investment opportunity.[22]

2. *UK and Germany: Impact of Ownership Structures*

As we saw above, ownership patterns may prompt the emergence of rather different types of activism. If one takes the UK as an illustration, it becomes apparent that a dispersed ownership structure and an emergence of shareholder activism were in essence driven by policy. In contrast, the domination of controlling shareholders in corporate Germany fueled shareholder activism as minority shareholders rebelled against their controlling influence.

In the first instance, the dispersion of ownership in England only emerged after World War II as families began to unwind their controlling stakes in companies to benefit, inter alia, from tax incentives that favored diversification and the managerial revolution.[23] Furthermore, legal reforms gave minority shareholders a voice for the first time.[24] However, despite being relatively groundbreaking in nature as they represented the first statutory remedy for shareholders in England, they proved relatively inadequate

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18 J. SUROWIECKI, To the Barricades, The New Yorker, 9 June 2003, *http://www.newyorker.com/magazine/2003/06/09/to-the-barricades*.

19 J. ARMOUR/B. CHEFFINS, The Rise and Fall (?) of Shareholder Activism by Hedge Funds, The Journal of Alternative Investments 14(3) (2012) 17, 20.

20 CHEFFINS/ARMOUR, *supra* note 10, at 91–92.

21 World Bank, World Development Report 2022, Finance for an Equitable Recovery, *https://openknowledge.worldbank.org/bitstream/handle/10986/36883/9781464817304.pdf*.

22 SAWYER/BOEHMKE/LINDSAY, *supra* note 1.

23 BRIAN R. CHEFFINS, Corporate Ownership and Control: British Businesses Transformed (2008), chs. 2–4.

24 In particular, the Companies Act 1948.

in reality.[25] Lord Hoffman shed further light on the matter by stating that it was not until 1980 that Parliament gave the unfairly treated minority shareholder the power to "slay the dragon" by passing into law the "unfair prejudice" remedy, which is now found in section 994 of the Companies Act 2006.[26] Thus, despite reforms occurring in 1948 it was only in 1980 that minority shareholders finally gained a voice in the UK stock market. For various reasons, however, they did not take up the legal instruments that were available to them. The "unfair prejudice" remedy ultimately only really applies to small, quasi-partnership companies, and is unsuitable for large public companies.[27] The other minority shareholder activism tool, the derivative claim, suffered a setback in the famous decision *Prudential Assurance v Newman*, the only reported case where a UK institutional investor brought a derivative suit against directors of a portfolio company.[28] Despite the codification and extension of this remedy in the 2006 Act,[29] it has not gained great prominence for activist investors to date.

So, in sum, although shareholder rights became enforceable by law, many investors, and especially institutional investors, were cautious about engaging in activism. This was also due to fears of either being found guilty of market abuse because of potentially being privy to insider information or being considered to be acting in concert within the definition of the UK Takeover Code.[30] As such, activism per se did not materialize in full

25 Lord Hoffman as cited in the foreword to the first edition to R. HOLLINGTON, Shareholders' Rights (now 10th ed., 2024). Section 459(1) Companies Act 1985 (now section 994 Companies Act 2006) enables a shareholder to apply to the court by petition for an order on the ground that the company's affairs were being or had been conducted in a manner which was unfairly prejudicial to the interests of some members of the company.

26 Lord Hoffman as cited in the foreword to Hollington. See *supra* note 25.

27 Academic studies show that there are only six unfair prejudice petitions involving publicly traded companies that resulted in a judicial decision between 1998 and 2006, three of which involved allegations of misfeasance by the company's directors. See J. ARMOUR, Enforcement Strategies in UK Company Law: A Roadmap and Empirical Assessment, in: Armour/Payne (eds.), Rationality in Company Law: Essays in Honour of D.D. Prentice (2009) 71.

28 *Prudential Assurance Co. Ltd v. Newman Industries Ltd* [1982] Ch 204. See on this B. R. CHEFFINS/B. BLACK, Outside Director Liability Across Countries, Texas Law Review 84 (2006) 1385, 1407; ARMOUR, *supra* note 27, at 115; also G. P. STAPLEDON, Institutional Shareholders and Corporate Governance (1996) 132.

29 The derivative claim is now restated in ss. 260 ff. Companies Act 2006.

30 I. CHIU, The Foundations and Anatomy of Shareholder Activism (2010) 29. The aim of the Takeover Code is to ensure fair and equal treatment of all shareholders during takeovers and furthermore provide a framework for the manner in which takeovers are to be conducted.

until the UK's 2008 banking crisis led to a call on institutional investors to take a more proactive approach in the enforcement of corporate governance. Consequently, shareholder activists began to gain a reputation for overcoming apathy and actively engaging in the strategies of their targeted corporations.

In the second instance, the ownership structure of the "Germany AG," which was characterized by a concentration of ownership due to extensive cross-shareholding networks, and long-term relational financial ties between banks, insurance companies, and institutional firms, guaranteed not only ownership stability and continuity but also acted as a shield against hostile takeovers.[31] With blockholders dominating the shareholder community and, to a degree, the supervisory board, minority shareholders were left with no other option but to engage in activism in order to maximize the returns on their investments. In any case, the abolishment of the capital gains tax on the sale of cross-shareholdings in early 2002 marked a pivotal change in Germany's former low-liquidity insider market.[32] The removal of capital gains tax on the sale of cross-shareholdings opened the floodgates to foreign investors who had previously only held circa 18% of German stocks.[33] As foreign investors arrived on the German market so too did shareholder activists. This pivotal change undermined the ownership networks that had shielded German corporations from takeovers for decades.

In summary, it becomes evident that regulatory changes have not only been influential on the extent of shareholder activism but that developments in global markets and ownership structures have played an equally influential role on the commonality of shareholder activism.

III. The Players: Who are the Activists?

Turning to the identity and characteristics of the activists themselves, these have also undergone dramatic changes over time. The takeover wave of the 1980s in the US became synonymous with corporate raiders buying shares to gain control of their targeted corporations. However, the primary goal of

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31 J. CIOFFI, Corporate Governance Reform, Regulatory Politics, and the Foundations of Finance Capitalism in the United States and Germany, German Law Journal 7 (2006) 533, 540; A. ONETTI/A. PISONI, Ownership and Control in Germany: Do Cross-Shareholdings Reflect Bank Control on Large Companies?, Corporate Ownership and Control 6 (2009) 54, 72; W.-G. RINGE, Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG, American Journal of Comparative Law 63 (2015) 493.

32 N. HOLLOWAY, The End of Germany AG, Forbes, 11 June 2001, *http://www.forbes.com/global/2001/0611/024.html*. See in more detail RINGE, *supra* note 31.

33 HOLLOWAY, *supra* note 32.

gaining control of their targeted corporations was not in pursuit of making returns from the corporation's operational profits but to raise the firm's listed value to maximize the returns as shares were subsequently sold at peak prices.[34] Buying or selling businesses, or threatening to do so, became more lucrative than actually running a company, and consequently led to the takeover wave of the 1980s.

1. Corporate Raiders and the Takeover Wave of the 1980s

The takeover wave of the 1980s was characterized by daring takeover bids that were engineered by corporate "raiders" on the basis of aggressive and innovative financial techniques.[35] An activist cohort subsequently established itself in the US which specifically targeted underperforming corporations in the hope of improving operational performance before exiting. Amongst others, the operating performance of a targeted corporation was often improved by initiating changes to the firm's strategy. However, despite their apparent success, it remains undisputed that the purchase of these shareholdings was financed predominately out of debt with limited equity which generated short-term gains and left no company safe from a hostile bid.[36] In consequence of their aggressive strategies, opposition to corporate raiders soon mounted, not only on the part of the targeted corporations themselves via the implementation of defense strategies but also on the part of the government, which took action to protect the interests of targeted corporations. Although takeover defense strategies became plentiful, the most successful was colloquially known as the "poison pill" defense.[37] The "poison pill" strategy can either come in the form of a flip-in or flip-over but fundamentally allows the target corporation to reduce the value of or dilute its stock in order to ward off a hostile bid.[38]

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34 A. D. BOYER, Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons from the Robber Barons, Washington and Lee Law Review 50 (1993) 977, 978.

35 CHEFFINS/ARMOUR, *supra* note 10, at 75–76.

36 M. R. PATRONE, An International Comparison of Corporate Leeway to Ward Off Predators, Butterworths Journal of International Banking and Financial Law 25 (2010) 355, 355.

37 The "poison pill" defense was developed by Martin Lipton, a New York attorney, in order to help El Paso Co. fend off a hostile takeover bid. See *id.*

38 A flip-in poison pill is the more frequently used out of the two and enables existing shareholders to purchase further stock at a discount when the poison pill is activated by a hostile bidder. This has the effect of diluting the would-be acquirer's stock in the target and thus deters a hostile acquisition. In contrast, a flip-over enables shareholders to purchase the acquirer's shares at a discounted price but only after

By the early 1990s, however, the reception of the poison pill made classical "raider" tactics unworkable. The pill had fundamentally changed the distribution of hostile takeovers in favor of target shareholders, at the expense of returns to acquirer shareholders. While they remained socially efficient (this is just the slicing up of the pie), a business model of engaging in "raiding" by acquiring companies, implementing changes, and then exiting, became less appealing. Moreover, once a takeover attempt became public, event-driven traders would rapidly bid the price up to the highest expected price that will be offered in the tender offer, reverse engineering any gains from the transaction. This means that the acquirer really only made money on the first toehold of 5%, before the initial disclosure obligation is triggered.

2. *Institutional Investors*

The decline of the classical "raider" was paralleled by the rapid growth of institutional investors during the 1980s. This was primarily a response to an increased proportion of household savings being invested directly in equity and corporate bonds via private-funded pension schemes and life-insurance policies as the longevity of the aging population increased.[39] Larger portfolios meant that many institutional investors could no longer dispose of large blocks of stock on the market at any one time and were thus forced to alter their strategies from one centered on exit to one that advocated activist engagement in pursuit of profit maximization.[40] Additionally, the disposal of large stocks on the market at any one time was no longer an option as it risked triggering sharp falls in stock valuation, a market crash, and a probable reduction in the value of portfolios.[41]

Although the rapid growth and subsequent increase in institutional investor portfolios forced investment strategies to be altered, the rise of institutional shareholder activism in the UK was predominantly driven by policy. Policymakers in the UK were the driving force in advocating that institutional shareholders engage in activism in response to wider corporate governance concerns and the social good.[42] The policy-led drive for engagement in the UK was more in keeping with a shareholder's responsibility

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the merger has taken place. In the last 15 years the poison pill has only been triggered intentionally twice. Id.

39 Id.

40 J. M. LORING/C. K. TAYLOR, Shareholder Activism: Directorial Responses to Investors' Attempts to Change the Corporate Governance Landscape, Wake Forest Law Review 41 (2006) 321, 324.

41 Id.

42 CHIU, *supra* note 30, at 18.

and accountability to the market at large as opposed to promoting investment strategies tailored towards profit maximization. Scholars further argue that this policy-led drive for activism in pursuit of greater corporate governance was also widespread in continental Europe and was subsequently embodied in regulation and corporate governance codes.[43] It is argued that institutional investors are best placed to enforce corporate governance as, unlike individual investors, they are operating within a professional capacity and thus have the necessary expertise to manage the investment funds within their portfolios.[44] Irrespective of the origins in the surge of activist engagements, it should be noted that institutional investors are often constrained in their ability to partake in shareholder activism due to their own conflicts of interests.[45] Moreover, institutional investors are also limited in their penchant towards activism by rules mandating certain diversification requirements of their holdings.[46] Both points distinguish them from hedge funds, to which we now turn.

3. Hedge Funds

Nearly two decades after corporate raiders dominated stock markets, hedge funds began to re-emerge, filling the gap that had been left by institutional investors due to their concerns over conflicts of interests and regulatory constraints.[47] Despite re-emerging in the 1990s it was only in the twenty-first century that hedge funds took center stage.[48] Their ability to take the

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43 C. van der ELST, Revisiting Shareholder Activism at AGMs: Voting Determinants of Large and Small Shareholders, ECGI Finance Working Paper No. 311/2011, *http://ssrn.com/abstract=1886865*, at 12.

44 Id.

45 A. HAMDANI/Y. YAFEH, Institutional Investors as Minority Shareholders, Review of Finance17 (2013) 691.

46 For example, European UCITS (mutual funds) are subject to the so-called "5/10/40 rule", which means that a maximum of 10% of a UCITS fund's net assets may be invested in securities from a single issuer, and that investments of more than 5 per cent with a single issuer may not make up more than 40 per cent of the whole portfolio. See Directive 2009/65/EC (as amended), Art. 52.

47 On hedge fund activism generally, see E. HELLEBUYCK, Activist Hedge Funds and Legal Strategy Devices, in: Masson/Shariff (eds.), Legal Strategies: How Corporations Use Law to Improve Performance (2009) 277; S. GERAGHTY/H. SMITH, Shareholder Activism as a Strategy for Hedge Funds, in: Astleford/Frase (eds.), Hedge Funds and the Law (2010) ch. 8; M. BUTU, Shareholder Activism by Hedge Funds: Motivations and Market's Perception of Hedge Fund Interventions (2013); A. HAMDANI/S. HANNES, The Future of Shareholder Activism, Boston University Law Review 99 (2019) 971.

48 CHEFFINS/ARMOUR, *supra* note 10, at 80.

stock market by storm with currently over $4 trillion under management,[49] a cutting-edge investment strategy which centered on corporate activism, and a cut-throat “do what it takes” mentality were arguably in part a result of their organizational structure and the subsequent lack of regulation governing their operations.[50] Many activist hedge funds are run by similar figures that had already been active as “raiders” during the 1980s, but now using different tactics: after full control contests had become too expensive, they felt able to achieve their goals just as effectively without actually following through with a full seizure of control. Today, they frequently take a small stake in their target, combined (potentially) with a proxy fight to deliver changes in corporate governance or operational strategy—very much along the lines of a classic disciplinary takeover. Alternatively, they could use the stake to agitate for a merger with a strategic partner that would unlock synergies—and a payday for target shareholders.

By comparing hedge funds with institutional investors, it is possible to shed some light on their unique business structure that has enabled them to pursue a strategy of corporate activism away from the prying eyes of the public and policy makers. Although hedge funds are commonly managed from the US or the UK, they are typically incorporated in offshore jurisdictions and are thus subjected to a minimal degree of public oversight and regulation.[51] This has enabled hedge funds to increase their market power whilst diversifying their risks by benefiting, inter alia, from the use of derivatives contracts, from overweighing target stock, and from high levels of leverage.[52]

Furthermore, unlike institutional investors, hedge funds are not constrained by potential and/or actual conflicts of interests in pursuing their investment strategies. This is predominately due to the fact that they avoid investing in large entities where wider interests can often conflict with a duty towards their investors.[53] By rather opting to invest in corporations that enable them to make trading-induced profits with a quick turnaround, hedge funds do not run the risk of being confronted with potential conflicts

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49 J. COX, Hedge Fund Assets Soar to Record High Amid Boom in Trading Profits, CNBC, 2 June 2021, *https://www.cnbc.com/2021/06/02/hedge-fund-assets-soar-to-record-high-amid-boom-in-trading-profits.html*.

50 P. CROWNEY, Proxy Warriors, Institutional Investor, 31 December 2002, *https://www.institutionalinvestor.com/article/2btgjg8p0a1uihjxcf9xc/corner-office/proxy-warriors*.

51 EUROPEAN PARLIAMENT, The Economic Consequences of Large Shareholder Activism, Study No. IP/A/ECON/IC/2009-004, at 23.

52 Id.

53 European Parliament, Hedge Funds: Transparency and Conflict of Interest, Study No. IP/A/ECON/IC/2007-24 (2007), at 26.

of interest.[54] Targeted corporations are frequently undervalued, presenting the ideal opportunity for profit maximization via shareholder activism.

Their often aggressive tactics in the pursuit of profit maximization in the short term can be attributed to the performance-based compensation schemes for hedge fund managers which contrast greatly with the fixed compensation fees earned by institutional investors.[55] This compensation scheme typically comprises of an annual fixed fee that ranges from 1–2% of portfolio assets in addition to a performance-based fee ranging from 15–25% of the profits earned annually.[56] This arguably aligns the interests of fund managers and investors in generating maximum returns on investments. Thus, shareholder activism is purely an element of a hedge fund's investment strategy as opposed to the concurrent enforcement of corporate governance that is pursued by many other institutional investors today.[57]

As such, markets fully anticipate that the engagement by a hedge fund in a targeted corporation will undoubtedly lead to an improvement in the target's operational performance.[58] It is therefore common to witness steep increases in stock prices as hedge funds make their initial stock purchase in the target. Empirical data from the US and Europe illustrate that hedge fund engagement mostly involves advantages for other target shareholders. According to these studies, the initial investment decision by an activist hedge fund is usually related to a substantial increase in their returns.[59] For what

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54 Id.

55 M. MIETZNER/D. SCHWEIZER/M. TYRELL, Intra-Industry Effects of Shareholder Activism in Germany: Is There a Difference between Hedge Fund and Private Equity Investments?, Schmalenbach Business Review 63 (2011) 151, 156.

56 W. N. GOETZMANN/J. E. INGERSOLL, Jr./S. A. ROSS, High-Water Marks and Hedge Fund Management Contracts, Journal of Finance 58 (2003) 1685. The typical arrangement is a "2 and 20" standard. It consists of a 2% management fee on assets under management and a 20% performance fee; the latter of which is only charged when the fund's profits exceed prior levels. D. CUMMING/S. JOHAN/G. WOOD (eds.), The Oxford Handbook of Hedge Funds (2021), at 38.

57 M. KAHAN/E. B. ROCK, Hedge Funds in Corporate Governance and Corporate Control, 155 University of Pennsylvania Law Review 155 (2007) 1021, 1028. See also A. ENGERT, Transnational Hedge Fund Regulation, European Business Organization Law Review 11 (2010) 329.

58 See the overview provided by M. R. DENES/J. M. KARPOFF/V. B. MCWILLIAMS, Thirty Years of Shareholder Activism: A Survey of Empirical Research, Journal of Corporate Finance 44 (2017) 405.

59 A. BRAV et al., Hedge Fund Activism, Corporate Governance, and Firm Performance, Journal of Finance 63 (2008) 1729; A. KLEIN/E. ZUR, Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors, Journal of Finance 64 (2009) 187; BECHT et al., *supra* note 6.

we know, these increased returns are apparently real long-term returns,[60] and they appear as a consequence of real improvements and reliable profits, and not a mere redistribution to the detriment of debtholders and other stakeholders.[61] Also, research has documented a positive impact of hedge fund engagement on corporate innovation.[62] Further, the holding periods of hedge funds are much longer than previously anticipated.[63]

Regulatory strategies following the financial crisis targeted hedge funds in particular. It is notable, however, that none of these regulatory instruments targeted the implications of hedge fund activity for the functioning of traditional corporate governance mechanisms. It is clear that hedge funds' sophistication in exploiting the traditional categories and tools of corporate governance poses significant challenges for regulators and lawmakers.[64] For example, the EU AIFM Directive and the US Dodd-Frank Act limit themselves to certain rules on the registration and supervision of hedge fund managers, and do not pursue an activities-based approach.[65]

4. *Private Equity*

The twenty-first century also marked the emergence of private equity funds which have frequently been compared with hedge funds due to their innate similarities. Nevertheless, despite their concurrent reputations for activist engagement and similar remuneration structures for fund managers, they arguably deploy different investment strategies. As opposed to the short-term investment strategies of hedge funds, private equity funds will typically focus on longer-term investments which are innate to closed-end funds. Investments of a closed-end fund in targeted corporations will usually last five years, at which point in time the fund will exit passing the proceeds to

60 L. BEBCHUK/A. BRAV/W. JIANG, The Long-Term Effects of Hedge Fund Activism, Columbia Law Review 115 (2015) 1085; E. DEHAAN/D. LARCKER/C. MCCLURE, Long-Term Economic Consequences of Hedge Fund Activist Interventions, Review of Accounting Studies 24 (2019) 536.

