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Beyond Anglo-American Models: Japan’s Unique Approach to M&A and Its Impact on Shareholder Activism and Sustainability

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I would like to thank seminar participants at Seoul National University, GoetheUniversität, and 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).

Abstract

Japan has been evolving its M&A laws, charting a course distinct from that of the US and European models. First, whether an M&A is “good” or “bad” is evaluated by whether it enhances corporate value rather than solely on the acquisition price paid to shareholders. Second, although poison pills are available in Japan, triggering them by the board of directors alone is likely to be enjoined by the courts, whereas shareholder approval significantly reduces the likelihood of such injunctions. This reflects the development of a case law principle that respects shareholder intent. However, given that shareholders are more likely to support acquisitions that offer higher prices, there is a question of whether the case law principle is consistent with the aforementioned corporate value standard. Third, partial tender offers are available. This study makes three points. First, respecting shareholders’ intent may result in the highest purchase price offer, which 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. 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. Third, Japanese law is unlikely to permit anti-activist pills like those adopted in the United States, with lower triggering thresholds of 5% to 10%, as such activists’ shareholdings do not necessarily damage corporate value. 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.

Keywords: Japan, M&A, corporate governance, shareholder activism, poison pill, partial tender offer, corporate value, sustainability

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This study makes three points. First, respecting shareholders' intent may result in the highest purchase price offer, which 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. 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. Third, Japanese law is unlikely to permit anti-activist pills like those adopted in the United States, with lower triggering thresholds of 5% to 10%, as such activists' shareholdings do not necessarily damage corporate value. 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.

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I. Introduction

Recently, unsolicited takeover bids and shareholder activism targeting listed Japanese companies have begun to gain momentum, with Japan described 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 to evaluate M&A transactions, prioritizing whether an acquisition enhances corporate value over the

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[1] *See*, Hideyuki Sano, Lisa Du, Takako Taniguchi & Winnie Hsu, *Activist Investing Booms in Japan, Led by Elliott's Successes*, Bloomberg (June 26, 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 Stewardship Code in 2014 and Corporate Governance Code in 2015. *See* Gen Goto, *The Logic and Limits of Stewardship Code: The Case of Japan*, 15 BERKELEY BUS. L.J. 365, 397 (2019) (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 Hideyuki Miyajima, *Corporate Governance Reform, and Ownership, and Control: Perspective from Japan*, 30 ASIAN J. POL. SCI. 260, 268 (2022) ("[t]he US and the UK are inclined to the stakeholder model, while CG reform in Japan continues to introduce shareholder primacy models").

[3] Johan Jidinger & Hideaki 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] Yasutomo Tsukioka, *The Impact of Japan's Stewardship Code on Shareholder Voting*, 67 INT'L REV. ECON. & FIN. 148, 150 (2020) ("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, at 260.

[6] It is well known that Japanese defensive measures are not used for negation tools, and they function differently from the US ones. *See* Akio Hoshi, *The Peculiar Development of Anti-Takeover Measures in Japan*, 24 J. CORP. L. STUD. 587 (2024).

acquisition price offered to shareholders. This approach differs significantly from rules that focus primarily on offer prices.[7]

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 creates a 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] This practice is common in friendly and hostile takeovers in Japan, in contrast to European systems, which generally prohibit partial acquisitions when an acquirer gains control.[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 shareholders' intent may result in the highest purchase price offer, which 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

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[7] *See infra* Part II.1.

[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 shares than that limit. 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 the Financial Instruments and Exchange Act.

[11] *See infra* Part III.

[12] *See infra* Part II.4.

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-activist pills like those adopted in the United States, with lower triggering thresholds of 5% to 10%, as such activists' shareholdings do 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-path approach is not an incomplete adoption of Western models, but rather a rational and coherent system that weighs shareholders' interests. The analysis demonstrates that this approach has a theoretical justification, suggesting that legal transplantation does not always result in complete convergence with source jurisdictions.

The paper proceeds as follows. Part II analyzes the relationship between corporate value standards and the principle of shareholders' 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. Second, it analyzes whether courts should allow poison pills, even without shareholder approval, if these standards are inconsistent.

Section 1 introduces the corporate value standards. Section 2 provides an overview of how courts and soft laws 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 takeover price attractiveness, 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 undesirable acquisition proceeds from a corporate

[13] *See infra* Part III.6.
[14] *See infra* Part IV.1.
[15] *See infra* Part IV.2.
[16] *See infra* Part II.3.

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 represents a reasonable second-best solution 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 Guidelines by METI

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

In court precedents, impairment of corporate value is the dividing line for determining whether a takeover defense measure can be justified.[18] As the defensive measures taken in court cases are discriminatory against the acquirer, it is necessary to explain why they do not violate the principle of shareholder equality (Art. 109 para. 1, 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 management 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 when the acquisition of management control by a particular shareholder was likely to impair

[17] *See* Yasushi Ito, *Burudokku sōsu jiken saikōsai kettei [The Bulldog Sauce Case Supreme Court Decision]*, 1923 JUNKAN SHŌJI HŌMU 37, 41 (2011) (Japan) (arguing that courts lack expertise in corporate takeovers, so deferring to shareholder judgment is less problematic than court intervention).

[18] *See infra* Part II.B.1.

[19] Law No. 86/2005.

