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

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Abstract

Recent years have witnessed a surge in unsolicited takeover bids and shareholder activism targeting listed Japanese companies. This trend can be attributed to the decline in cross-shareholdings and the increasing institutional investors’ stewardship activity as a result of corporate governance reforms over the past decade. These reform as well as the growing proportion of foreign investors have made it easier to secure shareholder support for management changes when such changes are deemed reasonable.

In parallel with these corporate governance developments, Japan has been evolving its M&A laws, charting a course distinct from both the US and European models. First, the determination of whether an M&A is "good" or "bad" is based on whether it enhances corporate value, rather than solely on the acquisition price paid to shareholders. Second, while poison pills are available in Japan, their triggering 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 will. However, given that shareholders are more likely to support acquisitions offering higher prices, there is a question of whether this case law principle is consistent with the aforementioned corporate value standard. Third, partial tender offers are commonly used in Japan, both in friendly and hostile takeovers. Even in the case of partial acquisitions, courts generally require shareholder approval for poison pills, deviating from the case law of Delaware. Although recent amendments to the takeover regulations considered adopting a European-style prohibition on partial acquisitions, such amendments were ultimately rejected. Is it reasonable for Japanese law to generally permit partial acquisitions?

This paper examines these points. In addition, it analyzes how shareholder activism is positioned under an M&A law with the aforementioned characteristics, and how the corporate value standard, the principle of respecting shareholder will, and sustainability are interrelated.

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

# Introduction

## Corporate Value Standard

Recently, unsolicited takeover bids and shareholder activism targeting Japanese listed companies have begun to gain momentum, with Japan sometimes described as the world's second-largest activist market.[[2]](#footnote-3) This development stems from Japanese corporate governance reforms that have emphasized shareholder interests over the past decade (in sharp contrast to the UK and US, where recent discussions have focused on stakeholder interests). These reforms have resulted in decreased cross-shareholdings and relative shareholdings. Institutional investors have increased their engagement activities in search of investment returns. These changes allow reasonable proposals to replace current management teams to gain the support of many shareholders. [[3]](#footnote-4)

The market for corporate control is global. For example, Nippon Steel recently proposed a buyout of US Steel, but this has become a political issue in the US, and it remains unclear whether the buyout proposal will materialize.[[4]](#footnote-5) Seven & I, the owner of Japan's 7-eleven, has rejected a $47 billion buyout offer by Canada's Couche-Tard.[[5]](#footnote-6)

In a notable case, KKR and Bain Capital competed in a takeover bid for FUJISOFT INCORPORATED, a Japanese system development company. The bidding war saw both firms progressively raising their offers, with Bain Capital at one point proposing a higher purchase price (9,600 yen per share) than KKR's offer (9,451 yen per share). Interestingly, despite Bain's higher price, FUJISOFT's board maintained its support for KKR's proposal, citing concerns about corporate value enhancement rather than merely focusing on price. The reasons provided were: (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 purchase 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 later than 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 of low priority.[[6]](#footnote-7) The contest eventually concluded when KKR raised its tender offer price to 9,850 yen on February 4, 2025, prompting Bain Capital to withdraw its offer on February 17, 2025. KKR's tender offer was ultimately consummated with a shareholding ratio of 57.24%,

This case raises an immediate question: Does the directors of the target company, after accepting a takeover offer to go private, violate their duties by favoring a lower offer price when multiple competing takeover offers exist? As in Delaware cases, should a director, after deciding to sell a company, act as a facilitator of an auction and not support a lower-priced takeover offer?[[7]](#footnote-8)

Japanese law has not adopted the norm that offer price is the primary criterion for evaluating the merits of an acquisition. Rather, whether the acquisition will increase corporate value is of primary importance, and whether the acquisition price is sufficient is of secondary importance. This view is most clearly documented in the Takeovers Guidelines published by the Ministry of Economy, Trade and Industry (METI) in 2023.[[8]](#footnote-9) The Takeovers Guidelines was prepared by a study group established by the METI (chaired by Hideki Kanda, professor emeritus at the University of Tokyo), and although they are not legally binding, their contents are so persuasive that many players act based on them, and their influence on actual M&A market practices is extremely significant.[[9]](#footnote-10) The Takeovers Guidelines sets forth the principle of corporate value and the common interests of shareholders as the first of three principles it proposes. This first principle declares 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."[[10]](#footnote-11) This does not mean that an acquisition with a high acquisition price is necessarily a desirable acquisition. This corporate value standard is also supported by the academic community, as it embodies the idea that maximizing societal wealth is a desirable criterion for acquisitions.[[11]](#footnote-12)