61 BRAV et al., *supra* note 59.

62 BRAV et al., How Does Hedge Fund Activism Reshape Corporate Innovation? Journal of Financial Economics 130 (2018) 237.

63 B. CHAKRABARTY/P. C. MOULTON/C. TRZCINKA, Institutional Holding Periods, Working Paper 2013, *http://ssrn.com/abstract=2217588*.

64 On this, W.-G. RINGE, Hedge Funds and Risk-Decoupling: The Empty Voting Problem in the European Union, Seattle University Law Review 36 (2013) 1027, 1033.

65 See HOUSE OF COMMONS, Treasury Committee, Banking Crisis: International Dimensions, HC 615 (2009) p. Ev 90f. There are just a few such abstract provisions, in particular on risk and liquidity management, see Arts. 12 ff. of the AIFM Directive.

their investors.[66] Adopting a long-term investment strategy with a corporation arguably implies that a private equity fund will be inclined to adopt a "hands-on approach" with the board as they are of the opinion that this method is the most effective in generating value before the firm is either sold or rejoins the market.[67] This contrasts greatly with the strategies deployed by hedge funds as they typically avoid majority or sole ownership, preferring to reap rewards as minority shareholders.[68] With a long-term outlook, it is more common for private equity funds to actively engage in the strategy and management of their targets; an engagement policy which is argued to be pivotal in generating shareholder wealth and enabling a fund to exit with profit.[69] A study conducted by Acharya and co-authors revealed that private equity funds play an active role in the strategy of the targeted firm, with 89% of interviewees citing value creation and 56% of interviewees citing exit as their principal priorities.[70]

IV. New Ground: ESG, Cyclicality, and More

Over the past several years, activists have demonstrated remarkable flexibility and adaptability to shifting trends. Not only did they emerge from the 2008 financial crisis stronger than before, but they also capitalized on subsequent crises. They leveraged the climate crisis and the ESG investing boom of the late 2010s and early 2020s just as effectively as they exploited the Covid-19 pandemic and the oil crisis following Russia's attack on Ukraine. This ability to align with the prevailing zeitgeist underscores their exceptional skill in seizing business opportunities under all conditions.

1. Overcoming the Financial Crisis

During the financial crisis, the outlook for activists, in particular hedge funds and private equity firms, was bleak. A reduction in available liquidity, private companies seeking a quick exit from their private equity shareholders, and potential targets shying away from listing on the main markets due to costs and regulatory obligations seemed to create the advent of a "buyer's strike" or the end of the locust era.[71] Faced with higher startup costs

66 European Parliament, *supra* note 51, at 25.
67 Cheffins/Armour, *supra* note 10, at 59.
68 Id.
69 Chiu, *supra* note 30, at 98 ff.
70 V. V. Acharya et al., Corporate Governance and Value Creation: Evidence from Private Equity, Review of Financial Studies 26 (2013) 368.
71 *The Kay Review of UK Equity Markets and Long-Term Decision Making*, February Interim Report (2012) at 26. For evidence on the decline of shareholder activism

and an increasingly competitive market, private equity and hedge funds were perceived to be finding it ever more difficult to amass sufficient returns to remain profitable.[72] Some scholars even heralded the near "eclipse" of private equity.[73]

However, it is now evident that shareholder activism has not just survived but dramatically prospered over the years since the crisis. During crisis times, falling profits and dividends will force boards to be more responsive to demands for disposals by shareholders.[74] For example, Chris HOHN, the founder of TCI, gained notoriety in 2005 after having succeeded in removing two directors from the board of Deutsche Börse and in stopping attempts to acquire control of the London Stock Exchange.[75] Following heavy losses in 2008, and the departure of various founding partners, little was heard of the fund on the market. However, recent figures on the global hedge fund industry indicate that activist hedge funds have doubled their assets under management from $ 66 billion in 2013[76] to an estimated sum of more than $ 130 billion in 2021, after years of macroeconomic turbulences and record profits in 2021.[77] As a note of caution, however, the future success of shareholder activism looks likely to be constrained with new regulations coming into force over the next few years and the support of large asset managers.

The 2007–2009 global financial crisis has intensified the debate about the role that investors play or should play in corporate governance. To some, increasing shareholder influence and facilitating shareholder intervention when necessary is part of the essential reforms; activism in particular is often hailed as the solution for effectively monitoring management. To others, activism by shareholders who potentially have short-term inter-

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during the financial crisis, see M. BECHT et al., Returns to Hedge Fund Activism: An International Study, Review of Financial Studies 30 (2017) 2933.

72 FINANCIAL SERVICES AUTHORITY, Hedge Funds: A Discussion of Risk and Regulatory Engagement, Discussion Paper DP 05/4, June 2005, at 34.

73 B. R. CHEFFINS/J. ARMOUR, The Eclipse of Private Equity, Delaware Journal of Corporate Law 33 (2008) 1.

74 "Long Live Activism", Financial Times, 4 November 2008, at 8.

75 I. SIMENSEN, Activist Investors Seek Success in Germany, Financial Times, 6 December 2007, *https://www.ft.com/content/11940e52-a440-11dc-a28d-0000779fd2ac*; W. HUTCHINGS, Where are They Now? Chris Hohn, Financial News, 9 July 2010, *https://www.fnlondon.com/articles/fn100-where-are-they-now-chris-hohn-20100709*.

76 S. FOLEY, Activist Hedge Funds Increase Corporate Bond Risk, says Moody's, Financial Times, 10 March 2014.

77 S. KLEMASH/D. A. HUNKER, What Boards Need to Know about Shareholder Activism, 16 March 2021, *https://corpgov.law.harvard.edu/2021/04/03/what-boards-need-to-know-about-shareholder-activism/*.

ests is part of the problem, not a solution. Lawmakers are still undecided to what extent (and when) shareholder activism can improve firm value and performance or to what extent (and when) shareholder activism can produce distortions that make matters worse.

In any case, following the struggle of hedge funds and private equity funds during the financial crisis, the ensuing recession and more market developments have undoubtedly played a role in the rise of more targeted and more focused shareholder activism.[78] For many investors, voting their shares has become a legitimate method to express dissatisfaction with the performance of a specific board member. In addition, the weak stock market performance since 2007 has increased the clout of activist investors, and low interest rates have given hedge funds record investment volumes. At the same time, the economic recovery since 2009 has given companies time to reduce debt and to build cash piles which make them interesting targets for activists.[79] This may help explain why shareholder activists have also begun targeting larger and blue-chip companies such as Apple, Procter & Gamble, and Sony, generating a profound echo in the corporate world and in the media.[80] It is said that activism has outpaced any other hedge fund strategy performance over the past years.[81]

Advances in technology have surely helped foster this development. The rise of information technology, along with greater disclosure obligations, has made it easier to access information about target companies, board members, and financial data.[82] It has further encouraged greater shareholder collaboration. Shareholder activism can therefore be said to have become more targeted in character.[83]

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78 D. MCCRUM/D. GELLES, Stirrers and Shakers, Financial Times, 22 August2012, at 7; "Anything You Can Do, Icahn Do Better", Economist, 15 February 2014, at 51.

79 Paul PARKER, head of global corporate finance and M&A at Barclays Capital, is cited as saying "The percussive theme song is unmistakable; use it or lose it. Excess capital must be used or returned to shareholders." See MCCRUM/GELLES, *supra* note 78.

80 S. F. ARCANO/R. J. GROSSMAN, Activist Shareholders in the US: A Changing Landscape, Skadden, Arps, Slate, Meagher/Flom LLP Insight, 17 June 2013, *https://corpgov.law.harvard.edu/2013/06/28/activist-shareholders-in-the-us-a-changing-landscape*.

81 S. FOLEY, Activist Investors' Success Owes Much to Wider Bull Run, Financial Times, 2 March 2015.

82 J. FOX, Ackman, Icahn and their Pals Are Keepers, Bloomberg View, 12 January 2015.

83 D. PRIAL, Shareholder Activism More Focused, Targeted, Fox Business, 25 May 2012, *https://www.foxbusiness.com/features/shareholder-activism-more-focused-targeted*.

2. *Sustainability and ESG*

Around the late 2010s, when the climate crisis was in full swing, ESG investing (for environmental, social, and governance criteria) and sustainability in capital markets became an important policy concern.[84] Activists were quick to sense the potential in such sentiment and adjusted accordingly. Therefore, recent years have seen a rise in specific activism for sustainability and ESG objectives. On the face of it, such activism seemed to differ markedly from classical activism which is pursued mostly for financial gains. Instead, campaigns put environmental goals such as curbing climate change or social issues like racial equity center stage. Asset managers may even pick up very recent phenomena such as the ethical use of artificial intelligence.[85] However, hedge funds and other activists were and still are profit-seeking vehicles that put financial returns above everything else: ESG investing and other green and social policies were nothing else than a golden business opportunity at the time.

There were mostly two distinct types of players in this area: newly set-up vehicles that were expressly created for activist campaigns; and secondly, traditional hedge funds that turned their attention towards sustainability goals.

As an example for the first category, the most prominent story of ESG activism was that of Engine No. 1, an "impact-focused fund" which launched an activist campaign at US oil giant ExxonMobil. Starting in December 2020, the tiny hedge fund initiated a proxy contest at ExxonMobil for its alleged failure to adequately respond to evolving energy needs and emissions standards. The following months saw increasingly strong pressure from Engine No. 1, which had urged Exxon to cut capital spending and to focus on accelerating rather than on deferring the transition to cleaner energy. This culminated in an epic shareholder meeting in May 2021, where Engine No. 1 was successful in installing three of its director nominees on the Exxon board—which, in effect, was a major defeat for the incumbent management.[86]

As an example for the second type of activist, the hedge fund TCI also shifted its attention to ESG objectives. In 2020, TCI launched a "say on climate" campaign, calling for a shareholder vote on climate policy.[87] They

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84 See RINGE, *supra* note 2.

85 K. BRYAN, Asset managers pressure tech companies over possible AI misuse, Financial Times, 20 June 2023.

86 D. BROWER, ExxonMobil Shareholders Hand Board Seats to Activist Nominees, Financial Times, 26 May 2021, *https://www.ft.com/content/da6dec6a-6c58-427f-a012-9c1efb71fddf*.

87 T. HUMAN, TCI Goes Global with "Say On Climate" Campaign, 2 December 2020, *https://www.corporatesecretary.com/articles/esg/32358/tci-goes-global-%E2%80%98say-climate%E2%80%99-campaign*.

filed resolutions at several US-listed issuers to annually disclose their greenhouse gas emissions, to produce a plan to manage those emissions, and to hold an annual advisory vote on the plan. In the case of Spanish airport operator Aena, TCI was successful in pushing for the introduction of the world's first "say on climate" vote.[88] This push for an advisory vote on the climate plan was supported by BlackRock, which said in a voting bulletin it would be "beneficial at Aena given the material risk to its business model and its need to accelerate its efforts."[89]

The motivations for such ESG activism follow very heterogeneous patterns. They may be either motivated by the traditional pursuit of financial gains, as sustainable business decisions may be considered as a more profitable long-term strategy, or may at least provide a hedge against social and, in particular, climate change-related long-term risk.[90] Seen from this perspective, climate change was viewed as a significant source of financial risk, reflected in a return premium on assets with high climate risk exposure.[91] Relatedly, activists also cared about the transition risks of stranded assets in individual firms.

In the alternative, ESG activism may simply follow other, non-financial preferences and be motivated by the nonpecuniary goal of pursuing social, not necessarily profit-driven preferences. For example, the motivation of activists may be intrinsic, such as the pursuit of sustainability goals, frequently reflected in the preferences of specific wealthy individuals, pressure groups, NGOs, and other interest groups.

Both strategies may come under pressure in market turmoil or uncertainty: for example, 2022 saw the Russian invasion of Ukraine, soaring oil and gas stocks and many green stocks underperforming—accordingly, the success rates of many ESG campaigns declined as shareholder support for them dropped.[92] Instead, ESG activism may morph into so-called "trojan horse" campaigns, where an ESG initiative is combined with traditional

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88 T. HUMAN, Aena Adopts Annual Advisory Vote on Climate Plan, IR Magazine, 5 November 2020, *https://www.irmagazine.com/reporting/aena-adopts-annual-advisory-vote-climate-plan*.

89 BlackRock Investment Stewardship Group, Voting Bulletin: Aena S.M.E. SA, *https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-aena-oct-2020.pdf*.

90 P. KRUEGER/Z. SAUTNER/L. STARKS, The Importance of Climate Risks for Institutional Investors, Review of Financial Studies 33 (2020) 1067.

91 R. ENGLE et al., Hedging Climate Change News, Review of Financial Studies 33 (2020) 1184; S. GIGLIO/B. KELLY/J. STROEBEL, Climate Finance, Annual Review of Financial Economics 13 (2021) 15.

92 R. SHERRATT, Tough Times for ESG Activism, Insightia/Olshan Shareholder Activism Annual Review (2023) at 15.

activism objectives such as a breakup or sale of a company, or the replacement of corporate directors.[93] By combining both issues, a campaign can appeal to a larger group of supporters, including those who are increasingly growing wary of ESG matters. A recent example of this is Third Point’s campaign against Shell, where the fund called for the breakup of the oil company into two stand-alone companies, one of which, Third Point argued, could make more aggressive investments in renewables and other carbon-reduction technologies.

The ESG orientation may also come under pressure for purely political reasons. Whereas the Biden administration sought to facilitate ESG investing,[94] the SEC under new President Trump has moved quickly to implement new rules that seek to rein in the power of large fund managers and to “crack down on ESG.”[95] These reforms aim at larger and more traditional fund managers and not directly at hedge fund activism. They may nevertheless herald a new, broader political backlash against the industry. In fact, few things have become so politicized in corporate America in recent years as ESG investing.[96]

One thing is clear, however: ESG activism is often nothing else than the pursuit of financial gains. Firms like Engine No 1 and TCI are not environmentalists, nor would they ever “sacrifice profit for the planet.” Nowhere is this more evident as is the case of Engine No 1. Just one year after its widely celebrated “climate victory” against Exxon, it voted against a resolution proposed by climate advocacy group Follow This, which called on Exxon to reduce its so-called scope 3 emissions. Then, in 2023, all three of its board picks supported Exxon’s acquisition of hydrocarbon explora-

93 R. J. GROSSMAN et al., Activism Landscape Continues To Evolve, Skadden’s 2022 Insights, 19 January 2022, *https://www.skadden.com/insights/publications/2022/01/2022-insights/corporate/activism-landscape-continues-to-evolve*.

94 For example, the US Department of Labor (DOL) under Biden clarified the ability of retirement plan fiduciaries to invest in ESG funds in the retirement plans that they sponsor under the US ERISA framework. See Department of Labor, Employee Benefits Security Administration, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 29 CFR Part 2550, 87 Fed. Reg. 73,822 (1 December 2022).

95 See, for example, SEC, Compliance and Disclosure Interpretations, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting (11 February 2025); and SEC, Staff Legal Bulletin No. 14M (12 February 2025), which addresses an issuer’s ability to exclude shareholder proposals under Rule 14a-8. See P. TEMPLE-WEST/A. POLLARD/E. PLATT, BlackRock and Vanguard Halt Meetings with Companies After SEC Cracks Down on ESG, Financial Times 19 February 2025).

96 D. A. CIFRINO, The Politicization of ESG Investing, 24 January 2025, *https://www.sir.advancedleadership.harvard.edu/articles/politicization-of-esg-investing*.

tion firm Pioneer Natural Resources Co.—a deal that propelled Exxon's oil production to the highest in 140 years.[97] This unanimous support underscores how significantly the ESG investing movement has changed under different circumstances, and how little Engine may genuinely care about climate change.

These developments vividly illustrate activists' chameleon-like nature and their remarkable talent to "reinvent themselves." Depending on the political zeitgeist, they adopt the role of either aggressive capitalists, saviors of the planet, or both. During the 2024 election campaign, numerous activist investors openly endorsed Trump, contributing tens of millions of dollars to his campaign and affiliated political action committees.[98] By the start of Trump's second administration in early 2025, little was left of ESG activism (except, perhaps, NGOs and pressure groups), while hedge funds refocused on their "true" mission of pursuing financial returns above everything else; many are moving back to traditional M&A.[99] Today, activist investors are buoyant about the potential for increased opportunities in their traditional domains under an economic landscape shaped by Trump's signature mix of tax cuts, deregulation, lighter antitrust scrutiny, and pro-business rhetoric.[100] Ironically, many secretly continue to use ESG factors or sustainable investing, but are now changing their rhetoric, officially framing investment decisions on "risk, opportunities and profitability" instead.[101]

3. *Portfolio Engagement*

Traditional institutional investors, such as pension funds, mutual funds,[102] and index funds, are historically more passive vis- à-vis their investee companies, for the most part due to a lack of resources, incentives to free-ride,

97 K. CROWLEY/S. KISHAN, Why One-Time Exxon Adversary's Board Picks Backed Mega Deal, Bloomberg, 12 October 2023, *https://www.bloomberg.com/news/articles/2023-10-12/exxon-s-one-time-adversary-engine-no-1-unanimously-backed-deal*.

98 K. H. E. LIEKEFETT/D. ZABA, Shareholder Activism under Donald Trump, Harvard Law School Forum on Corporate Governance, 8 November 2024, *https://corpgov.law.harvard.edu/2024/11/08/shareholder-activism-under-donald-trump/*.

99 Diligent Market Intelligence, Olshan/Sidley, Shareholder Activism Annual Review 2025, at p. 3.

100 CRYSTAL PARTNERS, Why Activist Investors Are Excited for Four Years of Trump, 31 January 2025, *https://www.crystalfunds.com/insights/why-activist-investors-are-excited-for-four-years-of-trump*; A. GIBLIN, Shareholder activists pivot to focus on CEOs and M&A, Diligent, 20 February 2025, *https://www.diligent.com/resources/blog/shareholder-activists-pivot-to-focus-on-ceos-and-m-and-a*.

101 M. SCOTT, ESG Watch: New SEC rules under Trump turn up the heat for sustainable investors, Reuters, 17 March 2025.

102 Regulated by the UCITS Directive in the EU.

and the remuneration of their fund managers. Recent years have seen a tremendous growth of passive investing. The "Big Three" institutional investors, BlackRock, Vanguard, and State Street Global Advisors now control about 80 percent of all global indexed money, making them a dominant force in the governance of public companies around the world.[103] Despite their traditionally passive role, these funds do play an important role in the engagement and activism context.