[20] Saikō Saibansho [Sup.Ct.] August 7, 2007, Hei 19 (kyo) no. 30, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215 (Japan). 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, at 602-604.

the existence and development of the company, thereby undermining its corporate value and harming its interests and the common interests of its shareholders.[22]

The Corporate Value Study Group (chaired by Professor Hideki Kanda), formed by the 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, the 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 a study group established by the METI (chaired by Professor Hideki Kanda). Although they are not legally binding, their content is so persuasive that many players act based on it, and their

[22] Saikō Saibansho [Sup.Ct.] August 7, 2007, Hei 19 (kyo) no. 30, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215, 2223-2224 (Japan) (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 without the company's existence and development. Thus, if a buyer's control acquisition threatens the company's existence, development, corporate value, and common shareholder interests, discriminatory treatment to prevent such damage 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* (May 27, 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*, at 14, (June 28, 2019), 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] (hereinafter: Takeovers Guidelines). The Takeovers Guidelines is markedly oriented toward stimulating the economy through M&A. It states 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 22) aimed to present an interpretation of the legality of takeover defense measures, the 2023 Takeovers Guidelines address takeover defense measures in a small part, with descriptive content, refraining from proactively presenting new legal interpretations. *See* Tomotaka Fujita, *Kigyō Baishū ni okeru Kōdō Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 JURISTO 14, 15 (2024) (Japan).

influence on M&A market practices is highly significant.[26] The Guidelines for Corporate Takeovers of 2023 set forth the principles of corporate value and the common interests of shareholders as the first of the three principles proposed. It clearly states the corporate value standard as 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 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 it does not consider the two concepts to be exactly the same. The Supreme Court implied that the impairment of corporate value was the cause, with the common interests of shareholders being impaired.[29]

The Takeovers Guidelines also distinguish between corporate values and the common interests of shareholders. The corporate value standard of the 2023 Takeovers Guidelines aims to ensure and enhance corporate value and shareholder interest. The Takeovers 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

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[26] For example, in the FUJISOFT case, the target company's opinion expressly cites Takeovers Guidelines and relies on the 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* (November 19, 2024), https://www.fsi.co.jp/e/press_release/img/20241119_02.pdf [https://perma.cc/74W7-SLRB].

[27] METI, Takeovers Guidelines, *supra* note 25, at 10.

[28] Mutsuhiko Yukioka, *Baishū o Meguru Taishō-gaisha no Torishimariyaku no Kōikihan [Code of Conduct for Directors of Target Company Concerning Takeover]*, 2367 JUNKAN SHŌJI HŌMU 15, 21 (2024) (Japan).

[29] *See supra* note 22.

[30] METI, Takeovers Guidelines, *supra* note 25, at 8. METI's soft laws have used the corporate value concept since 2005 with some changes. *See*, Manabu Matsunaka, *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 states 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 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, first, one must pay attention to whether the acquisition increases corporate value and, second, whether the acquisition price includes an adequate distribution of such increased corporate value.

The following notable recent case helps in better understanding this standard. KKR and Bain Capital competed 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 (JPY 9,600 per share) than KKR (JPY 9,451 per share). Interestingly, despite Bain's higher price, FUJISOFT's board supported KKR's proposal, pointing out concerns about corporate value enhancement rather than merely focusing on price. The reasons for this are as follows: (1) KKR's tender offer price was formed through adequate competitive procedures and reasonable efforts to realize shareholder interests and was deemed sufficient; (2) the difference between Bain Capital's offer price and KKR's tender offer price was relatively small; and (3) considering that the completion of Bain Capital's tender offer was expected to be at least three months after the completion of KKR's tender offer, 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 when KKR raised its tender offer price to JPY 9,850 on February 4, 2025, prompting Bain Capital to withdraw its offer on February

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Concept of Corporate Value, Corporate Governance, Shareholder Interests, and Stakeholder Interests in Japan, 57 J. JAPAN. L. 83 (2024).

[31] METI, Takeovers Guidelines, *supra* note 25, at 12.

[32] Fujita, *supra* note 25, at 16.

[33] METI, Takeovers Guidelines, *supra* note 25, at 13.

[34] METI, Takeovers Guidelines, *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* (December 17, 2024), https://www.fsi.co.jp/e/press_release/img/20241217.pdf [https://perma.cc/XDR4-C544].

17, 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 offer price 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 takeover offer, as in Delaware case.[37] However, the answers to these questions were negative under the corporate value standards. If a lower-price offer increases corporate value, then it should proceed under this standard.

2. Principle of Shareholders' Intent

a) Nippon Broadcasting System (2005)

In cases of poison pills injunctions, case law respecting shareholders' intentions has been developed.[38] The implementation of poison pills based solely on the decisions of the board of directors is likely to be enjoined by courts, and without shareholder approval, defense measures are not permitted in principle. The Tōkyō High Court clearly held this doctrine in the Nippon Broadcasting System case in 2005, in which new share subscription rights were issued only by resolution of the board of directors. It 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]

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

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

[38] *See* Curtis J. Milhaupt & Zenichi Shishido, *The Enduring Relevance of the Poison Pill: A U.S.-Japan Comparative Analysis*, 28 STAN. J.L. BUS. & FIN. 336 (2023) ("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 Kōtō Saibansho [Tōkyō High Ct.] March 23, 2005, Hei 17 (ra) no. 429, 1173 HANREI TAIMUZU [Hanta] 125, 132 (Japan). 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),

As an exception, the Tōkyō High Court held, in dicta, that the issuance of new stock subscription rights by 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] The court took the view that a defense measure is lawful even without shareholders' explicit approval if the hostile takeover damages corporate value by causing irreparable harm to the company. The board of directors bears the burden of proving irreparable damage 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 in the judicial process.[41] The court will not judge which acquirer enhances corporate value more, which is left to the shareholders' intent.

b) Bulldog Sauce (2007)

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

In the Bulldog Sauce case, where a shareholders' meeting approved the triggering of a poison pill in response to a takeover bid, the Supreme Court recognized the legality of its triggering and denied an injunction against the pill.[42] It held that it generally respects shareholders' intent and does not intervene in whether corporate value would be damaged if shareholders approve of takeover defense measures. The court did not independently evaluate whether a hostile acquirer would damage corporate value before assessing the

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which would have increased Fuji's stake to 59% and diluted Livedoor's from 42% to 17%. The court enjoined the issuance.

[40] Tōkyō Kōtō Saibansho [Tōkyō High Ct.] March 23, 2005, Hei 17 (ra) no. 429, 1173 HANREI TAIMUZU [HANTA] 125, 133 (Japan).

[41] *Id*. at 134.