## Principle of Shareholders’ Intent

In the cases of injunctions of new share issuance or poison pills, case law respecting shareholders’ intent has developed.[[12]](#footnote-13) To implement poison pills based solely on the board of directors decision is likely to be enjoined by courts. For example, in the Nippon Broadcasting System, Inc. case (2005), where new share subscription rights were issued only by a resolution of the board of directors without a shareholders' meeting resolution, the Tokyo High Court held that "it is generally not permissible to allow directors to issue new shares for the primary purpose of changing the composition of shareholders, who are the electors of directors."[[13]](#footnote-14) In the Japan Asia Group case (2021), where a poison pill was introduced only by the board of directors without any plans for shareholder approval, the Tokyo High Court enjoined the poison pill that was intended to counter an unsolicited takeover.[[14]](#footnote-15)

Conversely, if shareholders’ approval is obtained, the possibility of judicial injunction is reduced. In the Bulldog Sauce case (2007), where a shareholders' meeting had 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 of the pill.[[15]](#footnote-16) Similarly, in the Nippo Sangyo case (2021), where the target company had obtained approval for a poison pill at a shareholders' meeting before the acquirer's tender offer commenced, the Nagoya High Court denied an injunction of the pill.[[16]](#footnote-17) In the Fuji Kosan case (2021), an injunction was sought against a poison pill introduced with shareholders' meeting approval when an acquirer initiated a tender offer after proposing to take the target company private. The Tokyo High Court found the pill legal and dismissed the case.[[17]](#footnote-18) Furthermore, in the Tokyo Kikai Seisakusho case (2021), where an acquirer was purchasing shares through the market trading, and the target company introduced a poison pill as a countermeasure which was approved by shareholders excluding the acquirer and the target company’s director, the Tokyo High Court found the pill legal and rejected the request for an injunction.[[18]](#footnote-19)

Thus, in the poison pills cases, the most important factor in reaching a conclusion is whether the pills have been approved by shareholders, with shareholder intent being respected. Respect for shareholders’ intent here does not merely mean ensuring the opportunity to elect or dismiss directors at a shareholders' meeting (i.e., just avoiding a dead-hand poison pill[[19]](#footnote-20) is not enough), but rather the key factor is whether there is explicit shareholder approval for the poison pill. The Takeovers Guidelines refers to this as the principle of shareholders' intent, stating that "[t]he rational intent of shareholders should be relied upon in matters involving the corporate control of the company."[[20]](#footnote-21)

Then, the following question arises. Shareholders are generally more likely to support acquisitions with higher offer prices. Is the legal norm of respecting shareholders’ intent therefore consistent with the corporate value standard discussed earlier? This question touches on a fundamental difference between Japanese and Delaware corporate law approaches to defensive measures. In Japanese law, which limits board discretion in implementing poison pills, there's an apparent tension between respecting shareholder intent and protecting corporate value. Shareholders naturally tend to favor higher offer prices, which might lead them to approve acquisitions that maximize short-term gains but potentially sacrifice long-term corporate value. The Japanese approach emphasizes direct shareholder approval for defensive measures, creating a more shareholder-centric system than Delaware's. In Delaware, the board has greater discretion to implement defensive measures.[[21]](#footnote-22) This divergence reflects different priorities in corporate governance. The Japanese system places more trust in the collective decision-making of shareholders, while Delaware law grants boards more authority to evaluate threats to corporate policy. The challenge for Japanese corporate law is reconciling these potentially competing interests: respecting shareholders’ intent (which may favor short-term price maximization) while also protecting the corporate value standard that considers longer-term interests. This creates a unique legal framework that differs significantly from the board-centric Delaware approach that dominates much of global M&A jurisprudence.