The most important reason for this lies in the phenomenon of "universal" or "common" ownership. Over the past several years, this term has come to describe the phenomenon where a number of large diversified institutional investors dominating today's corporate landscape, such as the Big Three, are holding significant stakes in the vast majority of firms in many economies.[104] This trend has given universal owners greater incentives to favor policies and initiatives that support are "systemic" or affect the system as a whole, rather than the fate of one single isolated company. The reason is that funds that have invested in virtually every firm in the market are less concerned with the performance of individual portfolio companies, and more interested in the state of whole economies, if not the world economy. Against this backdrop, scholars have argued that the trend towards universal ownership would increase their incentives to push for example for greater ESG commitment in investee firms, or at least favor general policies that support such efforts.[105] Seen in this light, funds that "own the market" appear to be the ideal conduits for the internalization of a large fraction of the negative externalities caused by environmental damage and social disparities. This prospect is even more promising in the ESG field than in the context of traditional corporate governance engagement, which predominantly relies on firm-specific analysis.[106]

As I discuss elsewhere, activism benefits from collaboration between different institutional investors who engage in coalition-building.[107] Likewise, portfolio-oriented institutional investors lend their support to cam-

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103 J. C. COATES IV, The Future of Corporate Governance Part I: The Problem of Twelve, *http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_1001.pdf*. See also D. MCLAUGHLIN/A. MASSA, The Hidden Dangers of the Great Index Fund Takeover, Bloomberg Businessweek, 9 January 2020.

104 See, e.g., L. BEBCHUK/S. HIRST, The Specter of the Giant Three, Boston University Law Review 99 (2019) 721, 735, fig. 1.

105 See, e.g., M. CONDON, Externalities and the Common Owner, Washington Law Review 95 (2020) 1, 17–18.

106 See M. BARZUZA/Q. CURTIS/D. WEBBER, Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, Southern California Law Review 93 (2020) 1243.

paigns that they believe will be system-stabilizing.[108] First observed in the context of traditional shareholder activism, the collaboration model has become increasingly important in the context of green activism.[109]

To illustrate, Engine No. 1 when taking on ExxonMobil was only successful due to coalition-building with institutions such as US pension funds CalSTRS, CalPERS, New York State Common, and the Church of England. Blackrock and Vanguard, two of the largest Exxon shareholders, also voted to support at least three of the four director nominees on Engine No. 1's slate.[110] Together, this alliance proved critical in the campaign's victory and may herald a new era for shareholder activism.[111] The coalition of investors was therefore not only successful in shaking up ExxonMobil, but it also handed a major victory to the ESG movement as a whole. Other pertinent examples of shareholder team-building abound. They have been documented in campaigns against Evergy[112] or Procter & Gamble.[113] Even IT giants

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107 See W.-G. RINGE, Adaptive Advocacy: The Reinvention of Shareholder Activism, forthcoming in the Oxford Handbook of Corporate Law and Governance (2nd ed. 2025), section 4.5.

108 W. MCNABB, Vanguard Chairman and CEO, stated that "To understand the full picture, we often also engage with other investors, including activists and shareholder proponents": see "An Open Letter to Directors of Public Companies Worldwide", Vanguard, 31 August 2017, *https://global.vanguard.com/documents/investment-stewardship-mcnabb-letter.pdf*.

109 For shareholder proposals with a focus on environmental issues, see R. MONKS/A. MILLER/J. COOK, Shareholder Activism on Environmental Issues: A Study of Proposals at Large US Corporations (2000–2003), Natural Resources Forum 28 (2004) 317; G. MICHELON/M. RODRIGUE, Demand for CSR: Insights from Shareholder Proposals, Social and Environmental Accountability Journal 35 (2015) 157; E. EDING/B. SCHOLTENS, Corporate Social Responsibility and Shareholder Proposals, Corporate Social Responsibility and Environmental Management 24 (2017) 648; V. RAGHUPATHI/J. REN/W. RAGHUPATHI, Identifying Corporate Sustainability Issues by Analyzing Shareholder Resolutions: A Machine-Learning Text Analytics Approach, Sustainability 12 (2020) 4753.

110 A. MARSH/S. KISHAN, Engine No. 1's Exxon Win Provides Boost for ESG Advocates, Bloomberg, 27 May 2021, *https://www.bloomberg.com/news/articles/2021-05-27/engine-no-1-s-exxon-win-signals-turning-point-for-esg-investors*; B. NAPACH, BlackRock and Vanguard Played Key Roles in Exxon's Shareholder Proxy Vote, ThinkAdvisor, 27 May 2021, *https://www.thinkadvisor.com/2021/05/27/blackrock-and-vanguard-played-key-roles-in-exxons-shareholder-proxy-vote/*.

111 M. PHILLIPS, Exxon's Board Defeat Signals the Rise of Social-Good Activists, New York Times, 11 June 2021.

112 D. FRENCH, US Utility Evergy Adds Directors in New Agreement with Activist Firm Elliott, Reuters, 26 February 2021, *https://www.reuters.com/article/us-evergy-elliott-idUSKBN2AQ294*.

such as Apple have become the target of shareholder coalitions, led by activist fund Jana Partners.[114]

Coalition-building in this field has extended way beyond just bilateral or ad-hoc coalitions, though. The ESG field, which is rich in advocacy groups, NGOs, and other specific vehicles, sees many institutionalized platforms which support activism. For example, the initiative Climate Change 100 + brings together more than 570 investors, responsible for over $54 trillion in assets under management. The United Nations operates its own platform known as "Principles for Responsible Investment," promoting the integration of ESG issues within the investment industry and coordinating engagements.[115] Such networks allow for easier interaction between investors, identifying lead investors, spreading information, and helping to share the costs of engagement.[116]

V. Conclusion

This paper paints a largely positive picture of activist investors' engagement in corporate governance while highlighting their exceptional flexibility and adaptability. I argue that shareholder activism has continuously reinvented itself, responding to the shifting political climates and industry dynamics under which it operates. Activists rebounded from the financial crisis stronger than before; they not only survived, but positioned themselves at the forefront of the climate crisis by capitalizing on ESG and sustainable investing. Today, they are readily adapting to a new zeitgeist, which is shaped by climate denial, protectionist politics, and deregulation. None of this should be surprising. Activists, particularly hedge funds, have repeatedly shown their ability to navigate evolving market conditions and to exploit shifting regulatory landscapes.

On a positive note, the growing trend of coalition building and collaborative engagement is emerging as an important market practice. It increases engagement opportunities and enhances investor influence, while at the

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113 A. Gray/P. Temple-West, Investor Rebellion at Procter/Gamble over Environmental Concerns, Financial Times, 14 October 2020, *https://www.ft.com/content/1dd92502-e95b-4c21-be1c-c18a598acf1a*.

114 R. G. Eccles, Why an Activist Hedge Fund Cares Whether Apple's Devices Are Bad for Kids, Harvard Business Review (January 2018), *https://hbr.org/2018/01/why-an-activist-hedge-fund-cares-whether-apples-devices-are-bad-for-kids*.

115 See *https://www.unpri.org/*.

116 For a detailed analysis, see E. Dimson/O. Karakaş/X. Li, Coordinated Engagements, ECGI Finance Working Paper No. 721/2021, *http://ssrn.com/abstract_id=3209072*.

same time serving as a built-in screening mechanism, helping to filter out abusive campaigns.

In sum, there is still plenty of life in the old dog. Whilst some predicted the end of hedge funds and private equity a few years ago, they have instead emerged from successive crises stronger than ever. Having honed their tactics and enhanced their credibility, they are here to stay—constantly reinventing themselves. “Locust” was the wrong animal to describe them. A “chameleon” would have been more accurate.

SUMMARY

This paper explores the evolution of shareholder activism in Western markets, tracing its transformation from the corporate raiders of the 1980s to today's geopolitical allrounders, incorporating both aggressive hedge fund activism and ESG-driven engagements. It situates activism within its shifting regulatory and ownership contexts in the United States, the United Kingdom, and Germany, showing how legal frameworks, market structures, and macroeconomic crises have repeatedly reshaped activist strategies. The analysis identifies the distinct roles played by corporate raiders, institutional investors, hedge funds, and private equity, highlighting their changing methods and motivations. Recent developments—such as the rise of sustainability-focused “ESG activism”, coalition-building among institutional investors, and the cyclical adaptation of activist tactics to political and economic climates—illustrate the remarkable flexibility of modern activism. The paper argues that shareholder activists have consistently reinvented themselves to exploit new market and regulatory conditions, evolving from “locusts” into “chameleons” capable of blending profit-seeking motives with broader governance and sustainability agendas.

U.S. Shareholder Activism: Convergence with Japan

Nobuhisa ISHIZUKA*

I. Introduction
II. Historical Development
  1. Origins
  2. Early Development
  3. Takeover Era
III. Turning Point
  1. Great Financial Crisis
IV. Current Strategies
  1. Regulatory Developments
  2. Activist Characteristics
  3. Engagement Strategies
V. Japan's Convergence
  1. Pre-Financial Crisis
  2. Great Financial Crisis
  3. Abenomics
  4. U.S. Convergence
VI. Conclusion

I. INTRODUCTION

Shareholder activism in the U.S. has evolved over many decades, facilitated by regulatory changes triggered by large economic shocks that prompted public demand for increased corporate accountability. The origins of the latest evolution that has broadly shaped current practices in the U.S. can be traced to the Great Financial Crisis of 2008–2010. It was this event—which led to dramatically increased funding from institutional investors and competition among activists—that prompted the more sophisticated and nuanced tactics that characterize hedge fund activism today.

Over the past 10–15 years, hedge fund campaigns have been defined by an increased focus on shareholder value. This has been marked by a notable shift from aggressive public campaigns designed to pressure boards and management to quiet engagement with target companies. There are different types of activists; this article focuses specifically on hedge funds. It does not address so-called "gadfly" activists, social issue activists, or union

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* The links provided were last verified on 23 June 2025.

pension activists, all of which played important roles in the development of shareholder engagement with companies during earlier periods.

This article does not claim to be a comprehensive history of shareholder activism in the U.S., nor does it seek to present a new interpretation of this complex subject. Rather, it attempts to place current trends in Japan, a country which has seen a dramatic increase in shareholder engagement with target companies, in the context of the long history of U.S. shareholder activism. It observes how strategies in the U.S. have evolved over time in a way that has converged with the current state of the market in Japan, making Japanese companies more receptive to the current style of U.S. activist engagement.

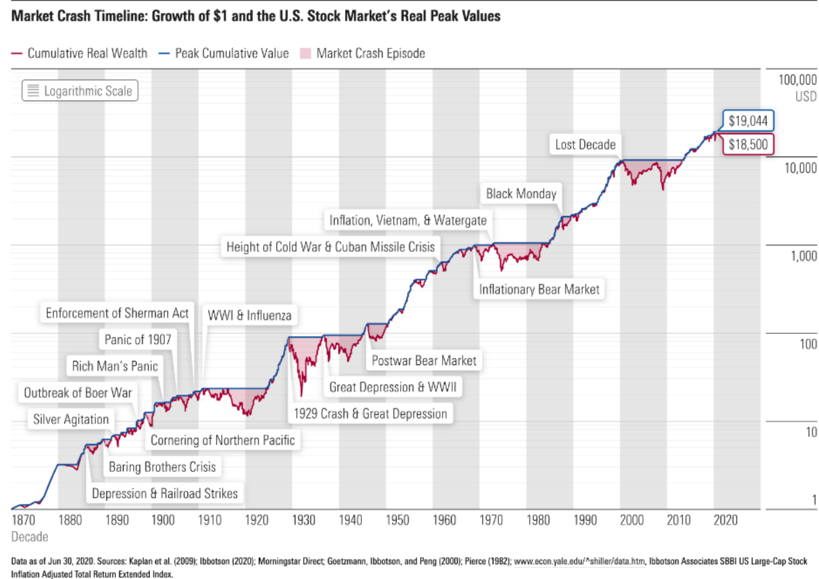
II. Historical Development

1. Origins

The history of corporate governance in the U.S. can be viewed within the framework of the balance of power (or the degree of "separation") between shareholders and corporate management—i.e., between widely dispersed owners and the managers to whom they delegate the responsibility of operating the enterprise. Boards owe duties to such owners to oversee management in this role.[1] Major disruptions to the value of investments in the U.S. stock market over the past 100 years prompted public shareholder and government regulatory responses that facilitated a gradual shift of power from boards and management to shareholders.

The significance of such responses can be illustrated by the value over 150 years of $1.00 invested in 1870 in the U.S. public markets. Whereas such an investment was worth approximately $19,000 in 2020, major crises significantly disrupted the overall upward trend during the Great Depression in 1929 (89% decline), during the political and inflationary shocks of the 1970s-1980s (40% decline), during the corporate scandals coinciding with the Dotcom bust in 2000–2002 (43% decline in the S&P 500), and during the Great Financial Crisis in 2008–2010 (50% decline in the S&P 500). Such events have triggered dramatically increased public scrutiny of the effectiveness of boards and management.

1 This is the standard U.S. framework, which differs from the stakeholder corporate governance model that has been standard in Japan until its relatively recent and gradual move towards a more shareholder-centric model. The duties of boards and management under relevant U.S. law differ, and many activists target boards specifically. However, because of their overlapping roles as targets of corporate underperformance, for purposes of this paper the terms "board" and "management" are used interchangeably as descriptive proxies for the target corporation.



Source: https://www.morningstar.com/features/what-prior-market-crashes-can-teach-us-in-2020

This context is important for understanding the rise of shareholder activism in the U.S. Large public swings in the perception of management effectiveness in protecting shareholder interests has been a key driver of the growth and acceptance of activist campaigns over many decades.

2. *Early Development*

Shareholder activism in the U.S. is not a new phenomenon. In the early 1900s, American financial institutions such as insurance companies, mutual funds, and banks were active participants in U.S. corporate governance. But over the three or four decades following the stock market crash of 1929, laws aiming to limit the power of financial intermediaries led to a decline in their active role in corporate governance.[2]

The current form of U.S. shareholder activism dates from the SEC's introduction in 1942 of the predecessor of today's proxy rule 14a-8 that first allowed shareholders to submit proposals for inclusion on corporate ballots.[3] The fundamental regulatory structure governing such activities was estab-

2 S. L. Gillan / L. T. Starks, The Evolution of Shareholder Activism in the United States (2007), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=959670*.

3 Gillan / Starks, *supra* note 2, 3.

lished during this time. SEC Rule 14a-8, also known as the Shareholder Proposal Rule, allows public company shareholders to submit proposals for inclusion in the company's proxy materials for voting at the annual shareholder meeting. Shareholders can propose resolutions on various issues, including environmental, social, and governance (ESG) topics, for a vote at the annual shareholder meeting.[4]

From 1942 through the end of the 1970s, shareholder activism was dominated by individual investors. As of the late 1940s only 7–8% of the equity in U.S. corporations was held by institutional investors (Coffee, 1991).[5] Individuals were the predominant filers of shareholder proposals, with a significant number of such proposals focused on social issues. Starting in the mid-1980s, shareholder activists began to work in organized numbers, led by public pension funds, and a number of shareholder rights associations worked to "upgrade shareholder awareness" by submitting proposals to companies during the annual shareholder meeting season.[6]

The 1980s represented the return of institutional investors, with a significant rise in their corporate ownership, which started to narrow the separation between institutional shareholders and corporate management.[7] The delegation of management responsibilities by owners to managers started to weaken as institutional shareholders began to demand increased accountability for performance. This period also saw the rise of corporate raiders—perhaps the ultimate activists—who used the market for corporate control to try to impose discipline on corporate boards and management.

As noted above, institutional investors held only about 7% of U.S. equities in 1950, but their ownership percentage had jumped to 40% by 1980, and over 60% by the end of 2005.[8] Now, together with hedge funds and private equity funds, they own over 80%.[9] In addition, the Department of Labor, through its oversight of ERISA rules, began to pressure corporate

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4 For a general overview of the legal and regulatory framework relating to shareholder rights, activism, and engagement in respect of U.S. publicly traded companies, see F. J. AQUILA/L. BOEHMKE, United States, in: Aquila (ed.), The Shareholder Rights and Activism Review (8th ed., 2023) 179, 180–184.

5 J. C. COFFEE, Jr. Liquidity Versus Control: The Institutional Investor as Corporate Monitor, Columbia Law Review 91 (1991) 1277, 1291, *https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1028&context=faculty_scholarship*.

6 GILLAN/STARKS, *supra* note 2, 7.

7 "Institutional investors" include endowment funds, commercial banks, mutual funds, hedge funds, pension funds, sovereign wealth funds, and insurance companies.

8 GILLAN/STARKS, *supra* note 2, 8.

9 Pensions & Investments, 80% of Equity Market Cap Held by Institutions (25 April 2017), *https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions*.

pension funds to assume a more active role in monitoring the companies in their portfolios. They pushed for the voting of proxies by the pension funds rather than delegating that responsibility to their external managers, arguing that voting was one of their fiduciary duties.[10]

3. *Takeover Era*

The takeover era of the 1980s provides a useful contrast to the current style of hedge fund activism. It marked the emergence of a number of legal innovations by companies to protect themselves from increasingly aggressive shareholder demands. Activist tactics during this time were focused on countering such moves, arguing that they entrenched underperforming boards and management.

The activist investment strategy at this time was focused more on short-term results based on taking advantage of increases in a company's stock price under their traditional long-short and arbitrage strategies. During this era activists operated largely alone and on the fringes of the large private equity and raider-driven transactions, relying on capital raised from high net worth individual investors. Regulators and courts in this environment were relatively deferential to boards and management in dealing with aggressive shareholders, evidenced by their tendency to uphold various defenses against shareholder demands,[11] while balancing board and management duties to shareholders as a whole. In situations where hedge fund activists took principal positions, they tended to be in smaller target companies, bounded by the amounts they had under management from their high net worth clients.

Through the 1990s and into the 2000s, as institutional investor activity increased in search of higher returns, their interests started aligning with the activist agenda, and they began investing more money with hedge funds to push for improved corporate governance and higher levels of performance of target companies.[12] The emergence of proxy advisors during this period arose from institutional investors' need for advice on the voting of their directly owned shares.

With the increased backing of institutional investors and proxy advisors, proposals for larger structural changes at companies began appearing on the

10 GILLAN/STARKS, *supra* note 2, 10.

11 Examples include shareholder rights plans, classified boards, plurality voting for board elections, by-law advance notice provisions, etc.