[42] Saikō Saibansho [Sup.Ct.] August 7, 2007, Hei 19 (kyo) no. 30, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215 (Japan)("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.").

credibility of shareholders' judgments. This doctrine differs from the Tōkyō High Court's approach in the Bulldog Sauce case.[43] The Tōkyō High Court held that triggering poison pills was legal if it was recognized as necessary and reasonable for resisting an abusive takeover. It then evaluated whether the acquirer qualified as an abusive acquirer based on court-determined facts. The Supreme Court, however, did not take such an approach to determine whether the acquirer was abusive, but paid respect to shareholders' intent.

However, one can argue that the Supreme Court respects shareholder approval of the pill too broadly. There is room for doubt as to whether shareholders truly determine whether the acquisition of hostile acquirers would damage corporate value. When shareholders vote on the poison pill, they express opinions on whether it should be introduced to eliminate hostile takeovers, but not directly on whether such a hostile takeover would damage corporate value. Theoretically, shareholders are most likely to agree with defensive measures by comparing the acquirer's proposed takeover price with the share value they would enjoy under the current management if defense measures were introduced. They do not pay much attention to whether a target company's corporate value will increase or decrease after a hostile takeover is completed. Additionally, cross-shareholding shareholders might favor defensive measures against hostile takeovers which increase the target company's corporate value to maintain friendly relationships with business alliances through cross-shareholdings.[44] Despite these logical possibilities, the Supreme Court directly connected the shareholders' approval of defense 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 also 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 board resolution was legal under the Companies Act and denied the injunction of

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[43] Tōkyō Kōtō Saibansho [Tōkyō High Ct.], July 9, 2007, Hei 19 (ra) no. 917, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2306 (Japan).

[44] Peng Xu & Wataru Tanaka, *Baishū bōei-saku in za shadō obu kabushiki mochiai – Jirei Kenkyu [Takeover Defense Measures in the Shadow of Cross-Shareholding--A Case Study]*, 1885 JUNKAN SHŌJI HŌMU 4 (2009) (Japan) (found that 58% of the shareholders in this case were cross-shareholders).

the pill.[45] The Nagoya High Court held that the purpose of the defensive measures was not to prevent the takeover itself by board judgment, but to ensure that shareholders had the necessary and sufficient information and time to make appropriate judgments about selling their shares to the acquirer or keeping them and have an opportunity to negotiate with the person intending to make large-scale purchases of the target company's shares. It 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]

[45] Nagoya Kōtō Saibansho [Nagoya High Ct.], April 22, 2021, Rei 3 (ra) no. 138, 446 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 130 (Japan). 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.

[46] Nagoya Kōtō Saibansho [Nagoya High Ct.], April 22, 2021, Rei 3 (ra) no. 138, 446 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 130 (Japan).

[47] Tōkyō Kōtō Saibansho [Tōkyō High Ct.], April 23, 2021, Rei 3 (ra) no. 798, 446 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 154 (Japan). 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 unfair issuance, finding pill's primary purpose was preserving control for incumbent directors or supporting shareholders.

[48] Tōkyō Kōtō Saibansho [Tōkyō High Ct.], April 23, 2021, Rei 3 (ra) no. 798, 446 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 154 (Japan).

[49] *Id*. at 156.

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 injunction request on June 23, 2021. The shareholders' meeting was scheduled for June 24. 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 defense plan if shareholder approval was not obtained at the annual meeting on June 24, 2021. The board's response was to let the shareholders themselves decide whether the corporate value and, in turn, the common interests of shareholders would be harmed by the inability to secure sufficient information and time to make appropriate tender offer decisions.[50]

On June 24, 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 defense 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 of the reverse stock split being passed.[52]

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[50] Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.], June 23, 2021, Rei 3 (yo) no. 20089, 450 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 151 (Japan).

[51] Tōkyō Kōtō Saibansho [Tōkyō High Ct.], August 10, 2021, Rei 3 (ra) no. 1593, 450 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 143 (Japan).

[52] *Id*. at 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* Wataru Tanaka, *Bōeisaku to Baishū Hōsei no Shōrai: Tōkyō Kikai Seisakusho Jiken no Hōteki Kentō [Defense Measures and the Future of Takeover Legislation: Legal Analysis of the Tōkyō Kikai Seisakusho Case]*, 2286 JUNKAN SHŌJI HŌMU 4, 14 (2022) (Japan).

Furthermore, regarding confirming shareholders' intentions to approve the poison pill, the Tōkyō High Court held that there was no such problem at the shareholders' meetings, while the tender offer, in this case, 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, negating the fact that the main objective was to maintain and secure management control.

f) Tokyo Kikai Seisakusho (2021)

In the Tokyo Kikai Seisakusho case, the Supreme Court upheld the Tōkyō High Court's decision that the poison pill introduced by board resolution and triggered after a shareholders' meeting to confirm shareholders' intent was legal.

In this case, the acquirer 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. However, the target company agreed to cancel these measures unless approved at a subsequent shareholders' meeting. This meeting used a majority voting requirement excluding both the acquirer's group and the target company's directors. With approximately 79% of eligible shareholders approving the defensive measures, they remained in place. The acquirer sought an injunction against these measures, but the Tōkyō High Court found the pill legal, and rejected the request for an injunction.[53]

The reasons for the target company's excluding the voting rights of acquirers and target company directors in shareholder meetings were as follows: Prior court decisions (Nippo Sangyo, Japan Asia Group, and Fuji Kosan cases) were understood in practice that when defense measures were introduced and triggered only by the board, whether such measures were legal depended on whether they were subject to the condition that the shareholders' meeting would be held afterward, and the pill would be canceled if shareholders disapproved.[54] In the Tōkyō Kikai Seisakusho case, where a poison pill is

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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.

[53] Tōkyō Kōtō Saibansho [Tōkyō High Ct.], November 9, 2021, Rei 3 (ra) no. 2391, 453 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 98 (Japan).