## Partial Tender Offer

Japan's approach to partial tender offers also represents a significant difference in M&A practices from the US and European models. In Japan, takeovers of listed companies through partial tender offers (in which a maximum number of shares to be purchased is set and no more than that maximum will be purchased even if the number of the tendered shares exceed it) are commonly used for both friendly and hostile takeovers. The 2024 amendment of the tender offer regulations did not change the rules on partial tender offer.[[22]](#footnote-23)

Is it reasonable for Japanese law to allow partial offers? In a partial tender offer, if a premium is attached to the tender offer price, the market share price after the tender offer will typically be lower than the tender offer price, which makes the partial tender offer coercive. Also, for target company shareholders, there is uncertainty at the time of tendering as to whether pro rata settlement will be made or whether all tendered shares will be purchased.[[23]](#footnote-24) While a hostile takeover can be countered with shareholder-approved poison pills, the possibility of such countermeasures in friendly takeovers is virtually nonexistent. Even though Japan's tender offer regulations have moved closer to a European-style system by subjecting in-market purchases to tender offer regulations by the 2024 amendment, is there a rationale for a system that principally allows partial tender offers? What would be the impact on a target company's corporate value if control is acquired through a partial tender offer?

## Structure of this Paper

In this paper, I first discuss the rationale for Japanese law combining the corporate value standard with the principle of shareholder intent (Section II). Second, I discuss the rationale for Japanese law generally permitting partial share purchases (Section III). The former differs from Delaware law, and the latter differs from European law. In this sense, Japanese law can be said to be taking a third path. I argue that this third path is, in fact, quite rational. Section IV discusses the impact of corporate value standards and the principle of shareholders’ intent on shareholder activism and sustainability. Section V concludes the paper.

# Relationship between Corporate Value Standards and Respect for Shareholders’ Intent

## Introduction

This section analyzes two key issues. First, whether the corporate value standard and the principle of shareholders’ intent might be inconsistent with each other. Second, whether courts should allow poison pills even without shareholders’ approval, if these standards are indeed inconsistent.

The corporate value standard is now well established in Japanese law as an appropriate criterion for determining the reasonableness of defensive measures against hostile takeovers.[[24]](#footnote-25) Under this standard, it is desirable for a takeover proposal to proceed if it enhances corporate value, and to be blocked if it would diminish corporate value. Here, corporate value means the discounted present value of a company's future cash flows.[[25]](#footnote-26)

Takeover defense case law has established a norm that shareholders should determine whether corporate value would be damaged. In the Bulldog Sauce case, where shareholders approved a poison pill, the Supreme Court held that such a pill with discriminatory conditions against an acquirer did not violate the principle of shareholder equality: "The principle of equality of shareholders obliges a company to treat its shareholders equally according to the nature and number of shares they hold to protect individual shareholders' interests, but since individual shareholders' interests are generally unthinkable without the company's existence and development, if a particular shareholder's acquisition of management control threatens the company's existence and development and damages the corporate value and, in turn, the common interests of its shareholders, even discriminatory treatment against such a particular shareholder to prevent such damage may not violate the principle of equality of shareholders unless such a treatment violates the principle of equity and lacks reasonableness."[[26]](#footnote-27)

The Supreme Court further held that "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, who are the entities 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."[[27]](#footnote-28)

However, confirming shareholders' intent in takeover defense situations is not always consistent with determining whether corporate value would be impaired. This is because shareholders may decide whether to support or oppose a defense based on the takeover price's attractiveness, and the attractiveness of the takeover price does not necessarily align with whether corporate value would be impaired.[[28]](#footnote-29) In particular, economically rational shareholders who tender their shares to the offeror have little concern about whether the company's corporate value will be impaired after selling those shares.[[29]](#footnote-30) If shareholders primarily judge based on takeover price attractiveness, the principle of shareholders’ intent may not be logically consistent with the corporate value standard.

Should courts allow poison pills without shareholders’ approval if an acquisition that is not desirable from a corporate value standpoint proceeds? It is generally not clear to courts whether a specific acquisition is desirable from a corporate value standpoint. Therefore, trusting shareholders' intent as a proxy for realizing corporate value standards may not be perfect, but it represents a reasonable second-best solution.[[30]](#footnote-31)

In the following subsections, this paper examines the principle of respecting shareholders' intent (Subsection B); clarifies the relationship between corporate value and takeover price (Subsection C); examines whether the defensive measure without shareholders’ express approval is legal, assuming no guarantee that the best-priced acquisition maximizes corporate value (Subsection D).