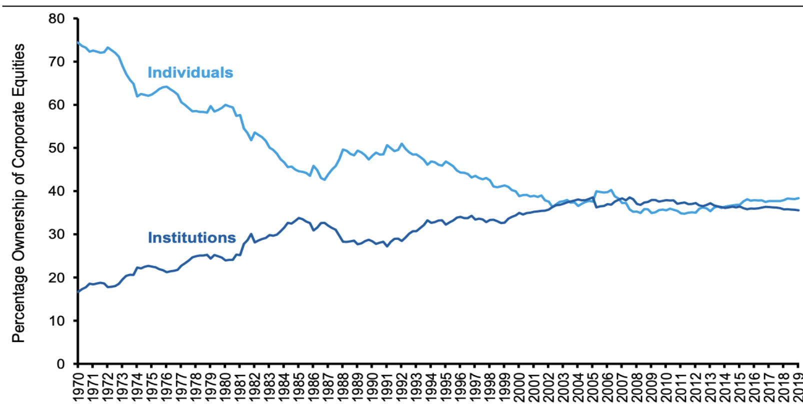
12 GILLAN/STARKS, *supra* note 2, 9; M. TONELLO, Hedge Fund Activism: Findings and Recommendations for Corporations and Investors (The Conference Board Research Working Group Series, 17 September 2008) 11, *https://ssrn.com/abstract=1107027* or *http://dx.doi.org/10.2139/ssrn.1107027*.

activist agenda, and public campaigns gained more attention and influence. The regulatory landscape also started shifting towards shareholder empowerment during this period through a series of new SEC rules, such as permitting short slates of directors on proxy cards and permitting private solicitations of an unlimited numbers of shareholders without making any public disclosures.[13]

In the meantime, companies were relatively passive in dealing with shareholders, exercising caution under the advice of those who warned about the potential pitfalls of boards directly engaging with shareholders.[14] Such caution was driven by regulatory concerns with such matters as selective disclosure and confidentiality.

The slide below shows the dramatic rise in institutional shareholder ownership of U.S. companies over the timeline given above, from 1970 to 2019. Note the top line (percentage of individual shareholders) compared to the bottom line (percentage of institutional shareholders).[15] The initial peak in the rise of institutional shareholders occurred during the 1980s, with a continuing rise occurring since then.

Exhibit 8: Shift in U.S. Equity Investors from Individuals to Institutions, 1970-2019



Source: Federal Reserve.
Note: Institutional investors include insurance companies, private pension funds, mutual and closed-end funds, and ETFs.

13 M. LIPTON, Will a New Paradigm for Corporate Governance Bring Peace?, Harvard Law School Forum on Corporate Governance and Financial Regulation (5 October 2015), *https://corpgov.law.harvard.edu/2015/10/05/will-a-new-paradigm-for-corporate-governance-bring-peace/*.

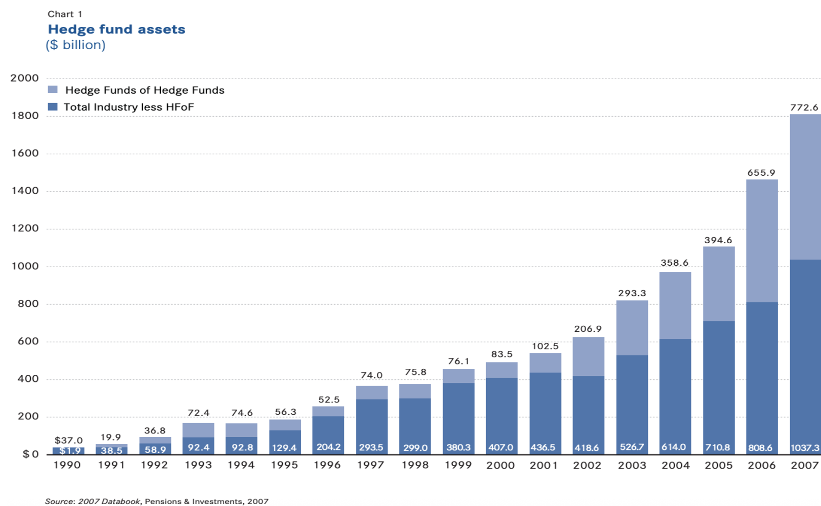
14 L. THOMPSON Jr., The Dos and Don'ts of Board-Shareholder Communication, Compliance Week (March 2013).

III. Turning Point

1. *Great Financial Crisis*

The Great Financial Crisis[16] (GFC) marked a major turning point. Many of the changes in the current evolution of shareholder activist tactics had occurred during the 1990s in the wake of the shifting balance between shareholders and management. But the public reaction to management and board performance during the crisis accelerated the pressure on regulators to act and for corporations to change their approach to governance. This was a result of increased scrutiny by shareholders of managerial performance and public anger at the perceived failures of management accountability.[17] The origins of current activist strategies have their roots in a noticeable shift in regulatory and hedge fund activity in the wake of the 2008–2010 financial crisis.

In the run-up to the GFC, the amount of assets managed by hedge funds, and the number of hedge funds, had exponentially increased. The chart below shows the amounts managed by hedge funds between 1970 and 2007, right up to the moment of the crisis.[18]

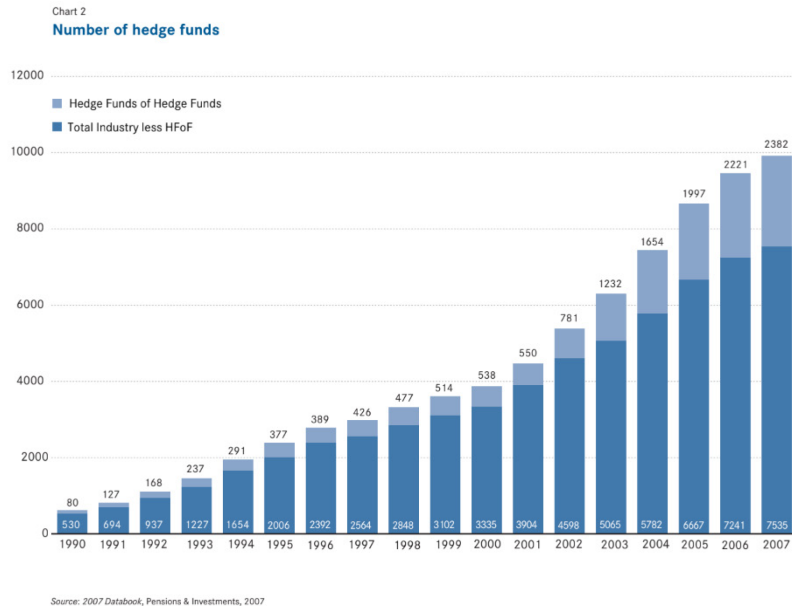


15 This convergence, which is narrower than the figures cited earlier, can be attributed to different methodologies for counting institutional and individual shareholdings.

16 For general background information, see *https://www.investopedia.com/terms/g/great-recession.asp*.

17 S. F. Arcano/R. J. Grossman, Activist Shareholders in the U.S.: A Changing Landscape (Harvard Law School Forum on Corporate Governance, 17 June 2013), *https://corpgov.law.harvard.edu/2013/06/28/activist-shareholders-in-the-us-a-changing-landscape/*.

The chart below shows the number of hedge funds during the same period.[19] The dramatic increase in their financial reserves, and the competition created among them by their increasing numbers, created important incentives to accumulate larger stakes and diversify their strategies in search of greater returns.



In the decade immediately preceding the crisis, therefore, the hedge fund market had already undergone a dramatic transformation: together with exponential growth, hedge funds had become more institutionalized, had diversified their clientele, and had adopted a wider array of investment strategies.

By 2007, capital flows into hedge funds were no longer provided solely by the wealthy individuals who had funded the industry up to that point. Long-term institutional investors (including private and public pension funds, endowments, and foundations) were focused on diversifying their portfolios and increasing performance. They were now interested in absolute-return strategies and increasingly viewed hedge funds as an integral part of their asset allocation decisions.[20]

18 TONELLO, *supra* note 12, 11.
19 TONELLO, *supra* note 12, 12.
20 TONELLO, *supra* note 12, 11.

As they grew in numbers, hedge funds explored new approaches to shareholder engagement and correspondingly refined their strategies. After 2003, in the run-up to the crisis, the market was already seeing hundreds of instances of shareholder activism involving hedge funds. During this pre-crisis period, activists became focused on a few courses of action that were very different than those of the 1980s. (The investment strategies typical of the 1980s still exist to varying degrees, but their approach and emphasis have evolved.) For example, they would:

- Push to leverage a company's balance sheet in order to return cash to shareowners and achieve short-term financial gains.
- Try to assume an operating role, blurring the lines between themselves and private equity (an alternative strategy with longer investment timelines) with the objective of increasing performance and shareholder value.
- Advocate a quick sale of the company in search of a market premium higher than otherwise attainable under existing ownership.
- Request structural changes such as the repeal of defensive measures, including staggered boards and shareholder rights plans, in order to facilitate governance changes that would lead to greater influence over management.
- Seek an outright change in top management in order to achieve the same influence.[21]

By the spring of 2007, New York corporate lawyer Martin Lipton asserted that "attacks by activist hedge funds constitute the number one key issue for directors".[22] When the crisis arrived later that year, the foundation for a significant shift in activist strategies was already in place, and the funds were well positioned for the next stage of their evolution.

The significance of the financial crisis in accelerating the development of shareholder activism into its current form can be summarized by several observations. The leading legal responses represented a combination of legislative, regulatory, and governance reforms that led to a marked shift in the balance of power between boards and management on the one hand, and shareholders on the other. These included the passage of the Sarbanes-Oxley Act in 2002 and the Dodd-Frank Act in 2010 (which mandated increased disclosure and transparency as well as enhanced reporting requirements), and revisions to U.S. Securities and Exchange Commission rules which loosened requirements for submitting shareholder proposals.[23]

21 TONELLO, *supra* note 12, 12.
22 TONELLO, *supra* note 12, 12.
23 LIPTON, *supra* note 13, 2–3.

The financial crisis led to increased motivation by traditional institutional shareholders to champion corporate governance reforms, and it led to greater influence of proxy advisory services (e.g., ISS, Glass Lewis), whose voices were relied upon to advise on such measures. This arose from distrust of management and increased unwillingness to accept management responses to shareholder proposals or unsolicited approaches by third parties. Boards and management of companies, recognizing this trust deficit, struggled to regain the confidence of the markets; an increasing number of companies decided to voluntarily dismantle some of their structural defenses as a signal of receptivity to shareholder frustrations (e.g., redemption of shareholder rights plans; declassification of boards; adoption of majority voting for the election of directors).

The focus of institutional shareholders on governance reforms led to their increased willingness to support hedge funds in bringing pressure on boards and management to force changes. This included a willingness to support the election of minority slates of hedge fund nominees to allow funds to agitate for change, particularly influenced by the willingness of proxy advisors to recommend dissident minority slates.

The fallout from the GFC gradually coalesced into a combination of continuing regulatory responses and an evolution towards more nuanced and sophisticated forms of activist engagement that were increasingly focused on quiet partnership with companies to promote changes that enhance value, as opposed to adversarial tactics designed to apply public pressure.

IV. Current Strategies

1. Regulatory Developments

In the years after the GFC, SEC rulemaking continued to shift toward increased empowerment of shareholders. Most notably, the SEC amended the proxy solicitation rules in 2022 to require use of a universal proxy. Under the new regime, company and dissident proxy cards are required to list both the company's candidates and the dissidents' candidates. Before, shareholders could only vote for candidates from one side: either from the dissident slate or from the company slate, but not both.[24]

In practice, the proxy access mechanism has rarely been used and only as a last resort. Nevertheless, the new universal proxy standards expanded proxy access to all companies and all shareholder groups, free from prior ownership percentage requirements. Effectively, any shareholder has the

24 A. Baker et al., The Evolving Battlefronts of Shareholder Activism (6 March 2023), *https://ssrn.com/abstract=4380801*.

right to launch a campaign subject to a limited number of requirements. The universal proxy card regime is also likely to further increase the role and power of proxy advisory firms for investors who rely on them to evaluate nominees.[25]

On the other hand, certain revised SEC policies under the Trump administration can be interpreted as swinging the pendulum back towards broader protections of boards and management. Recently issued guidance from the SEC staff regarding the use of passive shareholding reports on Schedule 13G broadens the scope of governance-related topics that will be interpreted as seeking to control or influence a company, which would require filing a Schedule 13D.[26] Institutional investors, which are generally reluctant to project the appearance of putting direct public pressure on companies (which such a filing could signal), may become more wary of engagement that could be interpreted as exceeding the new bounds.[27]

2. Activist Characteristics

The closer partnership between institutional investors and activist hedge funds, including increased amounts invested with such funds combined with evolving engagement methodologies in light of increased competition among the funds, has led to the emergence of new characteristics of shareholder activism over the past 10 years.

First, the dramatically increased amount of funding directed to hedge funds started permitting activists to target large and mega-cap companies (defined as those with over $25 billion market capitalization).[28] By 2014 the numbers of such targets had tripled; activist hedge funds became able to influence even the largest companies with less than a 1% stake. 5% used to be the threshold required to exert influence over targets (corresponding to Schedule 13D filing requirements), which made acquisitions of influential stakes in large cap companies prohibitively expensive. However, after the financial crisis the effective use of the media, combined with a smaller stake, has been enough to exert significant influence. As of 2014, almost 60% of

25 BAKER, et al, *supra* note 24.

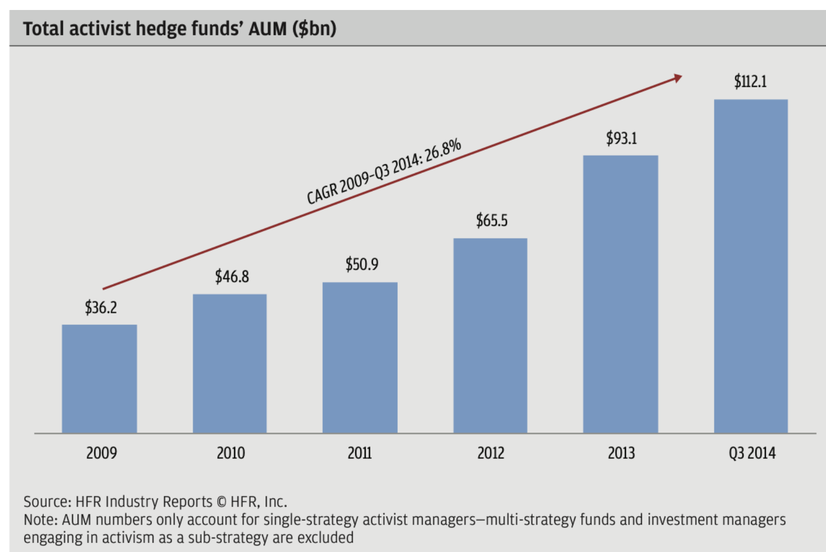
26 Debevoise & Plimpton, SEC Provides New Guidance on Schedule 13G Eligibility (13 February 2025), *https://www.debevoise.com/insights/publications/2025/02/sec-provides-new-guidance-on-schedule-13g*.

27 Skadden, Arps, Slate, Meagher & Flom LLP, Prepare for Changes to the Shareholder Engagement Process (7 March 2025), *https://www.skadden.com/insights/publications/2025/03/prepare-for-changes-to-the-shareholder-engagement-process?sid=db870855-06b6-4616-800b-30e9e26e0482*.

28 JP Morgan, The Activist Revolution (January 2015) at 6, *https://www.jpmorgan.com/content/dam/jpm/cib/complex/content/investment-banking/archive/pdf-59.pdf*.

campaigns targeting $25 billion-plus market cap companies were initiated by activists having less than a 1% stake at the time of announcement.[29]

The chart below shows the dramatic increase in the amount of assets under management available to activist hedge funds in the post-GFC period.[30]



Second, hedge fund activists have demonstrated a willingness to be more patient with their engagement, as indicated by longer holding periods for their stakes. A common perception is that activist holding periods are short, but the data reveals a more complex picture. Although roughly half of activist campaigns 10 years ago ran less than six months, more than 15% of the positions at that time were held for longer than 24 months. And there is every reason to believe that this percentage has grown significantly since then.[31]

The foregoing factors, perhaps combined with the need of hedge funds to distinguish themselves from competitors in an increasingly competitive market, have led to a broader range of strategies ranging from relatively quiet engagement to overtly hostile approaches. There has been a notable shift to more quiet engagement; relatively few campaigns proceed to a proxy fight. Most forms of engagement range from public disclosure of holdings coupled with private conversations (lowest pressure), to threats of proxy fights (increased pressure), publicly disclosed letters and presenta-

29 JP Morgan, *supra* note 29.
30 JP Morgan, *supra* note 29, 1.
31 JP Morgan, *supra* note 29, 7.

tions to management (more pressure), and direct letters to shareholders (the highest level before an actual proxy fight or hostile takeover).[32]

By far the most significant impact on the success of shareholder activism has been the changing attitudes and behavior of traditional long-only institutional investors, namely public pension funds, institutional investors, and money managers. For the reasons noted earlier, the environment after the GFC made them for the first time more comfortable supporting hedge fund activists, although they are, generally speaking, reluctant to project the appearance of pressuring their investee companies directly.[33]

From the target company perspective, attitudes have dramatically changed over the past 10–15 years or so from cautious engagement with shareholders to proactive outreach and engagement. The uniform and widely provided advice of financial and legal advisors now is the importance of having a proactive engagement strategy, with detailed guidelines on how to navigate the legal and regulatory risks and requirements.[34]

When engaging with target companies, hedge fund activists tend to focus their pressure on several investment themes. During the timeline above, and especially over the past 10 years, activists have gradually rebranded themselves from corporate agitators to defenders of shareholder value. And while the nature of their campaigns has changed, their core themes continue to follow several lines.

Without doubt, the most significant core weakness of a target company that attracts activists is underperformance. This thesis posits that the target has underperformed relative to peers, requiring changes to its strategy, which may be coupled with management change. A company's capital allocation decisions also can be an important thematic focus, particularly if the target company has excess liquidity that the activist will argue is not being productively used and therefore should be returned to shareholders or utilized in alternative ways. Another theme is corporate clarity, which argues that the target is not focused enough and should divest assets or businesses, a streamlining that will increase the overall value of the business. At the structural end of the spectrum, the activist will seek to influence corporate control, by arguing that the target should sell itself, ask for a higher price in a proposed sale, or abandon a pending acquisition. Or an activist will follow a theme centering around governance—e.g., the board is not independ-

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32 JP Morgan, *supra* note 29.

33 JP Morgan, *supra* note 29, 8.

34 TONELLO, *supra* note 12, 7; C. BROMILOW et al., Director Dialogue with Shareholders, The Corporate Board (May/June 2014).

ent enough, management is paid too much, and barriers to shareholder voice are too high.[35]

3. *Engagement Strategies*

As noted above, the post-GFC period has been marked by the emergence of quiet engagement by activist funds, representing a shift away from "transformation-only" adversarial tactics.[36] Hedge fund activists have widely varying approaches; some engage quietly first and then go public if they do not make progress. Others go public first to assess the reaction and then engage quietly. The overall trend has been to focus more on quiet, partnership-style forms of engagement, with an evolution of sliding scale and hybrid tactics—e.g., quiet to public, public to quiet, and a mix of the two.[37]

Their style of investing has evolved into strategies that have expanded in numerous directions. Some hedge funds are part-time activists. Some are dedicated to a particular sector, geography, or market cap. But many of them are now focused on returns generated by long-term improvements in performance.

Activists examine the causes of underperformance. As noted above, they develop their approaches according to different themes. Sometimes they believe the full value of the company cannot be realized unless it goes private. Sometimes they think there needs to be more focus on a company's core assets; the company may have grown too big with too many non-core businesses that are distracting the company. There may be multiple combinations of core themes that drive the strategy.

A number of activists may have some interaction with the company before they buy substantial amounts of shares. They may start with the company's investor relations department and methodically work their way up to higher levels of management. And they may have held an investment for some time by the point they are having substantive conversations with the board.