[54] HIDEKI KANDA, KAISHAHŌ [CORPORATE LAW] 187 (26th ed., Kōbundō, 2024) (Japan).

introduced in response to market purchases, the shareholder composition itself changed in the acquirer's favor over time, even if the board of directors wants to convene shareholders' meetings to confirm the shareholders' intent.[55] The target company's board has no effective countermeasures against rapid market purchases before the record date of the shareholder meetings.[56] Therefore, they were excluded from 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 information and time, 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 meetings should confirm the uncoerced intent of shareholders regarding potential damage from inadequate information and time. Given this purpose, allowing acquirers to vote was inappropriate; thus, invoking the pill after confirming other shareholders' intent was lawful.[57]

g) Mitsuboshi (2022)

Even when shareholder approval has been formally obtained, defensive measures cannot be justified if shareholders are distorted. In the Mitsuboshi case, the board resolution introduced a poison pill and was triggered through an ordinary resolution at the shareholders' meeting to confirm the target company's shareholder intent, MITSUBOSHI Co., Ltd. The Supreme Court[58] approved the injunction against the defense measure, upholding the Ōsaka High Court's[59] finding that, while an inference of necessity was affirmed, the measure was not reasonable (too excessive[60]).

The issue centered on the target company's identification of acquirers (including those acting in concert) for defense measures. The target announced that shareholders who submitted proxies favoring acquirer proposals would be classified as poison pill targets,

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[55] *Id*.

[56] *Id*.

[57] Tōkyō Kōtō Saibansho [Tōkyō High Ct.], November 9, 2021, Rei 3 (ra) no. 2391, 453 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌSHŌJI] 98, 103-104 (Japan). 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, at 187.

[58] Saikō Saibansho [Sup.Ct.], July 28, 2022, Rei 4 (kyo) no. 12, 1667 KIN'YŪ SHŌJI HANREI [KINHAN] 56 (Japan).

[59] Ōsaka Kōtō Saibansho [Ōsaka High Ct.], July 21, 2022, Rei 4 (ra) no. 750, 1667 KIN'YŪ SHŌJI HANREI [KINHAN] 30 (Japan).

[60] KANDA, *supra* note 54, at 186.

considering this pro-acquirer conduct. The Ōsaka High Court found this could coerce shareholders into voting for the target's proposals to avoid unfavorable treatment. Thus, despite a 54.46% approval, the court questioned true shareholder support for current management, concluding the resolution alone did not make the pill reasonable.[61]

In this case, multiple parties simultaneously purchased shares of the target company, and an individual and two entities were ordered to pay administrative monetary penalties by the Financial Services Agency on August 28, 2024, for violating large shareholding reporting regulations.[62] While the target company understandably had difficulty identifying 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) Takeovers Guidelines

The Takeovers Guidelines by METI follow case law. It names one of its three principles as “Principle 2: Principle of Shareholders’ Intent” and states that "the rational intent of shareholders should be relied upon in matters involving the corporate control of the company."[63]

Furthermore, the Takeovers 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 shareholders' meeting regarding the merits of the pill.[65] However, the Tōkyō High Court in the Nippon Broadcasting System case in dicta allowed the introduction and implementation of the pill based solely on the board’s judgment.[66] There was no reference to this position in subsequent court decisions. The METI’s previous documents since the 2005 Guidelines have not been made to explain this exception in a manner consistent with the principle of shareholders’ intent.

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[61] Ōsaka Kōtō Saibansho [Ōsaka High Ct.], July 21, 2022, Rei 4 (ra) no. 750, 1667 KIN’YŪ SHŌJI HANREI [KINHAN] 30, 40 (Japan).

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

[63] METI, Takeovers Guidelines, *supra* note 25, at 10.

[64] Fujita, *supra* note 25, at 14.

[65] *See supra* Part II.2.

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

In contrast, the 2023 Takeovers Guidelines acknowledge exceptional cases, such as Nippon Broadcasting, and argue that such an exception can be justified with respect to shareholders' intent. It describes such an exception as a "necessity" defense (a metaphor based on a criminal law concept). It states 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 triggering defense measures solely by the board in cases where shareholder approval can be assumed and where it is difficult for shareholders to express their intent from the viewpoint of shareholders' intent.[68] In this respect, the Takeover Guidelines consider the theoretical rationality.[69]

Furthermore, unlike the 2005 Guidelines, the 2023 Takeovers Guidelines state that passive confirmation of shareholder intent is insufficient.[70] 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

[67] METI, Takeovers Guidelines, *supra* note 25, at 58.

[68] Manabu Matsunaka, *Kigyō Baishū ni Okeru Kōdō Shishin no Rironteki Kentō (2) [Theoretical Analysis of Takeovers Guidelines (2)]*, 1592 JURISTO 26, 27 (2024) (Japan).

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, at 15.

[70] *Id*. at 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*, at 6 (2005), https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf [https://perma.cc/755C-35HH].

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, it 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 doctrine was preceded by case law through court cases in 2021, which the 2023 Takeover Guidelines organized retrospectively. As described above, the principle of shareholder intent occupies an important position in both case law and the METI Takeovers Guidelines.

i) Tension between the corporate value standard and the principle of shareholders' intent

Given the corporate value standard and the principle of shareholder intent, the following question arises: Shareholders generally favor acquisitions with higher offer prices, and economically rational shareholders who tender their shares have little concern about whether the company's corporate value will be impaired after selling those shares.[75] Is the legal norm of respecting shareholder intent consistent with corporate value standards?

This question highlights the 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 in Delaware's, where 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

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[72] METI, Takeovers Guidelines, *supra* note 25, at 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, at 27.

[75] WATARU TANAKA, KIGYŌ BAISHŪ TO BŌEISAKU [CORPORATE TAKEOVER AND DEFENSE MEASURES] 247 (Shōji Hōmu, 2012) (Japan).

[76] *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

corporate policies. The challenge for Japanese corporate law is to reconcile these competing interests by respecting shareholders' intent (which may favor short-term price maximization), while protecting the 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 this question.

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.

Corporate value standards and shareholder intent principles are typically consistent. 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 tendered shares 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 shareholders' intent on takeover

[77] METI, Fair M&A Guidelines, *supra* note 24, at 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. This encourages decisions based on corporate value standards, unlike all-or-nothing acquisitions. Conversely, if most value comes from tendered shares, the situation more closely resembles an all-or-nothing acquisition.

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. Even when considering this, 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.

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 but only in which case is more advantageous: 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 with higher corporate value but lower takeover price (hereinafter: Takeover Offer A) and one with a higher takeover price but damaging to corporate value (hereinafter: Takeover Offer B). If we ask shareholders about their will, Takeover Offer B with a higher takeover price is highly likely to be realized. However, takeover Offer A should be realized under corporate value standards. Thus, corporate value standards and shareholder intent principles are not always consistent.

This may occur in at least three situations: First, 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, A would pay only up to 100, and B's acquisition price would be higher.[79]

[79] For a general discussion of how auctions can be won at too high a price based on too high a valuation, *see* Richard H. Thaler, *Anomalies: The Winner's Curse*, 2 J. ECON. PERSPS. 191, 192 (1988).

Second, suppose that A and B are competitors in their product markets, and if A acquires the target company, B will be significantly disadvantaged in the competing product market (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 in the product market. Subsequently, B would propose a higher acquisition price than A.[80]

Third, the acquisition might reduce stakeholder interests (e.g., employees) and increase shareholder share.[81]

It is difficult to objectively observe how many real acquisitions with high prices, but not maximizing corporate value, occur. 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 price 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 permissible to reject such a proposal, express opposition, or call on shareholders not to accept it. The Financial Instruments and Exchange Act (hereinafter: 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 and Takeovers Guidelines do not permit this.

[80] Robert T. Miller, *Inefficient Results in The Market for Corporate Control: Highest-Value Users and Socially Optimal Owners*, 39 J. CORP. L. 101, 122-129 (2013).

[81] *See*, *e.g.*, Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES (Alan J. Auerbach ed., University of Chicago Press, 1988); Caley Petrucci & Guhan Subramanian, *Stakeholder Amnesia in M&A Deals*, 50 J. CORP. L. 87 (2024); METI, Fair M&A Guidelines, *supra* note 24, at 41.

[82] Law No. 25/1948.

[83] Article 27-10, JFIEA.

Defensive measures based solely on the judgment of the board are permitted only in exceptional cases.[84] Unless such exceptional circumstances exist, triggering countermeasures based solely on the board's judgment are 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.

Logically, the principle that a target company's board should base its decision for or against a takeover on corporate value, but 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 acquisition price offers are treated as more desirable, but higher prices are 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 takeovers risks abuse, with directors using corporate values as a pretext to reject takeover bids when motivated by their self-interest. This principle should be supported because it serves as a safety valve against directors' abuse of power 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 are 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 in M&A practices from those in the United States and the United Kingdom, where partial offers

[84] *See supra* Part II.2.
[85] Fujita, *supra* note 25, at 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 systems like labor laws to prevent easy profit transfers from stakeholders to shareholders would be preferable.
[87] Wataru Tanaka, *Sōron: M&A Hōsei no Kentō Kadai [General Remarks --M&A Legislation Issues]*, 2367 JUNKAN SHŌJI HŌMU 4, 6 (2024) (Japan).
[88] *Id*. at 6-7.

are rare.[89] The takeovers of listed companies through partial tender offers are common in Japan. Among the 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 one-third via partial tender offers.[90] Partial tender offers are often used for various strategic purposes, including maintaining a target company's listing after acquisition. A notable example is the tender offer by ITOCHU Corporation for Descente Ltd., which is considered the first hostile takeover bid between major Japanese companies and 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 and 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 the offer price. Consequently, unlike in all-or-nothing acquisitions, shareholder decisions regarding partial offers are more likely to align with corporate value standards. This reduces the potential conflict between corporate value standards and the principle of shareholder intent, as discussed in Part II. 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 from others. Partial offers are permitted when the tender offeror's post-offer shareholding ratio is less than two-thirds. However, partial offers are prohibited

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[89] Kotaro Inoue and Naoshi Ikeda, *Kabushiki hikōkaika torihiki ni okeru kabunushi hogo seido no kōka ni kansuru kokusai hikaku kenkyū [A cross-country analysis of shareholder protection in the going private transactions]*, 1 JSDA Kyapitaru Māketto Fōramu Ronbunshū [*Japan Securities Dealers Association Capital Market Forum Research Report*] 1 (Japan) (report that the portion of partial bids for tender offers whose deal size is more than USD 10 million are less than 4% in the United States, and less than 1% in the United Kingdom, but 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.

[91] For more information on this case, *see* Wataru Tanaka, *Jūgyōin to Kaishahō ni Tsuite no Ichishiron: Itōchū no Descente ni Taisuru Kōkai Kaitsuke Seiritsu ni Yosete [An Essay on Employees and Corporate Law -- In Response to the Passage of Itochu's Tender Offer for Descente]*, 1146 NBL 4 (2019) (Japan).

when the shareholding ratio exceeds two-thirds of the total share.[92] For instance, a partial tender offer in which the maximum number of shares to be purchased equals 70% of the total outstanding shares is prohibited. The maximum limit is less than two-thirds of the target company's total shares. This represents the 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] Additionally, for target company shareholders, there is uncertainty at the time of tendering as to whether a pro-rata settlement will be made or whether all tendered shares will be purchased.[94] While hostile takeovers can be countered with shareholder-approved poison pills, such countermeasures are virtually non-existent in friendly takeovers. The continued allowance of partial tender offers 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 the 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

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[92] Art. 27-13, para. 4, JFIEA; Art. 14-2-2, Order for Enforcement of the Financial Instruments and Exchange Act], Cabinet Order No. 321/1965.

[93] Marc Bremer, Kotaro Inoue & Hideaki Kiyoshi Kato, *Empirical Evidence of Coercive Tender Offers in Japan*, 41 JAPAN & WORLD ECON. 71, 74 (2017).

[94] Sharon Hannes & Omri Yadlin, *The SEC Regulation of Takeovers: Some Doubts from a Game Theory Perspective and a Proposal for Reform*, 25 YALE J. ON REG. 35 (2008).