There is a significant amount of preparatory work that goes into an activist campaign, including pre-engagement shareholder consensus-building. Many activists will not launch a campaign unless they believe they have a critical

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35 JP Morgan, *supra* note 29, 5.

36 See generally AQUILA/BOEHMKE, *supra* note 4, 185–188, for a summary overview of key trends in shareholder activism in the U.S.

37 For a fuller account of hedge fund activist strategies from which the description below has been drawn, see A. B. STEBBINS/E. R. GONZALEZ-SUSSMAN/T. WHITE, Is an Activist Targeting Your Company?, The Informed Board Podcast (18 February 2025), *https://www.skadden.com/insights/podcasts/2025/02/is-an-activist-targeting-your-company*. The recording also can be accessed at *https://player.captivate.fm/episode/246ca91c-9a90-4846-b83b-cd6861a327e1*.

mass of like-minded shareholders that will support them. They may use proxy advisors as a communication channel to reach out to other key constituencies in order to build such support in advance of launching a campaign.

By the time an activist approaches a company, the other shareholders, and the proxy advisors, they will have been engaged with a company for some time, sometimes years. They will have done a significant amount of research and have become convinced that a company is undervalued by the public markets. They look at the risk profile of what they think needs to change. They investigate how long it will take to implement change in light of macro factors in the industry.

In researching a company's underperformance, an activist will now focus more deeply on the qualitative aspects of its governance, which accounts for the reason why partnership instead of adversarial confrontation is deemed more suited to improving shareholder value. Activists no longer define a board as poorly governed just because it is classified or has implemented a rights plan or did not adopt majority voting, issues which had been the focus in the pre-GFC period. Extensive research informs the activist about a company's situation in detail, which provides important insights that help to formulate opinions about a company's effectiveness and its culture that will be used in the engagement process.

V. JAPAN'S CONVERGENCE

The foregoing evolution of hedge fund strategies in the U.S. provides important context for the current rise of shareholder activism in Japan. This section will compare how Japan's slow movement towards market reform has converged with the evolution of shareholder activism in the U.S. in a manner that has facilitated the importation of U.S. techniques into the country.

1. Pre-Financial Crisis

While during the 1990s and into the 2000s the U.S. was experiencing the beginnings of an alignment between institutional investors and hedge fund activists—this together with regulatory changes that began to narrow the separation between shareholders and management[38]—Japan was mired in its post-bubble decline. During this time Japan focused on revitalizing the economy through reactive measures such as technical amendments to corporate and commercial laws to facilitate corporate restructurings.[39] Market pressures

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38 See the text accompanying footnotes 6–9, *supra.*

39 See M. D. WEST, The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States, University of Pennsylvania Law Review 150 (2001) 527.

started loosening the cross-shareholdings that had acted as a shield protecting corporate boards and management from external market pressures, but such developments did not fundamentally change the dynamics of the shareholder-management relationship which was still distinctly separated and largely deferential to management. The market did not provide opportunities for the type of transformative transactions that the U.S.-style hedge fund activists were engaged in at the time[40]—the structural barriers were still too high.

2. *Great Financial Crisis*

While U.S. institutional investor inflows into hedge funds dramatically increased during the period straddling the GFC in the mid- to late 2000s, the period following the financial crisis created increased pressure in Japan for change in the shareholder-management power balance. Nevertheless, a number of factors continued to impede the development of a market that would make management receptive to robust shareholder engagement. Stable shareholder groupings characterized by cross-shareholdings, although slowly unwinding, continued to predominate, together with a general reluctance of stakeholders to challenge management policy. Few institutional investors were willing to support activist agendas. With very few successful cases of activist campaigns, the Japanese market lacked the robust ecosystem of the U.S. As a structural matter, shareholder rights continued to be relatively weak compared to the U.S., with proxy fights and hostile takeovers rare and discouraged by regulation and practice. On the policy level, Japan's post-GFC recovery efforts focused more on macroeconomic stimulus and monetary easing. This was in contrast to promoting corporate restructurings or governance reforms to actively address the sort of critical appraisals of corporate performance that opened the door in the U.S. for activists to push for improved efficiency and shareholder returns.

3. *Abenomics*

However, the gradual unwinding of cross-shareholdings, the significant undervaluation of Japanese equities, and a number of high profile corporate scandals attracted the attention of foreign investors, which over time accumulated a significant portion of the public market, jumping to over 30% by 2014.[41] This increase in foreign investors pushing for higher returns was

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40 See the text accompanying footnote 20, *supra*.

41 M. FUJIKAWA, Foreign Ownership of Japan Shares Hits All-Time High, The Wall Street Journal (19 June 2014), *https://www.wsj.com/articles/foreign-ownership-of-japan-shares-hits-all-time-high-1403173422*; see also J. R. FRANKS/C. MAYER/H. MIYAJIMA, The Ownership of Japanese Corporations in the 20th Century

significant in light of the importance of activists' ability to enlist the support of fellow shareholders for their campaign agendas. The turning point for Japan came during Prime Minister Shinzo Abe's second term, between 2012 to 2020. Government attention on the economy during this period, as embodied by Abenomics and its focus in particular on shareholder returns ("return on investment" or "ROI" continues to be a buzzword for the new capital allocation mindset), together with Abe's personal encouragement of foreign hedge fund investments in Japan, was the first real opening for U.S. activist funds to seriously engage with the emerging opportunities in the country. The adoption of the Corporate Governance Code (2015) and Stewardship Code (2014) represented an alignment of Japanese government policy with the fundamentals of the shareholder rights movement in the U.S. The result was a marked shift in the balance of power towards shareholders through increased transparency, oversight, and influence, with an emphasis on shareholder empowerment and value. Notable corporate scandals (e.g., Olympus 2011, Toshiba 2015) also attracted the attention of foreign hedge funds, which led to the first high-profile emergence of activists during this period. On a broader level, hedge funds started to increase their investments, albeit at relatively low volumes and amounts. Notwithstanding the new focus on governance reform, the level of corporate and shareholder receptivity to the tactics commonly associated with activists at the time, which still involved public pressure and agitation, also remained relatively low.

4. *U.S. Convergence*

The timeline above illustrates how the gradual change in the balance of power between ownership and control in Japan coincided with the shifts in U.S. hedge fund strategies previously outlined.

The run-up to the GFC and the transformation of U.S. activist strategies created by the increased financial power of hedge funds, combined with institutional investor and proxy advisor support, came at the time when Japan was in the early stages of moving towards a more market-driven (as opposed to a state-guided) economy. And as U.S. hedge fund activists were shifting their tactics—moving from public campaigns, high pressure, and proposals for structural change towards a focus on larger targets, smaller percentage stakes, and longer holding periods, with a broader range of engagement styles with companies—Japan was making its first serious efforts to narrow the separation between shareholders and management by shifting the corporate balance of power more in favor of shareholders.

(17 February 2014). European Corporate Governance Institute (ECGI) – Finance Working Paper No. 410/2014, *https://ssrn.com/abstract=2397142* or *http://dx.doi.org/10.2139/ssrn.2397142*.

During the Abenomics period (2012–2020), the U.S. hedge fund focus on undervaluation, underperformance, shareholder value creation and—especially—quiet engagement started aligning with not only the preferred style of shareholder engagement by Japanese companies, but also their strategic priorities, i.e., an increased focus on improving ROI. The true story behind this convergence is not just one of policy decisions in Japan that opened the door to foreign activism; it is, rather, a story of timing. The opportunities in Japan arising from corporate governance reform and increased emphasis on shareholder returns came at a time when more hedge funds themselves were finding success with the type of engagement that Japanese companies could accept and work with. When observing the U.S. activist experience in Japan, it is striking how often U.S. activists uniformly cite the quiet engagement approach as the one they recognize as most effective and the one they prefer to use. And there are increasing numbers of hedge funds now building significant experience in how to use such tactics effectively in the Japanese context.

VI. Conclusion

In many respects, the current boom in shareholder activism in Japan comes as a surprise to many observers who had long been accustomed to slow, incremental change—even in the face of intense external pressures for reform during the "lost decades" of the post-bubble era. The market conditions that eventually resulted in the policy changes that began to attract foreign investors in significant numbers created the opening for U.S.-style activists. However, the current market would not have emerged but for the parallel evolution of U.S. hedge fund tactics over a number of years, which saw a shift to a more nuanced and sophisticated approach towards target companies based on partnership and dialogue, in contrast to oppositional relationships and public campaigns. This evolution was driven by a number of developments in the U.S. market that aligned institutional investors with activists, leading to dramatically increased amounts of capital available for campaigns, coupled with a correspondingly sharp increase in the numbers of funds focused on increasing shareholder value. The resulting competition among funds led them to develop alternative forms of engagement with target companies that made them more effective in Japan.

The dramatic increase in activism in the Japanese market over the past several years is arguably attributable to this convergence of multiple changes both in the U.S. and Japan, which broadly culminated in an alignment of long historical preparation on the U.S. side and opportunity created by necessity on the Japanese side.

SUMMARY

To many observers long accustomed to slow, incremental change, the current boom in shareholder activism in Japan comes as a surprise. The opening for U.S.-style activists was created by market conditions that eventually resulted in policy changes that attracted significant numbers of foreign investors. However, even the current market would not have emerged without a parallel evolution in U.S. hedge-fund tactics, which gradually shifted over a number of years to a sophisticated and more nuanced approach, one based on partnership and dialogue with target companies, in contrast to adversarial relationships and public campaigns. This article attempts to place current trends in Japan, which has seen a dramatic increase in shareholder engagement with target companies, in the context of the long history of U.S. shareholder activism. It describes how strategies in the U.S. have evolved over time to converge with the current state of the market in Japan, making Japanese companies more receptive to the cur-rent style of U.S. activist engagement. The dramatic increase in activism in the Japanese market over the past several years is arguably attributable to this convergence of multiple changes on either side that has culminated in an alignment between long historical preparation in the U.S. and opportunity, created by necessity, in Japan.

Shareholder Activism in France

Current Debates and Reform Prospects

Mai ISHIKAWA[*]

I. Introduction–General Aspects of Shareholder Activism in France
II. Launching the debate: Woerth–Dirx Report (2019)
III. Proposals from Stakeholder Groups
   1. Le Club des Juristes Report (2019)
   2. AFEP Report (2019)
   3. Paris Europlace Report (2020)
IV. The French Regulator's Position on Shareholder Activism
V. An assertive choice of a soft form of regulation?
VI. Conclusion

I. INTRODUCTION–GENERAL ASPECTS OF SHAREHOLDER ACTIVISM IN FRANCE

For many years in France, shareholder activism was considered a foreign phenomenon. Although 2022 was recognized as a record year for shareholder activism in France, a decline was observed after 2023.[1] However,

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* This article is based on a presentation from 13 March 2025 at the symposium "Shareholder Activism in Japan, the EU, the UK and the US: A Comparative Study", organized by UCL Laws, the Goethe Universität, the Max Planck Institute and the Deutsch-Japanische Juristenvereinigung. The author has previously written on the same topic in an article published in 2021 (M. ISHIKAWA [石川真衣], フランスにおける株主アクティビズム規制をめぐる議論の現状 [The current debate on shareholder activism regulation in France], 企業法制の将来展望－資本市場制度の改革への提言＜2022 年度版＞ [Prospects for the future of corporate legislation – Proposals for reform of the capital market system (2022)] (2021) 305). The purpose of this article is to examine the ongoing debate.

This work is supported by the JSPS KAKENHI Grant Number JP23K01183 and the Tohoku University Habataku Young Researchers Support Program (funded by Daiichi Sankyo Company, Limited).

The links provided were last verified on 26 June 2025.

1 S. GOLSHANI/D. LAMARCHE/F. THILLAYE/V. SEGARD, France. Trends and developments, in: Chambers Global Practice Guides – Shareholders' Rights and Shareholder Activism 2024 (2024) 85, *https://gpg-pdf.chambers.com/view/746828656/84/*. For an overall description of the situation from a legal point of view, see A.-C.

France remains under scrutiny by activists, and according to a survey, it is the second-best European country, after the UK, for the opportunities it provides for activist campaigns.[2] Since 2019, lively debates on the issue have been ongoing. Several questions may arise. The first is on the appropriateness of regulating shareholder activism. Even if an activist appears, would they not be a shareholder like any other? It is true that in France, where shareholders' rights are particularly well protected, there may be some reluctance to limit shareholders' rights. Furthermore, it is difficult to provide a precise definition of shareholder activism, as it takes so many different forms. The current trend of climate-related actions makes the situation even more complicated, blurring the lines and presenting situations that should be considered problematic.

In the above context, how can shareholder activism, including undesirable shareholder behaviors, be regulated? Several proposals were made by different stakeholder groups in France between 2019 and 2020 suggesting solutions to address this issue. This was followed by the publication of the position of the French financial regulator, the Autorité des Marchés Financiers (hereinafter the "AMF"). These publications reveal a general trend towards a soft form of regulation, a trend that remains evident today. This article aims to give an overview of the discussion in France and to briefly analyze the current state of the issue, which appears to concern the tools provided by financial market law rather than corporate law.

II. Launching the Debate: The Woerth–Dirx Report (2019)

The first comprehensive report on the situation in France is an informative report submitted in October 2019 to the French National Assembly by Éric Woerth and Benjamin Dirx.[3] The report provides an overview of the situation in France in the Brexit context, with an analysis of activist campaigns

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Muller, Droit financier. Les opérations de marché : l'introduction en bourse et ses conséquences, les transactions, les offres publiques d'acquisition [Financial Law. Market Operations: Initial Public Offerings and their Consequences, Transactions, Takeover Bids] (2023) 600–618.

2 Skadden, Arps, Slate, Meagher & Flom LLP, Activist Investing in Europe 2024 (2024) 12, *https//www.skadden.com/-/media/files/publications/2024/02/the-informed-board/activist_investing_in_europe_2024.pdf?rev=8d8a6aa2daa74afab28ba9d57542cef2&hash=5EA5FB36851012F9D8D19F06DAD9AB30.*

3 É. Woerth/B. Dirx, Rapport d'information en conclusion des travaux d'une mission d'information relative à l'activisme actionnarial [Information report concluding the work of a fact-finding mission on shareholder activism] (2 October 2019), *https://www.assemblee-nationale.fr/dyn/15/rapports/cion_fin/l15b2287_rapport-information.pdf.*

in Europe. The report states that few active campaigns were being conducted in France.[4] It observes that activism had taken multiple forms: "event driven" campaigns by investment funds, "short sellers" betting on prices, and medium-term investors wishing to correct undervaluation.[5]

The report was published in a context in which attention was focused on increasing the attractiveness of Paris as the leading financial center in Europe. It makes thirteen recommendations for improving the supervision of activist behavior without harming markets. These recommendations include the following points: (i) strengthening market transparency and improving issuers' knowledge of their shareholders, (ii) reducing asymmetries in communication and information between activist funds and listed companies, (iii) closely regulating short selling and encouraging transparency in the securities lending market, and (iv) providing additional regulatory powers to the AMF, the financial regulator.[6]

The publication of the report sparked lively debates on how to understand and respond to shareholder activism. Although there were no major legal reforms, the AMF was wary about the situation, and Robert OPHÈLE, the former chairman of the AMF, released a statement on the topic on 11 July 2019.[7] Concerned with the abnormally destabilizing effects on issuers and markets, but stating that developments must remain limited in scale (and scope), he made several recommendations that will be considered below: (i) the introduction of a 3% threshold for major shareholding reporting for large capitalizations, (ii) a new obligation to declare intent when crossing the threshold of 5% of capital or voting rights for large capitalizations, and (iii) a reporting obligation for short positions on debt instruments (including credit default swaps (CDS)).[8] The position adopted here is that the European framework provides adequate standards.[9]

III. PROPOSALS FROM STAKEHOLDER GROUPS

Several proposals have been made on the issue in a very short period. The originality of the debate lies in the diversity of the participants: think tanks, issuer groups, and market representatives.

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4 WOERTH/DIRX, *supra* note 3, 18.

5 WOERTH/DIRX, *supra* note 3, 21–45.

6 For a summary of the report, see WOERTH/DIRX, *supra* note 3, 9.

7 AMF, Contribution de Robert Ophèle aux réflexions sur l'activisme en bourse [Robert Ophèle's contribution to the debate on stock market activism] (11 July 2019), *https://www.amf-france.org/fr/actualites-publications/prises-de-parole/contribution-de-robert-ophele-aux-reflexions-sur-lactivisme-en-bourse.*

8 AMF, *supra* note 7.

9 AMF, *supra* note 7.

1. Le Club des Juristes Report (2019)

The first to publish a report was the Club des juristes, a French think tank created in 2007. The report, prepared by a working group chaired by Michel Prada, who served as chairman of the AMF from 2003 to 2008, made ten recommendations that can be summarized as follows: (i) provide a framework for activist campaigns through better transparency, (ii) increase dialogue between issuers and investors, (iii) strengthen the powers of regulators (the AMF and the European Securities Markets Authority (hereinafter referred to as the "ESMA")), and (iv) indicate directions for future amendments.[10]

The report's particularity is that its recommendations did not require a massive legislative intervention.[11] Its main expectation is that regulatory authorities play an active role. It emphasizes the impact of AMF recommendations and the importance of clarifying rules on the information publicized by activists as part of their campaigns.[12] Given the increasingly prevalent practice of short selling, the report recommends requiring a declaration of intent when certain thresholds are crossed or requiring aggregate disclosures in specific situations, particularly where investors are acting "in concert" within the meaning of threshold-crossing declarations.[13] Regarding the notion of "acting in concert (action de concert)", the report advocates specifying the behaviors likely to allow the characterization of acting in concert in the context of an activist campaign by following the example of the White List drawn up by the ESMA for the Takeover Directive (ESMA, 12 November 2013, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, ESMA/2013/1642).[14]

The report makes several parallel suggestions. To take a few examples, one suggestion is that the French Monetary and Financial Code be amended to give greater powers to the AMF such that its powers under Article L. 621-18 of the code include the ability to require investors—not just issuers—to correct or supplement their public disclosures to guarantee a fair framework for the activist campaign. Another suggested approach is to create a platform dedicated to shareholder dialogue, which would allow investors to consolidate their demands and engage in dialogue with issuers.[15]

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10 LE CLUB DES JURISTES, Groupe de travail présidé par Michel Prada, Rapport activisme actionnarial [Report on shareholder activism] (November 2019), *https://think-tank.leclubdesjuristes.com/wp-content/uploads/2019/11/Activisme-actionnarial-Le-Club-des-juristes-nov.2019.pdf*

11 LE CLUB DES JURISTES, *supra* note 10, 14.

12 LE CLUB DES JURISTES, *supra* note 10, 31–33 (recommendation no. 1 and no. 2).

13 LE CLUB DES JURISTES, *supra* note 10, 34–35 (recommendation no. 4).

14 LE CLUB DES JURISTES, *supra* note 10, 46 (recommendation no. 10).

2. *AFEP Report (2019)*

The Association Française des Entreprises Privées (French Association of Private Enterprises, hereinafter referred to as the "AFEP") is a French association representing 118 of the largest private corporations in France.[16] It has historically taken an active part in the public debate, especially on issues related to listed companies. For example, one of the French Corporate Governance Codes (the AFEP–MEDEF Code) for listed companies is prepared jointly by the AFEP and the Mouvement des Entreprises de France.