[95] In 2024, JFIEA amendments revised tender offer regulations. Market trading now falls under regulation when exceeding 30% ownership threshold 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, para. JFIEA), though these can still be partial offers without mandatory conditions or UK-style requirements for approval by 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].

offers, they remain common in Japan. Section 4 summarizes the advantages and disadvantages of partial tender offers. Whether a partial tender offers disadvantages to the target company's shareholders remains unclear. Therefore, Section 5 reports an empirical analysis that assesses the benefits and detriments of partial tender offers as a first step toward determining whether Japanese regulations require reform.

2. Overview of Japanese Takeover Bid Regulations

a) 1971 Amendment

Japan's takeover bid regulations are in the JFIEA, not the Companies Act. 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]

The 1971 amendment introduced tender offer regulations to Japanese law, 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: 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. In such cases, shares are 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 face liability for damages to shareholders whose tendered shares are not purchased.[99] The damage amount equals the number of shares that should have been

[96] HIROYUKI KANSAKU ET AL., JAPANESE FINANCIAL INSTRUMENTS AND EXCHANGE ACT 82 (Zaikei shōhō sha, 2018).

[97] HIDEFUSA IIDA, KIN'YŪ SHŌHIN TORIHIKI HŌ [FINANCIAL INSTRUMENTS AND EXCHANGE ACT] 214-15 (Shinsei Sha, 2016) (Japan).

[98] Takashi Matsukawa, *Yukashouken no Koukaikaituke no Todokede Seido [Notification System for Tender Offers for Securities]*, 556 JUNKAN SHŌJI HŌMU KENKYU 2, 8 (1971).

[99] Art. 27-18 para. 1 JFIEA.

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 damage claim.[100]

b) 1990 Amendment

Between 1971 and 1990, only three tender offers occurred. However, the 1990 Amendment significantly revised takeover bid regulations. This revision stemmed from the Japan-US Structural Consultations, where 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 suspected of restricting foreign capital. Its abolition in the 1990 amendment addressed this concern. Additionally, the tender offer rule was fundamentally revised for thorough shareholder protection, notably introducing the so-called "one-third rule."[101]

The one-third rule mandates a tender offer for share purchases outside the stock exchange from ten or fewer persons if the post-purchase ownership exceeds one-third.[102] This rule was a new exception: previously, tender offers were only required for acquiring over 5% of shares by soliciting many people, and not for purchases from a significantly small number of persons.

The one-third threshold was established because owning over one-third of a company's shares allows blocking special resolutions and exercising de facto corporate control.[103]

Purchasing such control blocks is considered to significantly affect other shareholders by changing the target company's control.[104] The one-third rule mandates 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 all shareholders have equal opportunities to sell their holdings.

The 1990 amendment was developed with reference to 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

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

[101] Junichi Naito, *Atarashii Kabushiki Koukaikaituke Seido (Jou) [New Takeover Bid System (1)]*, 1219 JUNKAN SHŌJI HŌMU 2 (1990) (Japan).

[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, at 5.

[104] *Id.*

[105] *Id.*

differences make Japan's approach unique. First, while the European Directive implements ex post regulations (Art. 5 Takeover Bids Directive),[106] Japan employs ex ante regulations. In Japan, the acquirer is prohibited from acquiring a control block (e.g., 40% of shares) in an off-market transaction with an existing major shareholder other than a tender offer. The acquirers must initiate a tender offer if they want to buy the 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, the time at which a tender offer becomes mandatory differs.

Second, partial tender offers are permitted in Japan. In contrast, in the United Kingdom, partial takeovers are prohibited, in principle, for voluntary takeovers (Rule 36, Takeover Code). Also, under the European Directive (Art. 5 para. 1) and the UK (Rule 9.1, Takeover Code), the mandatory bid rule requires that a takeover bid be made for all remaining shares when the 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 number of shareholders and shares in circulation will fall below the

[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 30% still requires a tender offer, similar to Japan's approach. Thus, certain ex post elements function as ex ante regulation.

[107] Paul L Davies, *The Notion of Equality of Treatment in European Takeover Regulation*, *in* TAKEOVERS IN ENGLISH AND GERMAN LAW 9, 23 (Jennifer Payne ed., 2002); Deborah A. DeMott, C*urrent Issues in Tender Offer Regulation: Lessons from the British*, 58 N. Y. U. L. REV. 945, 992-994 (1983); Jennifer Payne, *Introduction, in* TAKEOVERS IN ENGLISH AND GERMAN LAW 1, 2 (Jennifer Payne ed., 2002).

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

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 reduce 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.

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 fact that securities transactions that materially affect company control have significant impacts not only on shareholders solicited for such transactions but also on non-solicited shareholders, and the rule aims to protect these non-solicited shareholders. To ensure that all shareholders have opportunities to make appropriate investment decisions, it is important to (1) disclose information on the purpose, volume, and price of such transactions in advance; (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 that minority shareholders complete exit opportunities, but instead focuses on ensuring prior disclosure, providing deliberation periods, and maintaining uniformity in purchase prices.

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109 Shiro Ohkita, *Kōkai Kaitsuke Seido*, *Tairyō Hoyū Hōkoku Seido [Tender Offer System and Large Shareholding Reporting System]*, 1774 JUNKAN SHŌJI HŌMU 38, 39 (2006) (Japan).

110 ETSURO KURONUMA, KIN'YŪ SHŌHIN TORIHIKI HŌ [FINANCIAL INSTRUMENTS AND EXCHANGE ACT] 296 (2nd ed. Yuhikaku, 2020) (Japan).

111 Akira Nozaki, et al., *Kōkai Kaitsuke Seido ni kakaru Kin'yū Shōhin Torihiki Hō Tō no Kaisei [Amendments to the Financial Instruments and Exchange Act, etc., Relating to Tender Offer Systems]*, 2363 JUNKAN SHŌJI HŌMU 11, 12 (2024) (Japan).