The AFEP's report represents the issuers' perspective on shareholder activism. It's clear purpose is to clarify possible actions that issuers can take to oppose the negative effects of certain "short-termist" shareholder activities.[17] The report seems to be mainly hostile to short-termism and therefore lists some effective defensive practices for issuers.[18] Regarding the legislative and regulatory frameworks, its recommendations include amending the AMF regulatory rules to improve the transparency of activists' identities and conflicts of interest, introducing new regulations to ensure the objectivity of disclosures by activists, and revising the monetary sanctions imposed by the AMF.[19] The aim of these recommendations is to improve financial communication between activist funds and issuers. The AFEP report recommends reforming the major shareholding disclosure system to improve transparency when investors cross ownership thresholds via derivative instruments. According to the AFEP report, the current system of major shareholding disclosure does not reflect the true economic exposure of investors who use hedging instruments.[20] Consequently, the current system does not reveal the precise financial interests guiding investors.[21] Another proposal is to revise the French Commercial Code to provide for the automatic suspension of voting rights in the event of non-compliance with threshold-crossing disclosure requirements stipulated in the articles of association.[22] The report cites the need to revise the short-selling regulation, whereby issuers can be notified of net short positions exceeding the thresh-

15 LE CLUB DES JURISTES, *supra* note 10, 40 (recommendation no. 6), 45 (recommendation no. 9).

16 AFEP, About us, *https://afep.com/en/afep/.*

17 AFEP, Activisme actionnarial (December 2019) 3, *https://afep.com/wp-content/uploads/2019/12/Activisme-actionnarial_Décembre-2019.pdf*

18 The report underlines that the company's performance remains the best means of defense but notes that it is also important to prepare to react to the sudden arrival of an activist fund. See AFEP, *supra* note 17, 7–8.

19 AFEP, *supra* note 17, 9.

20 AFEP, *supra* note 17, 11.

21 AFEP, *supra* note 17, 11.

22 AFEP, *supra* note 17, 12.

olds of 0.1% and 0.2% of capital.[23] It is also noteworthy that the AFEP has shown reluctance to lower the first legal threshold for major shareholding disclosure to 3% (from currently 5%) or to lower the first threshold for declarations of intent to 5% (from currently 10%).[24]

3. *Paris Europlace Report (2020)*

Paris Europlace is an association of participants from the French financial sector that promotes the Paris market.[25] Concerned about the behavior of certain activists, the Paris Europlace report[26] made eight recommendations, focusing on measures to improve dialogue.[27] The report addresses issues related to the disclosure of shareholders' identities, the information transmitted to the AMF (which is then disclosed to the public), and the duty of vigilance for both issuers and shareholders in their statements. It also proposes the idea of setting up an ad-hoc working group to more closely examine sanctions regarding threshold-crossing disclosure requirements stipulated in the articles of association. Moreover, the report addresses the prevention of abuses in short selling by focusing on increased transparency regarding short positions and the establishment of centralized markets for securities lending.

IV. THE FRENCH REGULATOR'S POSITION ON SHAREHOLDER ACTIVISM

In response to these recommendations, the French markets regulator AMF published a follow-up to the reports on shareholder activism published between 2019 and 2020.[28] Strangely, the AMF considers that the current legal framework requires no major changes. It proposes several targeted measures to: (i) improve the transparency of investors' long positions, (ii) ensure improved transparency of investors' financial exposure, (iii) promote open, good-faith and fair dialogue between issuers and their share-

23 AFEP, *supra* note 17, 12.
24 AFEP, *supra* note 17, 14.
25 Paris Europlace, About, *https://www.paris-europlace.com/en/paris-europlace/about-1250.*
26 Paris Europlace, Gouvernance actionnariale et pratiques de marché [Shareholder governance and market practices] (January 2020).
27 L'Agefi, Paris Europlace milite pour un encadrement des activistes [Paris Europlace calls for a framework for activists] (9 January 2020), *https://www.agefi.fr/news/entreprises/paris-europlace-milite-pour-un-encadrement-des-activistes.*
28 AMF, Communication de l'AMF sur l'activisme actionnarial [AMF statement on shareholder activism] (April 2020), *https://www.amf-france.org/sites/institutionnel/files/2020-04/communication-amf-sur-activisme-actionnarial_avril20_2.pdf.*

holders, and (iv) increase the analysis and response capabilities of the AMF concerning activist campaigns.[29]

The AMF's position attracted considerable attention but did not lead to significant reforms. The AMF did not favor adopting a legal definition of shareholder activism.[30] According to the AMF, there is no apparent intrinsic definition of "activist" shareholders or any way to distinguish them, in absolute terms, from merely "active" shareholders.[31] Regarding the introduction of a legal threshold beyond the 5% threshold for major shareholding disclosure, the AMF considers that contractual freedom should remain the essence of the system. Thus, its position is that issuers should be able to choose whether to introduce and determine the level of such thresholds in their articles of association.[32] The AMF's position therefore contrasts with the European trend, in which a 3% threshold seems to be the norm.[33]

Although it favors the status quo, the AMF's position includes several points that may prompt a response. Indeed, the AMF has explored revising its doctrine to include certain developments and recommendations on shareholder dialogue,[34] and such revisions have taken shape. The AMF's "Guide on ongoing information and management of inside information" (Position-recommandation AMF 2016-08) was revised in 2021,[35] and this may well be the most important outcome of this issue. The first notable change is an amendment that specifies that issuers may provide the market with any necessary information, even during a "quiet period" (para. 1.6.1). Second, the revision recommends that any shareholder initiating a public campaign should, without delay, inform the concerned issuer of any substantial information—such as in a "white paper"—that it sends to other shareholders (para. 1.6.5, "Recommandation").[36] There is also a further recommendation regarding information on takeover bids that would require vigilance during both the pre-bid and the bid periods in declarations by the

29 AMF, *supra* note 28, 2.

30 AMF, *supra* note 28, 6.

31 AMF, *supra* note 28, 6.

32 AMF, *supra* note 28, 8.

33 For a comparison, see AMF, *supra* note 28, 7.

34 AMF, *supra* note 28, 2, 9.

35 AMF, Actualité, 17 March 2021, Activisme actionnarial: évolution de la doctrine de l'AMF [Shareholder activism: Changes in AMF doctrine], Bulletin Joly Bourse nº 200b5 (May 2021) 6.

36 AMF, Guide de l'information permanente et de la gestion de l'information privilégiée [Guide on ongoing information and management of inside information], Position-recommandation DOC-2016-08, *https://www.amf-france.org/fr/reglementation/doctrine/doc-2016-08?from=b3f21baf-0d59-4443-9728-121437da7905|9965b8b6-473a-40f9-88ea-edd61a126f6f|a4cba3ea-8384-4647-9b22-80da5fe201c2*.

shareholders of or persons with financial exposure to the bidder or the target company by virtue of agreements or financial instruments mentioned in I of Article L. 233-9 of the Commercial Code, or in declarations by their managers, agents and advisers (para. 1.6.7, “Recommandation”).

Regarding shareholder dialogue, the AMF guide now indicates good practices for improving dialogue. These practices were already explained in another AMF recommendation regarding corporate governance in listed companies that adhere to the AFEP–MEDEF corporate governance code (“Gouvernement d’entreprise et rémunération des dirigeants des sociétés se référant au code AFEP-MEDEF : présentation consolidée des recommandations contenues dans les rapports annuels de l’AMF”, AMF recommandation DOC-2012-02). [37] These include recommendations to disclose the presentation materials produced for governance “roadshows” on the company website and to consider appropriate disclosures in the event of a contested vote at annual shareholder general meetings (para. 1.6.6, “Recommandation”). Despite the repetition of what was stated in another AMF document, a consequence of this revision is to extend the scope of application to issuers whose securities are admitted to trading on a regulated market, a multilateral trading facility, or an organized trading facility, and no longer only to issuers declaring compliance with the AFEP–MEDEF code.[38] The guide also emphasizes the importance of engaging in ongoing dialogue on the main issues of concern to shareholders, including social, environmental and governance (ESG) strategies and performance (para. 1.6.6, “Recommandation”).

Given that the AMF, which for the most part—aside from the several recommendations in the aforementioned “Guide de l’information permanente et de la gestion de l’information privilégiée”—has been reluctant to robustly pursue shareholder activism, some issuers have found themselves left to their fate. The French Institute of Administrators (Institut Français des Adminis-

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37 AMF, Gouvernement d’entreprise et rémunération des dirigeants des sociétés se référant au code AFEP-MEDEF : présentation consolidée des recommandations contenues dans les rapports annuels de l’AMF [Corporate governance and executive compensation in companies that refer to the AFEP-MEDEF code: consolidated presentation of the recommendations contained in the AMF’s annual reports], Recommandation DOC-2012-02, *https://www.amf-france.org/fr/reglementation/doctrine/doc-2012-02*. The AMF recommendations on the organization of shareholder general meetings in listed companies (AMF, Recommandation AMF DOC-2012-05 Les assemblées générales d’actionnaires des sociétés cotées [Shareholder general meetings in listed companies], *https://www.amf-france.org/fr/reglementation/doctrine/doc-2012-05*) are also included in the guide (propositions no 1.1–1.10).

38 AMF, Guide de l’information permanente et de la gestion de l’information privilégiée, Position-recommandation DOC-2016-08, *supra* note 36, para. 1.6.6.

trateurs, hereinafter the "FIA") in October 2021 published a note, prepared by its law committee, entitled "L'administrateur face à une campagne activiste" [The director facing an activist campaign],[39] indicating that France ranks third in Europe, following the UK and Germany, for the highest level of activist activity.[40] France is confronting a movement gathering momentum worldwide: Shareholders are becoming more active. According to the FIA note, campaigns may be triggered by specific factors: government interventions in strategic companies during takeover attempts; the growing influence of the "Big Three",[41] in which share ownership is concentrated, creating a more favorable environment for shareholder activism.[42]

The note on directors facing activist campaigns indicates several good practices for board members, but the content is nothing new. The practices can be divided into two categories, one preventive, the other deterrent. On the prevention side, emphasis is placed on the importance of conducting shareholder dialogue with competent directors, the necessity of dialogue with investors who are not yet shareholders, preparation for possible activist campaigns, and board composition. [43] On the deterrent side, the note outlines considerations of the engagement strategy, including studying activist practices, establishing a single line of communication between the company and the activist, and refraining from expressions of individual views or views that differ from those of the board or management.[44]

V. An Assertive Choice of a Soft Form of Regulation?

A few years later, where do things stand? Although legislative solutions have been proposed in the past, the reforms at present seem to be mostly limited to soft law options. This trend is confirmed by two initiatives, one by the Club des juristes and the other by Paris Europlace.

The Club des juristes published a new report in December 2022 consisting of two parts. The first part re-examines the recommendations from 2019 in the current context and in light of new practices. The second part summarizes the status of implementation of its 2019 recommendations. In par-

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39 Institut Français des Administrateurs, Les notes de l'IFA: L'administrateur face à une campagne activiste [The director facing an activist campaign] (October 2021), *https://www.ifa-asso.com/mediatheques/ladministrateur-face-a-une-campagne-activiste/*.

40 Institut Français des Administrateurs, *supra* note 39, 1.

41 The "Big Three" are the largest asset managers: BlackRock, Vanguard and State Street.

42 Institut Français des Administrateurs, *supra* note 39, 4–5.

43 Institut Français des Administrateurs, *supra* note 39, 7–10.

44 Institut Français des Administrateurs, *supra* note 39, 10–12.

ticular, the report emphasizes the emergence of a form of activism, new to France, conducted by non-governmental organizations with social and environmental concerns;[45] but the Club's position still appears to be generally in line with the views it expressed in 2019.

To specify procedures for shareholder dialogue, the report recommends developing a guide on shareholder dialogue and revising the AMF's "Guide de l'information permanente et de la gestion de l'information privilégiée" (Position-recommandation DOC-2016-08). This would be done by introducing, through a new recommendation, a reasonable period between attempting to engage in dialogue with the issuer and launching a public campaign (giving the activist and issuer enough time to engage in dialogue before the public campaign and allowing the issuer to rectify/clarify any material errors in white papers), and by restraining activists from communicating with markets during "quiet periods".[46]

Regarding shareholder dialogue, the report would require the AMF to recommend that activists disclose their shareholding levels.[47] Alongside recommendations to the AMF, the report also makes recommendations to the ESMA that it complete its Q&A on the Market Abuse Regulation[48] to clarify the extent to which the regulations on investment recommendations apply to public information disseminated by activists, such as in white papers.[49]

In June 2024, Paris Europlace published its "Guide du dialogue actionnarial" (Guide on shareholder dialogue), the product of a working group, again chaired by Michel Prada, intended to describe good practices for regular constructive dialogue. Not legally binding,[50] these practices clearly demonstrate France's preference for a soft form of regulation of shareholder activism. A closer look at this guide's content reveals that it only considers "private" dialogue that shareholders may engage in with company management; it does not address "public" dialogue, such as discussions that may occur during shareholder general meetings.[51] This guide can be summarized as containing four principles, six good practices for issuers, and

45 LE CLUB DES JURISTES, Rapport Activisme actionnarial [Report on shareholder activism] (December 2022) 6, *https://think-tank.leclubdesjuristes.com/wp-content/uploads/2022/12/Activisme-actionnarial-Le-Club-des-juristes-Dec-2022.pdf*.

46 LE CLUB DES JURISTES, *supra* note 45, 10–12.

47 LE CLUB DES JURISTES, *supra* note 45, 14.

48 ESMA, Q&A on the Market Abuse Regulation (MAR), ESMA70-145-111, version 17, Last updated on 15 November 2022.

49 LE CLUB DES JURISTES, *supra* note 45, 18.

50 PARIS EUROPLACE, Guide du dialogue actionnarial [Guide on shareholder dialogue] (June 2024), 2, *https://www.paris-europlace.com/global/gene/link.php?news_link=2024094446_2094611245_2024-guide-dialogue-actionnarial-vf.pdf&fg=1.*

51 PARIS EUROPLACE, *supra* note 50, 2.

four good practices for shareholders. The principles are quite simple: continually engage in dialogue; engage in broad, open dialogue; engage in constructive dialogue, and promote dialogue to ensure fair and equitable discussions.[52] Regarding good practices, issuers are encouraged to allocate resources and establish policies on shareholder activism; to appoint a director charged with shareholder relations; or, to establish internal procedures and tools to facilitate communication with shareholders.[53] Shareholders are invited to respect the dialogue framework, provide information requested of them, and respond to companies seeking dialogue.[54] Although this guide emphasizes pursuing dialogue when both sides demur,[55] it does not seem entirely realistic that these recommendations will always be followed.

Why focus on soft forms of regulation, even when they are not certain to be effective? The answer seems related to the French understanding of shareholder activism. In France, responsibility for addressing this issue at the regulatory level lies with the financial markets regulator. At first glance, it appears that shareholder activism is more closely tied to capital markets law than company law. Indeed, the proposals and recommendations on this issue mainly concern capital markets law. The separation between company law and capital markets law is not the same as in some other jurisdictions;[56] in this context, the AMF publishes an annual report on corporate governance and executive compensation in listed companies[57] and openly discloses its views of shareholder activism-related initiatives. For example, the latest guide on shareholder dialogue published by Paris Europlace was received by the AMF as follows: "The AMF, which has long encouraged issuers and shareholders to engage in ongoing dialogue including on environmental and climate change issues, welcomes this initiative by Paris Europlace, which helps to promote and encourage shareholder dialogue."[58] As far as listed companies are concerned, the policy response to matters of dialogue falls within the competence of the AMF, and shareholder activism is both a matter of corpo-

52 Paris Europlace, *supra* note 50, 3.
53 Paris Europlace, *supra* note 50, 5.
54 Paris Europlace, *supra* note 50, 6.
55 Paris Europlace, *supra* note 50, 5–6.
56 For example, the Japanese Financial Services Agency does not usually directly interfere in corporate law-related matters.
57 AMF, Rapport sur le gouvernement d'entreprise et la rémunération des dirigeants des sociétés cotées [Report on corporate governance and executive compensation in listed companies].
58 AMF, Rapport sur le gouvernement d'entreprise et la rémunération des dirigeants des sociétés cotées (2024) 17, *https://www.amf-france.org/sites/institutionnel/files/private/2024-12/rapport-2024-sur-le-gouvernement-dentreprise-et-la-remuneration-des-dirigeants_0.pdf*

rate governance and an investment-related issue. The difficulty is the extent of what needs to be done; corporate governance requires greater confidence in the voices of shareholders, whereas certain investor behaviors require better regulation under financial market law. Under these conditions, it seems more reasonable to begin with flexible rules.

VI. Conclusion

Although it only took a few years for shareholder activism to become a well-recognized phenomenon in France—with French issuers sometimes reacting defiantly—radical measures seem to have been avoided for now. The possible reasons are not easy to explain. Whereas some fear that the constraints will infringe on the shareholder's freedom of expression,[59] especially in the light of the European Court of Human Rights judgement in favor of a "right of criticism" on the part of shareholders,[60] others point out the dangers of behind-the-scenes dialogue between issuers and shareholders, stating that it may violate the prohibition on selective disclosure of information as stated in Art. 223-10-1 of the "Règlement général de l'AMF" [The AMF general regulation].[61] A strong form of regulation of shareholder activism could detract from the attractiveness of the Paris financial center,[62] not to mention fail to enhance it, which is one of the current legislator's priorities.[63] In our view, the question of shareholder activ-

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59 Q. Bertrand, Les nouvelles propositions du Club des juristes sur l'activisme actionnarial et la libre expression de l'actionnaire actif [New proposals from the Club des juristes on shareholder activism and the free expression of active shareholders], Bulletin Joly Bourse, no. BJB201d9 (March 2023) 40, 44.

60 European Court of Human Rights, 30 June 2020, *Petro Carbo Chem S.E. vs. Romania*, Application No. 21768/12, *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203312%22]}*. For a French perspective on this case, see A. Couret, Le droit de critique de l'associé [The *associé*'s right to criticism], Bulletin Joly Sociétés nº121j3 (November 2020) 22.

61 F. Drummond, Dialogue actionnarial: promouvoir peut-être, sécuriser surtout [Shareholder dialogue: promoting perhaps, securing above all], Bulletin Joly Bourse nº BJB202a0 (November 2024) 1. Indeed, the article 223-10-1 stipulates that "All issuers must ensure that the public enjoys equal and simultaneous access to the information sources and channels that the issuer or its advisors make available specifically to investment analysts, particularly with regard to financial transactions."

62 A. Gaudemet, Activisme actionnarial: le débat ne se joue pas où l'on croit [Shareholder activism: the debate is not where you think it is], Bulletin Joly Bourse nº 118s3 (November 2019) 63.

63 In 2024, new legislation was adopted aiming to enhance the attractiveness of the Paris Financial Centre (Loi nº 2024-537 du 13 juin 2024 visant à accroître le financement des entreprises et l'attractivité de la France).

ism may be partly resolved through the shareholder identification system now in place at the European level through the Shareholder Rights Directive II (SRD II). Although the companies themselves bear the costs of shareholder identification, a potential increase in share capital can be identified this way, and it would be an effective tool for rectifying asymmetries in the understanding of companies' capital structures. Although France has long been protected, both by having fewer listed companies and by their particular shareholding structures with a high proportion of controlling shareholders, be they families, the state, or block holders,[64] given the increase in the number of activists and their fields of action, the side-effects of an ambiguous regulatory approach remain to be seen.