Second, the threshold was reduced from one-third to 30%. This change aligns with many foreign tender offer systems that set the mandatory tender offer thresholds at 30%. In addition, considering the typical percentage of voting rights exercised in Japanese listed companies, a 30% voting right can prevent special resolutions 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 has 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 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, distinguishing the Japanese approach from that of the United States. Furthermore, under the European mandatory-bid rule, an acquirer may first obtain a control block and 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 launch a tender offer that crosses the threshold of 30%.[113] In this respect, Japanese rules differ from European regulations. The Japanese amendments in 1990, 2006, and 2024 paid considerable attention to European rules, but did not adopt them entirely. Although Japanese legislation was based on comparative legal analysis, the resulting regulations are unique to Japan and differ 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 should be granted to minority shareholders when control changes. One may argue that, if minority shareholder protection under corporate law is insufficient, it is rational to grant exit rights to minority shareholders upon control changes 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 shareholders' interests have been severely impaired in Japan due to control changes. Partial tender offers have both advantages and disadvantages. Therefore, next sections provide a brief overview of both perspectives.

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[112] *Id.*

[113] It is well known that both rules have their advantages and disadvantages. *See* Lucian A. Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. ECON. 957 (1994).

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 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, and factors, such as inefficient financing, due to information asymmetry may be significant constraints.[115]

It can also be argued that financially constrained acquirers use their shares as a consideration (exchange tender offers).[116] However, in Japan, there have been few exchange tender offers; mostly all of the tender offers have been cash tender offers. This is because exchange tender offers are difficult to utilize as the rules are not sufficiently flexible, which makes the exchange tender impractical.[117]

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[114] MORI HAMADA MATSUMOTO HŌRITSU JIMUSHO, M&A HŌ TAIKEI [COMPREHENSIVE ANALYSIS OF M&A LAWS OF JAPAN] 55 (2nd ed. Yuhikaku, 2022) (Japan) (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).

[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* Tomotaka Fujita, *Shihai Kabushiki no Shutoku Tōkyōusei Koukaikaituke – Kyousei Koukaikaituke Seido no Kinou [Acquisition of Controlling Shares and Compulsory Takeover Bids -- The Function of the Compulsory Takeover Bid System]*, *in* KAISHA, KIN'YŪ, HŌ (GEKAN) [COMPANIES, FINANCE, AND LAW (VOL. 2)] 33, 59 (Shinsaku Iwahara, Tomonobu Yamashita & Hideki Kanda eds, Shōjihōmu, 2013) (Japan).

[116] Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693, 1736 n.108 (1985).

[117] NAGASHIMA ŌNO & TSUNEMATSU HŌRITSU JIMUSHO, KŌKAI KAITORI NO RIRON TO JITSUMU [PUBLIC TENDER OFFERS: THEORY AND PRACTICE] 391 (3rd ed. Shōjihōmu, 2016) (Japan) (Exchange offers are rarely conducted in Japan, resulting in a lack of practical experience in this area); ATSUSHI OISHI ET AL., ZEIMU HŌMU O TŌGŌ SHITA M&A SENRYAKU [INTEGRATED TAX AND LEGAL M&A STRATEGY] 28 (3rd ed., Chuo

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 over 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, 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, the target company can reliably remain listed with a partial tender offer. We often observe cases in which companies acquire substantial shareholdings for business alliances and capital tie-ups, while keeping target companies listed on the exchange.[119]

It can be discussed whether creating a situation equivalent to a partial takeover bid would be possible, even if partial takeovers were prohibited. The acquirer can initially acquire more shares than desired and sell excess shares until reaching the desired number. Even if a company violates the delisting criteria regarding the percentage of tradable shares, it does not immediately face delisting the day after the violation. If the company improves to meet the listing maintenance standards within a one-year grace period, its listing status will be maintained.[120] At that point, it would be sufficient to sell an adequate number of shares in the market.

However, a counterargument is that, compared to scenarios in which partial tender offers are permitted, this approach would incur wasteful transaction costs for buying and selling unwanted shares. Nevertheless, these costs are limited to transaction costs and may not be substantial.[121]

Keizaisha) (Japan) (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 50.02% in order to make the target keep listed on 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 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, at 1737 n.108.

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, if the prohibition of partial tender offers were uniformly introduced, hostile takeovers would become extremely difficult because due diligence would not be available to hostile bidders before gaining 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 synergies prove effective or divest their stake 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 partial purchases than in any-and-all offers.[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 are required, such detrimental takeovers may be deterred.[124]

A counterargument suggests that coercion issues can be addressed by introducing legal mechanisms to eliminate it (specifically, systems that separate the approval or disapproval of the acquisition itself from the declaration of intent to the tender) without prohibiting

[122] KURONUMA, *supra* note 110, at 294.
[123] TANAKA, supra note 75, at 387-391.
[124] Fujita, *supra* note 115, at 55-58.

partial takeover bids.[125] Under such legal mechanisms, 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 in maximizing the sum of private benefits enjoyed exclusively by controlling shareholders and the value corresponding to their shareholdings. Theoretically, the objectives of the controlling shareholders differ from those of the shareholders.[126]

However, the threat to minority shareholders cannot be resolved by prohibiting partial purchases. The conflict of interest between the controlling and minority shareholders persists unless a cash out or similar transaction occurs, even after a full tender offer. 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 not decisive in theory. Therefore, this study conducts an empirical study in the next section to assess whether minority shareholders are disadvantaged under partial tender offers 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.

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[125] Bebchuk, *supra* note 116, at 1762.

[126] *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003).

6. Empirical analysis

a) The Data

The data were obtained from SPEEDA by the Userbase Corporation. Among the 1,015 tender offers from January 1, 2008, to December 31, 2024, 239 were partial tender offers and 229 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.

[Insert Table 1 around here]

Table 1 lists these premiums. The average premium for 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 on the share price one month before the announcement was 25.93%.

[Insert Table 2 around here]

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 period, 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.

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 are statistically significant.