SUMMARY

Although shareholder activism was considered a foreign phenomenon in France for many years, the presence of activists is no longer an unfamiliar occurrence. Since 2019, lively debates on the issue have been ongoing. Initially, these took the form of proposals made by various stakeholder groups in France between 2019 and 2020, suggesting solutions for addressing shareholder activism. This was followed by the publication of the position of the French financial regulator, the Autorité des Marchés Financiers. More recently, two initiatives include recommendations that to a significant extent align with prior regulatory proposals, emphasizing in particular the regulation of shareholder dialogue. The analysis of the situation in France reveals a general trend towards a soft form of regulation, with a special emphasis on the tools provided by financial market law, rather than corporate law. The avoidance of strong measures to prevent or regulate activist campaigns can be explained by France's delicate situation: any regulation must respect the freedom of expression granted to shareholders and increase market attractiveness to investors; at the same time, regulations must respond to the danger posed by behind-the-scenes dialogue between issuers and shareholders and address issuers' rising demand for tools to deal with certain activist behavior. This leads to a deliberate choice of flexible rules that offer a wide range of solutions to the various situations associated with the phenomenon.

64 MULLER, *supra* note 1, 605–606.

Shareholder Activism in the UK

The Past, Present, and Future

Dionysia KATELOUZOU*

I. Introduction
II. The Historical Evolution of Shareholder Activism in the UK
III. The Contemporary Landscape of Shareholder Activism
  1. Evolving Forms and Tactics
  2. Empirical Trends in UK Institutional Shareholder Activism
IV. The Future of Shareholder Activism in the UK: Institutional Constraints and Contested Pathways

I. INTRODUCTION

Shareholder activism in the United Kingdom has travelled a long arc—from a marginal, insurgent practice often met with managerial resistance to a mainstream mechanism of corporate governance. Once associated primarily with adversarial hedge fund campaigns targeting underperforming firms, activism has evolved into a complex, multi-actor phenomenon that shapes boardroom dynamics, capital allocation decisions, and public policy debates. This transformation has been particularly visible in markets with high institutional ownership, where the boundaries between shareholder activism and shareholder stewardship have become increasingly blurred.

While the terms are sometimes used interchangeably, shareholder activism and stewardship reflect different traditions and orientations. Activism typically refers to shareholder-led efforts—often adversarial or event-driven—to influence specific corporate decisions, such as board composition, capital allocation, or strategic direction. Stewardship, by contrast, denotes a more continuous and relational mode of engagement, grounded in the fiduciary responsibility of institutional investors to monitor, vote, and engage with investee companies in pursuit of long-term value.[1] In practice, these modalities increasingly intersect, as investors adopt both tactical and

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* The provided links were last checked on 16 December 2025.

1 See generally the contributions in D. KATELOUZOU/D.W. PUCHNIAK (eds.), Global Shareholder Stewardship (2022).

systemic approaches to influence corporate behavior. This convergence is particularly evident in the UK context.

The UK exemplifies this trajectory with particular clarity. Its liquid capital markets, dispersed ownership structures, and pioneering Stewardship Code have positioned it as an early laboratory for shareholder engagement practices that are now gaining global attention—if not yet full adoption—in other jurisdictions, most notably Japan. What began in the early 2000s as a series of high-profile, firm-specific interventions by activist hedge funds has gradually institutionalized into a broader stewardship ecosystem. Over the past decade, a more diverse array of institutional actors—including index funds, pension schemes, and traditional asset managers—has normalized shareholder engagement as an integral part of responsible investment. These institutions now link firm-level value propositions to wider systemic concerns such as climate risk, supply-chain resilience, and social license to operate.

This shift marks more than a tactical shift; it reflects a deeper reconceptualization of shareholder activism in the UK. No longer framed solely as a corrective to managerial inefficiency or entrenchment, activism is now understood as part of a wider governance function—one that engages with long-term value creation and the management of systemic risk. As the economic rationale for shareholder intervention has broadened, so too has its normative scope. Activism has become more pluralistic in its methods and more expansive in its aims, moving beyond narrow financial concerns to encompass environmental, social, and governance (ESG) imperatives.

The UK's evolving model offers a rich case study in how shareholder activism can be institutionalized, diversified, and integrated into a broader regulatory and cultural framework. It does not offer a one-size-fits-all template, but it does provide a valuable lens for comparative inquiry—particularly for jurisdictions like Japan, where corporate governance reform is gaining momentum. By examining how the UK has navigated the tensions between shareholder power, corporate accountability, and public value, this chapter contributes to a deeper understanding of how similar governance challenges are framed, contested, and resolved across differing legal, institutional, and cultural contexts.

II. The Historical Evolution of Shareholder Activism in the UK

The story of shareholder activism in the UK begins in the aftermath of the First World War, when ownership of listed companies gradually shifted from entrepreneurial families to dispersed outside investors.[2] Although British firms retained stronger blockholders than their US counterparts, post-war studies revealed a growing separation between ownership and

control.[3] This transition fed into a broader post-war embrace of 'managerialism'.[4] From Burnham's fears of bureaucratic overreach to Drucker's hopes for responsible technocrats, the prevailing consensus cast shareholders as passive rentiers—legally supreme, but functionally disengaged.[5] They acquiesced in a tacit bargain: managers would run the firm, and shareholders would accept the returns they were given. Public meetings were perfunctory, and shareholder interventions were rare. Political and legal discourse increasingly focused on employees and the public interest, thereby sidelining shareholders as anachronistic.[6]

Albert O. Hirschman's theory of *exit* and *voice* helps explain this passivity.[7] With deep and liquid capital markets, shareholders typically exited underperforming firms rather than engaging with them.[8] By the 1970s, this logic was reinforced by the rise of contractarian theories: poor governance was not to be challenged via voice but corrected through market discipline—the so-called 'market for corporate control'.[9] Few environments rewarded this logic more than the City of London, where a vibrant takeover market and the 1968 City Code empowered hostile bidders and reinforced exit as the primary disciplinary mechanism.[10]

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2 For a fuller account of the historical foundations of shareholder governance and shareholder activism in the UK, see D. KATELOUZOU, The Path to Enlightened Investor Stewardship (Cambridge University Press, forthcoming), Chapter 2.

3 D.H. ROBERTSON, The Control of Industry (1943 edn., 1923) 65; H. PARKINSON, Ownership of Industry (1951); P. SARGANT FLORENCE, Ownership, Control and Success of Large Companies (1961).

4 The literature on 'managerialism' is vast. Some of the seminal contributions include R. MARRIS, The Economic Theory of 'Managerial' Capitalism (1964); J.K. GALBRAITH, The New Industrial State (1968); A.D. CHANDLER, The Visible Hand: The Managerial Revolution in American Business (1977); A.D. CHANDLER, Scale and Scope: The Dynamics of Industrial Capitalism (1990).

5 J. BURNHAM, The Managerial Revolution (3rd ed., 1944); P.F. Drucker, The New Society: The Anatomy of Industrial Order (1993 edn., Transaction Publisher 1950).

6 See e.g. T. HADDEN, Company Law and Capitalism (2nd ed., 1972) 84–86 (writing in the early 1970s that the most significant limitations on managerial powers are organized labor and involvement of government rather than the shareholders).

7 A.O. HIRSCHMAN, Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States (1970) 83.

8 B.R. CHEFFINS, Corporate Ownership and Control: British Business Transformed (2008) 373–377.

9 H. MANNE, The "Higher Criticism" of the Modern Corporation, Columbia Law Review 62 (1962) 399; H. MANNE, Mergers and the Market for Corporate Control 73 (1965) Journal of Political Economy 110.

10 CHEFFINS, *supra* note 8, 360–370. For a comprehensive account of the differences in the regulation of defensive tactics across the Atlantic, see J. ARMOUR/D.A. SKEEL Jr.,

Yet the limitations of this model became clear in the 1990s. Recession and a dwindling supply of undervalued targets stalled the takeover wave.[11] At the same time, the ownership landscape had shifted dramatically: individual shareholders who had dominated the 1960s were now being eclipsed by institutional investors. This transformation raised expectations for more informed and active oversight. Legal scholars at the time highlighted the potential for institutional voice to supplement or even replace exit as the primary mechanism of shareholder discipline, challenging the dominance of the market-based control paradigm.[12] Early empirical studies lent cautious support to this view, suggesting that institutional monitoring could, under the right conditions, improve governance outcomes.[13] Yet in practice, this promise proved elusive. Structural barriers—including portfolio diversification, collective action problems, and conflicts of interest—continued to constrain meaningful engagement and limited the emergence of a consistently activist investor class.[14]

Still, the architecture for change was beginning to take shape. Ownership was concentrating—by 2020, the top three shareholders in a typical FTSE firm held nearly a quarter of its equity.[15] At the same time, the growth of passive funds and long-term mandates made divestment more difficult, just as high-profile failures (such as Polly Peck, Maxwell, and Enron) exposed the inadequacies of market discipline.

Yet the economics of intervention remained a powerful constraint on shareholder activism. Traditionally anchored at the level of the individual firm, activism was shaped by a simple calculus: the size of an investor's

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Who Writes the Rules for Hostile Takeovers and Why. The Peculiar Divergence of U.S. and U.K. Takeover Regulation, Georgetown Law Journal 95 (2007) 1727.

11 M. JENSEN, The Eclipse of the Public Corporation, Harvard Business Review 5 (1989) 61–75.

12 B.S. BLACK, Agents Watching Agents: The Promise of Institutional Investor Voice, UCLA Law Review 39 (1992) 811; J. POUND, The Rise of the Political Model of Corporate Governance and Corporate Control, New York University Law Review 68 (1993) 1003; B.S. BLACK/J.C. COFFEE, Hail Britannia? Institutional Investor Regulation under Limited Regulation, Michigan Law Review 92 (1994) 1997.

13 See e.g. S.L. GILLAN/L.T. STARKS, Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective, Journal of Applied Finance 13 (2003) 4.

14 See e.g. E.B. ROCK, The Logic and (Uncertain) Significance of Institutional Shareholder Activism, Georgetown Law Journal 79 (1991) 445; A. HAMDANI/S. HANNES, The Future of Shareholder Activism, Boston University Law Review 99 (2019) 971, 977–983.

15 OECD, The Future of Corporate Governance in Capital Markets Following the COVID-19 Crisis (2021).

stake had to justify the costs of engaging with management.[16] Engagement would typically be pursued only when the expected benefits, in terms of improved firm performance or value realization, outweighed the direct and opportunity costs of intervention. This logic reinforced what came to be known as the 'passivity story': most institutional investors, lacking both the incentives and the concentrated holdings necessary to effect change, defaulted to silence or exit.[17]

That model began to unravel in the early 2000s, when hedge funds with concentrated portfolios and performance-based mandates demonstrated that targeted activism could be both feasible and profitable.[18] Their success, particularly in the Anglo-American markets, challenged longstanding assumptions about the viability of shareholder voice.[19] While their methods often diverged from those of traditional institutions, hedge funds' growing prominence prompted imitation and accommodation by a wider range of investors. Nonetheless, many mainstream investors continued to exhibit what has been called 'rational reticence'—preferring to support activist campaigns led by others rather than initiating them.[20]

Concurrently, a dense web of soft law instruments has emerged to legitimize and support shareholder engagement as a core feature of corporate governance. Beginning in the early 1990s, a series of soft-law initiatives—including the Cadbury Report in 1992 and the evolving Combined Code on Corporate Governance—reframed institutional investors not merely as passive recipients of returns but as key actors in corporate accountability. Rooted in agency theory and underpinned by strong shareholder rights in

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16 For the various costs of shareholder activism, see D. KATELOUZOU, Worldwide Hedge Fund Activism: Dimensions and Legal Determinants, University of Pennsylvania Business Law Review 17 (2015) 798, 797–802, 852 (elaborating that the costs of firm-specific shareholder activism include entry costs (that is, search costs associated with identifying the potential candidate target company), financing and transaction costs involved in acquiring an ownership stake, and the costs of actually executing an activist campaign (disciplining costs).

17 See e.g. B.S. BLACK, Shareholder Passivity Re-examined, Michigan Law Review 89 (1990) 520, 524.

18 D. KATELOUZOU, Myths and Realities of Hedge Fund Activism: Some Empirical Evidence, Virginia Law & Business Review 7 (2013) 459.

19 For literature reviews of the empirical literature, see e.g. A. BRAV et al., Recent Advances in Research on Hedge Fund Activism: Value Creation and Identification, Annual Review of Financial Economics 7 (2015) 579; J.C. COFFEE Jr./D. PALIA, The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance, Journal of Corporation Law 41 (2015) 545, 551 (2016).

20 R.J. GILSON/J.N. GORDON, The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights, Columbia Law Review 113 (2013) 863, 867, 895.

UK company law, these initiatives called for more active and responsible oversight.[21] The Cadbury Report explicitly urged institutional shareholders to hold boards accountable and to exercise voting rights with care.[22] This expectation was gradually institutionalized through successive iterations of the UK Corporate Governance Code, most recently revised in 2024.[23] The 2001 Myners Review further reinforced the notion that institutional investors had both the capacity and obligation to exercise stewardship on behalf of beneficiaries.[24] Within this framework, shareholder engagement was redefined as a routine function rather than an exceptional one.

By the end of the 2000s, shareholder engagement in the UK had undergone a fundamental transformation. Supported by a maturing soft-law infrastructure and evolving regulatory expectations, activism was no longer an isolated or confrontational gesture but part of a broader shift toward institutionalized shareholder stewardship. The codification of investor responsibilities—most notably through the UK Stewardship Code—signaled that shareholder voice was not simply permitted but expected.[25] This reconceptualization set the stage for a more sustained and sophisticated form of activism, driven less by opportunism and more by strategic alignment with institutional mandates.

III. The Contemporary Landscape of Shareholder Activism

1. *Evolving Forms and Tactics*

Contemporary shareholder activism in the UK has moved from the margins to the mainstream. As institutional investors replaced dispersed individual shareholders, activism became more strategic, visible and multi-dimensional.[26] The key question evolved from *whether* investors could act to

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21 For a critical analysis, see I. H.-Y. Chiu, The Meaning of Share Ownership and the Governance Role of Shareholder Activism in the United Kingdom, Richmond Journal of Global Law and Business 8 (2008) 117.

22 The Committee on the Financial Aspects of Corporate Governance, Report of the Committee on The Financial Aspects of Corporate Governance (1992) paras. 6.1, 6.6, 6.10, 6.11, 6.15 and 6.16.

23 See e.g. UK Corporate Governance Code 2024, at 4 and Principle D.

24 P. Myners, Institutional Investment in the United Kingdom: A Review (2001).

25 D. Katelouzou, Something Old, Something New: Cultivating Institutional Investor Engagement through Shareholder Stewardship, in: Enriques/Strampelli (eds.), Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices (2024) 185.

26 Generally, on the corporate governance role of institutional investors, see A. Dasgupta et al., Institutional Investors and Corporate Governance, Foundations and Trends in Finance 12 (2021) 276.

when, how, and *to what end*. For most, the decision to engage depends on cost-benefit calculations, expected impact, and alignment with long-term portfolio objectives.

One of the most significant structural shifts has been the rise of index funds, which—by design—cannot exit underperforming firms. This immobility, when combined with long-term investment horizons, substantial ownership stakes, and exposures to market-wide risks, reconfigures the choice set available to these investors, rendering engagement a structurally salient—though contested—response to corporate governance concerns.[27] While critics question whether index funds possess adequate oversight incentives given agency problems and potential conflicts of interest,[28] growing presence has nonetheless contributed to the expansion of shareholder activism beyond firm level, extending it across industries and entire portfolios.

This expansion has led to a more layered and hybrid landscape. Shareholder activism now varies along several axes: by level (firm, industry, or portfolio), by motivation (financial, reputational, or systemic), and by approach (offensive or defensive). Some campaigns continue to target individual firms; others function as symbolic interventions or industry nudges; and the most expansive—such as those addressing climate risk—aim to preserve market integrity and long-term value across entire portfolios.[29] These forms of activism are not mutually exclusive. Firm-specific interventions can generate spillover effects, influencing corporate policies reaching across sectors and prompting pre-emptive reforms elsewhere.[30]

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27 See e.g. E. DIMSON et al., Active Ownership, The Review of Financial Studies 28 (2015) 3225; M. BARZUZA et al., Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, Southern California Law Review 93 (2019) 1243; J. FISCH et al., The New Titans of Wall Street: A Theoretical Framework for Passive Investors, University of Pennsylvania Law Review 168 (2019) 17; M. KAHAN/E. B. ROCK, Index Funds and Corporate Governance: Let Shareholders Be Shareholders, Boston University Law Review 100 (2020) 1771; M. BECHT et al., Does Paying Passive Managers to Engage Improve ESG Performance?, European Corporate Governance Institute – Finance Working Paper No. 922/2023, HKU Jockey Club Enterprise Sustainability Global Research Institute – Archive, *http://dx.doi.org/10.2139/ssrn.4506415*.

28 J.D. MORLEY, Too Big to Be Activist, Southern California Law Review 92 (2018) 1407; L. BEBCHUK/S. HIRST, Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy, Columbia Law Review (2019) 119 2029, 2050–2075.

29 M. CONDON, Externalities and the Common Owner, Washington Law Review 95 (2020) 143–148 and 63–64; J.C. COFFEE Jr., The Coming Shift in Shareholder Activism: From “Firm-specific” to “Systematic Risk” Proxy Campaigns (and How to Enable Them), Brooklyn Journal of Corporate, Financial & Commercial Law 16 (2021) 45.

To pursue their objectives, activist deploy a diverse array of strategies. At the firm level, they may employ formal mechanisms—such as shareholder proposals, director nominations, or litigation—or exert informal pressure through public statements, vote-no campaigns, and behind-the-scenes engagement.[31] While UK activists often treat adversarial methods as a last resort, their availability strengthens the credibility of shareholder voice.[32] In contrast, portfolio-level activism relies on thematic engagement and coordinated voting strategies across multiple holdings. Common themes include board diversity, climate alignment, and adherence to ESG standards.

Coordination further amplifies shareholder influence. Hedge fund-led "wolf pack" campaigns exert pressure through informal alignment, while broader coalitions allow institutional investors to support activist demands without leading them.[33] These coalitions, whether formal or informal, can be highly effective—especially when activist demands align with long-term portfolio interests.[34] Firm-specific activism often generates governance externalities, prompting industry peers to adjust practices to avoid becoming targets themselves.[35]

Beyond informal constellations, formal collaborative platforms increasingly structure activism. In the UK, the Investor Forum facilitates coordinated engagement among major institutions.[36] Globally, initiatives such as the PRI Collaboration Platform, Climate Action 100+, and organizations

30 See e.g. N. GANTCHEV et al., Governance under the Gun: Spillover Effects of Hedge Fund Activism, Review of Finance 23 (2019) 1031.