[Insert Table 3 around here]

Table 3 reports on the firm performance for target firms, using ROE and ROA from the year the tender offer was launched (t = 0) 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 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 in allowing partial offers. If corporate value commonly declines after partial takeovers, prohibiting them, in principle, would be preferable. However, this was not the case as demonstrated by the data presented above. 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 control to expropriate corporate assets, potentially disadvantaging minority shareholders. One possible solution to this problem is an ex post remedy, whereby minority shareholders can claim damages against controlling shareholders after committing illegal acts. However, even if such a system is legislated, it may not function effectively. Consequently, some argue that guaranteeing exit rights is necessary to protect minority shareholders from changes in control.[127]

However, there is no convincing argument for introducing exit rights. Theoretically, control changes occur in 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

[127] *See* Davies, *supra* note 107, at 24.

a new party. In either case, the future actions of the new controlling shareholders are uncertain, and the risk that they might act opportunistically 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 shareholder structure and corporate profitability.[128] Moreover, if a controlling shareholder previously existed, 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, there is no qualitative difference in the potential for minority shareholder exploitation between the old and new controlling shareholders. Therefore, the general theory that changes in controlling shareholders are disadvantageous for minority shareholders 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, depriving shareholders of opportunities to express their undistorted views on friendly takeovers, which might reduce corporate value. Owing to the coercive nature of partially tendered 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) notify their opposition to such a bid.[130] Once such a mechanism is introduced in the future, partial tender offers do not need to be prohibited.

IV. The Impact of Corporate Value Standards and the Principle of Shareholder Intent on Activism and Sustainability

[128] *See* YOSHIRO MIWA & J. MARK RAMSEYER, KEIZAIGAKU NO TUKAIKATA [HOW TO USE ECONOMICS] 187-225 (Nippon Hyōronsha, 2007) (Japan).

[129] Luca Enriques, *The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization as Rent-Seeking?*", *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 767, 785 (Guido Ferrarini et al. eds., 2004).

[130] *See* Financial Services Agency, supra note 95, at 7, n.4.

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 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 defense 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.

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[131] Akio Hoshi, *Baishū bōei-saku no akutibisuto taikō-saku e no hen'yō to sono shihō shinsa [Takeover Defense Measures's Transformation into Anti-Activist Countermeasures and Their Judicial Review]*, *in* SHŌHŌGAKU NO SAIKŌCHIKU, IWAHARA SHINSAKU SENSEI, YAMASHITA TOMONOBU SENSEI, KANDA HIDEKI SENSEI KOKI KINEN [RECONSTRUCTION OF COMMERCIAL LAW STUDIES: A COMMEMORATION OF THE 70TH BIRTHDAY OF PROFESSOR SHINSAKU IWAHARA, PROFESSOR TOMONOBU YAMASHITA, AND PROFESSOR HIDEKI KANDA] 257, 259-260 (Hideyuki Matsui et al. eds., Yuhikaku, 2023) (Japan).

[132] On the American situation, *see* Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 U. CHI. BUS. L. REV. 417 (2022); Jeffrey N. Gordon, *The Rejected Threat of Corporate Vote Suppression: The Rise and Fall of the Anti-Activist Pill*, 2022 COLUM. BUS. L. REV. 206 (2022).

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 where parties act in concert or cooperation. The target company's board of directors retained reasonable 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 an acquisition's desirability. 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] On the other hand, since corporate value serves as the criterion, it would be challenging to justify shareholders' decision-making based on altruistic considerations of stakeholder interests that are not reflected in corporate value.[138]

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133 *See supra* Part II.2.g).
134 Hoshi, *supra* note 131, at 284-286.
135 Fujita, *supra* note 25, at 17.
136 Matsunaka, *supra* note 68, at 28.
137 *Id*. at 29.
138 Matsunaka, *supra* note 68, at 29.

As described above, when the management is displaced through corporate takeovers, sustainability factors are considered to the extent that they are reflected in corporate value; however, factors not incorporated into corporate value are disregarded. This has no direct impact on how sustainability factors influence routine management operations. However, this indicates 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 where donations not directly serving shareholders' interests may be recognized as lawful. According to the criteria established by the Supreme Court, when directors 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 making disproportionate donations beyond the appropriate scope violated directors' duties.[140] Socially beneficial activities are permissible if they meet these criteria, even if they potentially risk long-term shareholder interests.

However, questions may arise as to whether a framework permitting only this activity level 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 collaboration with 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 the 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, promoting such sustainability activities cannot solely appeal to directors' economic rationality, but must engage their ethical sensibilities. This represents the weak motivational framework provided by Japanese corporate law and takeover rules. To encourage sustainability management

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139 Saikō Saibansho [Sup.Ct.], June 24, 1970, Sho 41 (o) no. 444, 24 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 625 (Japan).

140 *Id.*

141 KENJIRO EGASHIRA, KABUSHIKI KAISHA HŌ [LAWS OF STOCK CORPORATIONS] 492 (8th ed. Yuhikaku, 2021) (Japan).

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, in cases of takeover defense, corporate value standards are adopted within a framework that respects shareholder intent. Second, respecting shareholders' intent may result in the highest purchase price offer, which does not necessarily maximize corporate value. Third, even when shareholders do not necessarily support corporate value-maximizing takeovers, a rule permitting boards to trigger poison pills without shareholder approval is undesirable. Fourth, Japanese law, which 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 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.

As described above, this study's central message is that it is rational for Japan to take a distinctive third path in corporate takeover law in contrast to the US and European approaches. This study argues that a third approach remains viable in corporate takeover law.

Table 1: Partial Tender Offers Premium

Variable	Obs	Mean	Std. Dev.	Min	Max
A. All Samples					
Premium to 1 day before	196	17.87	32.51	-90.30	180.64
Premium to 1 month before	196	18.74	33.00	-91.11	185.62
Premium to 3 months before	196	19.43	33.35	-91.24	183.85
Premium to 6 months before	196	18.50	34.79	-91.27	194.87
B. Pro-rata settled cases					
Premium to 1 day before	125	24.72	25.15	-31.29	118.75
Premium to 1 month before	125	25.93	25.00	-16.47	118.07
Premium to 3 months before	125	25.99	25.51	-15.82	113.52
Premium to 6 months before	125	24.39	24.87	-22.71	116.29

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.

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 reports on the firm performance for target firms, using ROE and ROA from the year the tender offer launched (t = 0) to three years after (t = 3).

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