31 The literature on activist strategies is voluminous. See e.g. S.L. GILLAN/L.T. STARKS, Corporate governance proposals and shareholder activism: the role of institutional investors, Journal of Financial Economics 57 (2000) 275; P. CZIRAKI et al., Shareholder Activism through Proxy Proposals: The European Perspective, European Financial Management 16 (2010) 738; J.A. MCCAHERY et al., Behind the Scenes: The Corporate Governance Preferences of Institutional Investors, The Journal of Finance 71 (2016) 2905; T. BOWLEY et al., Shareholder Engagement Inside and Outside the Shareholder Meeting, European Corporate Governance Institute – Law Working Paper No. 709/2023, *https://ssrn.com/abstract=4465802*.

32 M. BECHT et al., Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes U.K. Focus Fund, The Review of Financial Studies 22 (2008) 3093.

33 See e.g. A. BRAV et al., Wolf Pack Activism, Management Science 68 (2022) 5557.

34 On the impact of acting-in-concert rules, see D.W. PUCHNIAK/U. VAROTTIL, Rethinking Acting in Concert: Activist ESG Stewardship is Shareholder Democracy, NUS Law Working Paper No. 2023/023, European Corporate Governance Institute – Law Working Paper No. 731/2023 *https://ssrn.com/abstract=4565395*.

35 J. N. GORDON, Systematic Stewardship, Journal of Corporation Law 47 (2021) 627, 638.

36 The Investor Forum Review 2022 (January 2023).

like ShareAction provide infrastructure for joint action on systemic issues.[37] These coalitions combine firm-level tools—like shareholder resolutions and board nominations—with portfolio-level strategies, including coordinated voting and public policy advocacy, to drive large-scale corporate change.

Importantly, shareholder activism rarely seeks corporate control. Even in board contests or M&A situations, the goal is influence, not ownership. As CHEFFINS and ARMOUR argue, activists operate within a 'market for corporate influence', relying on persuasive rather than proprietary power.[38] While the traditional market for corporate control has not disappeared, it has evolved—shareholder activism increasingly functions as a complementary mechanism, relying on influence rather than takeovers to discipline management.[39] Within this framework, activists may target specific firms to send signals across markets, or they may use systemic campaigns to shift norms and enable more surgical interventions. Recognizing this strategic fluidity is essential to understanding how shareholder voice now operates across multiple scales.

The framing of activism has also evolved. While maximizing fund value remains central, the means to that end now often include environmental and social concerns. The once-sharp boundary between 'value' and 'values' has blurred.[40] Unlike earlier ESG efforts that focused narrowly on firm-specific risk mitigation, today's *sustainability-oriented shareholder activism* integrates financial and non-financial considerations at both the firm and portfolio levels.[41] Climate inaction, biodiversity loss, and labor risks are increas-

37 See e.g. J.-P. GOND/V. PIANI, Enabling Institutional Investors' Collective Action: The Role of the Principles for Responsible Investment Initiative, Business & Society 52 (2013) 64; E. DIMSON et al., Coordinated Engagements, ECGI, Finance Working Paper No. 721/2021, *https://ssrn.com/abstract=3209072*.

38 B.R. CHEFFINS/J. ARMOUR, The Past, Present and Future of Shareholder Activism by Hedge Funds, Journal of Corporation Law 37 (2011) 51, 55.

39 M.C. BURKART/S. LEE/P. VOSS, The Evolution of the Market for Corporate Control (29 January 2024), European Corporate Governance Institute – Finance Working Paper No. 956/2024, Swedish House of Finance Research Paper No. 24-05, HKU Jockey Club Enterprise Sustainability Global Research Institute – Archive *https://ssrn.com/abstract=4709037*.

40 L.T. STARKS, Presidential Address: Sustainable Finance and ESG Issues—Value versus Values, The Journal of Finance 78 (2023) 1837.

41 D. KATELOUZOU/Y. REN/M. SAGARRA, A Bibliometric Analysis of Four Decades of Shareholder Activism Research, Corporate Governance: An International Review (2024) 2, 19. For empirical literature on the effects of this activism, see T. BARKO et al., Shareholder Engagement on Environmental, Social, and Governance Performance, Journal of Business Ethics 180 (2022) 777; A.G.F. HOEPNER et al., ESG shareholder engagement and downside risk, Review of Finance 28 (2023) 483.

ingly presented as threats to long-term shareholder returns.[42] This financial-materiality framing has even enabled traditionally aggressive hedge funds to pursue sustainability campaigns. Notable examples involving UK-based activist funds include TCI Fund Management's pressure on Aena to adopt Paris-aligned emissions targets, Bluebell Capital's push for Glencore to divest its thermal coal assets, and Sarasin & Partners' engagement with BP and Shell to align capital expenditure with net-zero objectives—all of which framed environmental concerns as financially material.[43]

Yet tensions remain. Hedge-fund-style activists tend to engage only when environmental or social risks intersect clearly with financial performance, rather than out of a normative commitment to broader sustainability goals.[44] Some large asset managers have faced growing criticism for 'rational hypocrisy'—endorsing sustainability in public while applying it selectively.[45] In parallel, anti-ESG sentiment—especially as imported from US debates—add further complexity.[46]

These shifts in shareholder activism—towards broader motivations, hybrid tactics, and systemic goals—are reshaping the UK's governance landscape. But how are these changes playing out in practice? The next section turns to empirical data from UK campaigns over the past two decades to assess the evolving scope, strategies, and impact of institutional shareholder activism.

2. *Empirical Trends in UK Institutional Shareholder Activism*

The institutionalization of shareholder activism in the UK has coincided with a marked rise in public campaigns, particularly at the firm level. Once dominated by private, behind-the-scenes engagement,[47] the UK's activism

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42 See e.g. C. McDonnell et al., Climate action or distraction? Exploring investor initiatives and implications for unextractable fossil fuels, Energy Research & Social Science 92 (2022) 102769.

43 A. Gara, Billionaire Chris Hohn Explains Why Increased Disclosure Will Force Companies To Cut Their Carbon Emissions, Forbes, 9 March 2021; "Activist investor Bluebell urges Glencore to separate its thermal coal unit", Reuters, 30 November 2021; "Sarasin & Partners to support Paris-aligned proposal at Shell and Total, warning of 'empty promises'", Responsible Investor, 14 May 2020.

44 S. Hannes et al., The ESG Gap, Brigham Young University Law Review 49 (2023) 1137, 1168–1173; M. Moore/T. Wilson, BP pivots back to oil and gas after 'misplaced' faith in green energy, Financial Times, 26 February 2025.

45 A. Christie, The Agency Costs of Sustainable Capitalism, UC Davis Law Review 55 (2021) 875, 907–911.

46 H. Welsh, Anti-ESG Proposals Surged in 2024 But Earned Less Support (2024) (reporting a surge in anti-ESG proposals during the 2024 proxy season in the US, though average shareholder report remained low at just 1.9%).

landscape has become increasingly visible, data-rich, and central to corporate governance decades.

Between 2000 and 2010, UK firms were targeted in 128 campaigns involving 274 demands by 51 activist hedge funds. These figures significantly outpaced other European jurisdictions—Germany, for instance, recorded only 30 campaigns, while France and the Netherlands saw 25 and 20 respectively.[48] The momentum continued throughout the following decade. From 2013 to 2022, the UK registered 309 public activist campaigns and 505 individual demands, accounting for 27.2% and 29.18% of all such activity in Europe.[49] Activist demands peaked in 2019 (64) and again in 2021 (76), with the UK representing approximately 15% of all public campaigns in Europe in each of those years.

This growth has been driven primarily by hedge-fund-style activists, who initiated 68.66% of all UK campaigns during the 2013–2022 period. Of these, 42.77% originated from US-based funds and 35.26% from UK-based funds. In contrast, other institutional investors—including asset managers, private equity funds, and pension schemes—were responsible for only 31.49% of activist demands. The UK's institutional shareholding structure and strong shareholder rights under company law have created a favorable environment for this form of activism, particularly for hedge funds seeking to leverage concentrated stakes and a permissive legal framework.[50]

Activist demands span a wide range of objectives, from operational and financial restructuring to governance reform. Among the most common are board-related demands, especially board appointments, which constitute 39.2% of all demands. Activists typically push for short-slate board representation to enhance oversight rather than to obtain full control.[51] Corporate control activism—such as opposing or initiating M&A activity—remains a prominent feature, alongside calls for divestitures, cost-cutting measures, and, to a lesser extent, ESG reforms and capital returns.[52] While hedge

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47 BECHT et al., *supra* note 32, 3096.

48 D. KATELOUZOU, Hedge Fund Activism, Corporate Governance and Corporate Law: An Empirical Analysis Across 25 Countries (Ph.D Thesis, University of Cambridge 2012) 93–94.

49 The Diligent Market Intelligence (previously Insightia) is a subscription-based database; it is available at: *https://www.insightia.com/*.

50 On the legal determinants of hedge fund activism, see KATELOUZOU, *supra* note 16.

51 See also A.L. CHRISTIE, The new hedge fund activism: activist directors and the market for corporate quasi-control, Journal of Corporate Law Studies 19 (2019) 1.

52 This contrasts, for instance, with hedge fund activism in Japan, which is often directed at the cash reserves of Japanese companies. According to hand-collected data, 15.72% of the activist campaigns in Japan between 2000 and 2010 sought cash returns, as opposed to 8.76% in the UK. Data with the author.

funds tend to prioritize financial restructuring, other institutional investors are more likely to advance governance and sustainability-related objectives.

Success rates in UK activism are relatively high, particularly in campaigns targeting board appointments and capital structure changes. Hedge funds are generally more successful than other institutional investors,[53] though outcomes vary by demand type. Single-seat board seats are especially effective, with success rates exceeding 82%, while multi-seat bids see diminishing returns. These patterns indicate a preference for influence rather than control, with many activists negotiating change rather than relying on proxy fights.

Ownership levels also shape campaign dynamics. Most campaigns are launched with minority stakes, and hedge funds typically operate with smaller, more agile holdings than other investors.[54] While campaign success generally correlates with increased ownership, the relationship is nonlinear: campaigns with very large stakes do not always perform better. Instead, the most effective campaigns tend to fall within a moderate ownership range of 5% to 20%, striking a balance between influence and strategic flexibility.

Contrary to stereotypes of short-termism, UK activists often adopt medium- to long-term investment horizons. Many remain invested well beyond the resolution of a campaign, suggesting a shift toward sustained engagement rather than opportunistic arbitrage.[55] Hedge funds frequently exit via liquid market transactions, while other institutional investors may realize returns through mergers, delistings, or strategic realignments. In both scenarios, activists demonstrate enduring involvement in portfolio companies.

The timing of interventions further reveals strategic diversity. Some activists make demands shortly after acquiring a stake, while others wait months or even years before acting—blurring the lines between proactive and reactive engagement.[56] Even after securing specific outcomes, activists frequently maintain their positions for extended periods, reinforcing their influence over corporate governance and ongoing performance.[57]

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53 Hedge funds lead with a 53.2% combined success and partial success rate, compared to 44.7% for other institutional investors.

54 Nearly half (47.2%) of all demands are associated with ownership stakes below 5%. Data with the author.

55 The average (median) holding period for completed exits is 1,497 (1,185) days—far longer than typical US campaigns.

56 The average (median) time between initial investment and demand is 584 (129) days, with hedge funds typically holding longer before intervening.

57 The median duration after achieving an outcome is 301 days, with hedge funds exiting slightly later (303 days) than others (292.5 days).

Taken together, these patterns illustrate how UK shareholder activism has evolved into a sophisticated and multifaceted tool for corporate influence. While hedge-fund-style activists remain dominant, the growing involvement of other institutional investors is diversifying the field. The UK thus offers a valuable case study in the broader global shift toward institutionalized, deliberate, and purposeful shareholder engagement.

IV. The Future of Shareholder Activism in the UK: Institutional Constraints and Contested Pathways

As shareholder activism in the UK enters its third decade of institutional maturity, its trajectory is being shaped by three interlinked forces: institutional transformation, regulatory recalibration, and the growing salience of systemic risks. These developments mark not merely a continuation of past trends but a deeper evolution in the nature and purpose of shareholder voice. Activism is shifting from a tactical tool for firm-specific intervention into a continuous, norm-driven mode of investor governance, increasingly framed through stewardship and sustainability imperatives.

The most significant transformation is institutional. UK capital markets are now dominated by a concentrated cohort of institutional investors—particularly passive and quasi-passive funds, many of them foreign-owned.[58] These investors may not be inherently activist, but their inability to divest, long-term horizons, and exposure to portfolio-wide risks—combined with pressure from beneficiaries, NGOs, and regulators—has made them central to corporate governance debates.[59]

However, this shift also exposes a legitimacy gap. Most UK equities are held through intermediated structures such as pension schemes, investment trusts, and mutual funds, distancing ultimate beneficiaries (savers, pensioners, retail investors) from the exercise of shareholder rights.[60] As activism extends into ESG and systemic domains—where end-investor preferences are heterogeneous—questions of representation, voice, and accountability become more acute. These tensions are amplified in the case of universal owners. Large index funds, for instance, often hold stakes in both activist targets and their competitors or suppliers, creating portfolio-level conflicts

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58 Orient Capital, Foreign investors take an increased stake in UK plc (2021); K. FUKAMI et al., Institutional investors and stewardship (OECD Corporate Governance Working Papers, 2022).

59 T.A. GORMLEY/H.B. KIM, Do Index Funds Monitor? Revisited, European Corporate Governance Institute – Finance Working Paper No. 1057/2025, *https://ssrn.com/abstract=5004197*.

60 For a critical analysis, see S.A. GRAMITTO RICCI et al., The Shareholder Democracy Lie, Florida Law Review (2026) 78 forthcoming.

that can dampen their willingness to support firm-specific campaigns.[61] In such cases, the challenge is not the absence of influence but its contested legitimacy within a pluralistic, contested investment ecosystem.

Activism is also becoming more hybrid, thematic, and multi-scalar. While traditional hedge fund campaigns targeting capital allocation or governance reform remain prominent, they are now complemented by collaborative, portfolio-wide efforts aimed at systemic issues like climate risk, biodiversity, digital governance, and workforce equity.[62] These initiatives reflect a broader 'unbundling' of shareholder voice—cutting across asset classes, time horizons, and engagement styles. The result is a model of 'networked shareholder activism', in which influence is exercised through both direct interventions and collective norm-setting.

This transformation is not simply tactical. It signals a reconceptualization of the shareholder's role—from a rights-bearing principal concerned with disciplining management to a system-aware steward accountable for the long-term integrity of financial and social ecosystems.[63] Activism increasingly demands not only financial credibility, but narrative fluency, namely the capacity to frame goals in ways that resonate with both shareholders and broader stakeholders.

These institutional and conceptual shifts are unfolding alongside significant regulatory recalibration. The UK Corporate Governance Code (2024), the UK Stewardship Code (2026), and reforms to the listing regime reflect efforts to preserve the competitiveness of UK markets while responding to evolving public expectations of corporate responsibility.[64] Where shareholder rights once functioned primarily to check managerial discretion, they are now embedded in a broader regulatory project centered on sustainability, resilience, and legitimacy. Yet this recalibration remains fragile. Enhanced disclosure requirements and stewardship expectations risk becoming performative unless grounded in enforceable norms and linked to substantive outcomes.

In this context, the future of shareholder activism in the UK is unlikely to be defined by adversarial boardroom contests. Instead, it is evolving toward a more iterative, system-aware form of engagement—one that seeks

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61 Z. GOSHEN/D. LEVIT, Common Ownership and Hedge Fund Activism: An Unholy Alliance?, European Corporate Governance Institute – Finance Working Paper No. 982/2024, *https://ssrn.com/abstract=4835079*.

62 A. BAKER et al., The Evolving Battlefronts of Shareholder Activism, Stanford Closer Look Series Corporate Governance Research Initiative, *https://www.gsb.stanford.edu/faculty-research/publications/evolving-battlefronts-shareholder-activism*.

63 D. KATELOUZOU, The Unseen 'Others': A Framework for Investor Stewardship, Current Legal Problems 77 (2024) 295.

64 See further KATELOUZOU, *supra* note 2, Chapters 5 and 8.

influence not through confrontation, but through alignment, coordination, and sustained pressure. If successful, this transition may complete the shift from shareholder activism to enlightened shareholder stewardship—not as ESG box-ticking, but as a reimagined governance function capable of mediating complex trade-offs between short-term returns and long-term resilience. As shown elsewhere, while some activist hedge funds deploy stewardship rhetoric as a strategic tool of legitimization, others have begun to embody the logic of stewardship more substantively—indicating that enlightened shareholder stewards are not merely rhetorical constructs but an emerging, if uneven, reality in contemporary corporate governance.[65]

Yet this trajectory is neither linear nor uncontested. The politicization of ESG in the United States has already created hesitation among some global managers, while the UK faces its own challenges: critiques of greenwashing, inconsistent stewardship practices, and tensions over fiduciary duty, coordination legality, and shareholder influence over corporate strategy. These frictions reflect deeper questions about the role of investors in mediating public values and the difficulty of aligning diffuse beneficiary preferences with coherent engagement goals.

A comparative glance at Japan sharpens these insights. While Japan has adopted a Stewardship Code and taken steps to encourage active engagement, the uptake of confrontational tactics has been limited by cultural norms, legacy cross-shareholdings, and a consensus-oriented corporate culture.[66] Nonetheless, Japan has drawn inspiration from the UK model, pursuing collaborative investor engagement and improved transparency. The UK thus offers both a prototype and a warning: institutionalizing shareholder voice requires more than regulatory reform—it demands cultural realignment, sustained investor coordination, and mechanisms that link stewardship to tangible outcomes.

Ultimately, shareholder activism is not converging along a single global trajectory. National contexts—legal systems, institutional structures, ownership patterns, and political economies—continue to shape its form and effectiveness. For the UK, which now sits at the intersection of concentrated institutional ownership, expanding stewardship expectations, and mounting public scrutiny, the future of shareholder activism will depend less on influence over individual boardrooms and more on its ability to mediate plural interests, manage systemic risks, and preserve its legitimacy in a shifting governance landscape.

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65 D. KATELOUZOU, The Rhetoric of Activist Shareholder Stewards, New York University Journal of Law & Business 18 (2021) 665.

66 G. GOTO, The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code, in: Katelouzou/Puchniak (eds.), *supra* note 1 (2022) 222.

SUMMARY

This article examines the evolution, contemporary practice, and future trajectory of shareholder activism in the United Kingdom, tracing its transformation from a marginal, adversarial practice into a central feature of the corporate governance framework. Drawing on historical analysis and empirical evidence from UK activist campaigns over the past two decades, it shows how shareholder activism has expanded across multiple levels (firm, portfolio, and system), a widening range of actors (including hedge funds, asset managers, pension funds, and index investors), and increasingly plural motivations (financial, governance, and ESG-related), while remaining primarily oriented towards influence rather than corporate control. The article argues that contemporary UK shareholder activism is increasingly—but unevenly—embedded within a broader stewardship ecosystem shaped by regulatory expectations, sustainability concerns, and systemic risk. This development raises important legal and institutional questions concerning legitimacy, accountability, and the governance implications of increasingly intermediated share ownership. While the UK experience does not provide a universal model, it offers valuable insights for comparative corporate governance debates—particularly in jurisdictions such as Japan—on the capacity and limits of institutionalized shareholder voice as a mechanism for mediating long-term value, public interest, and corporate accountability.

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