## Principle of Shareholders’ Intent

### Nippon Broadcasting System Case (2005)

In the Nippon Broadcasting System case, where a takeover defense measure was implemented solely by board resolution without shareholders' meeting approval, the Tokyo High Court held that, from the perspective of the allocation of power between the board and shareholders, directors are generally not permitted to issue new shares for the primary purpose of changing shareholder composition.[[31]](#footnote-32)

As an exception, the Tokyo High Court held, in dicta, that the issuance of new stock subscription rights 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."[[32]](#footnote-33) In short, the court took the view that a defense measure is lawful if the hostile takeover would damage corporate value by causing irreparable harm to the company. The board of directors bears the burden of proving corporate value irreparable damage, and the court determines whether this burden has been met.

However, such an exception is very narrow. The Tokyo High Court declared it would not intervene regarding whether corporate value would be damaged in the following sense: The target company argued that issuing new stock subscription rights was for corporate defense because management control by a hostile acquirer risked damaging corporate value, while the value would be higher if the company remained in its existing corporate group of the incumbent major shareholder. The Tokyo High Court responded that comparing the corporate value of Y under X's management control and the corporate value of Y as a subsidiary of A is a question of business judgement, and judgment based solely on short-term circumstances immediately after management control changes is insufficient. Often, judgment must consider medium to long-term perspectives, economic conditions, social and cultural awareness changes, and technological innovations related to business content. These judgment factors are unsuitable for court determination in judicial proceedings, as they relate to business management judgment. The court concluded it would not evaluate whether the target company's corporate value would be enhanced if either X or A became the controlling shareholder because it is not suitable for court judgment in the judicial process.[[33]](#footnote-34)

From the corporate value standard perspective, theoretically, it is undesirable for X's acquisition to proceed if A would increase the target company's corporate value more. However, in the Tokyo High Court's view, the court's judgment would not be determinative in comparing whether X or A would better increase corporate value. In sum, the court will not judge which acquirer enhances corporate value more is, which is left to the shareholders’ intent.

### Bulldog Sauce Case (2007)

The Supreme Court in the Bulldog Sauce case expressed that it would generally respect shareholders' intent and not intervene regarding whether corporate value would be damaged if takeover defense measures are approved by shareholders.[[34]](#footnote-35) The court did not independently evaluate whether a hostile acquirer takeover would damage corporate value before assessing shareholders' judgment credibility. This differs from the Tokyo High Court's approach in the Bulldog Sauce case.[[35]](#footnote-36) The Tokyo High Court held that triggering poison pills is legal if recognized as necessary and reasonable to resist an abusive takeover, then evaluated whether the acquirer qualified as an abusive acquirer based on court-determined facts. The Supreme Court did not take such an approach to determine whether the acquirer was an abusive acquirer or not. Therefore, the Supreme Court is understood to have respected shareholders' intent.

Further, one can argue that the Supreme Court respects shareholders’ approval of the poison pill too broadly. There is room to doubt whether shareholders in this case truly determined that the corporate value would be damaged by the hostile acquirer's acquisition. When shareholders vote on a poison pill, they express opinions on whether such a pill should be introduced to eliminate hostile takeovers, but not directly on whether corporate value would be damaged by such a hostile takeover. Indeed, shareholders might agree to takeover defense measures because they believe the takeover price is insufficient, that the hostile takeover would damage corporate value, or that management under the current team has higher corporate value and will yield higher shareholder profits. However, most likely, shareholders agree to defensive measures simply by comparing the acquirer's proposed takeover price with the share value they would enjoy under current management if defense measures were introduced, without considering whether the target company's corporate value would rise or fall after a hostile takeover completion. Additionally, shareholders with interests beyond their shareholding (cross-shareholding shareholders) might favor defensive measures against the hostile takeover which increases the target company's corporate value, in order to maintain friendly relationship of business alliance through cross-shareholdings.[[36]](#footnote-37) Despite these logical possibilities, the Supreme Court directly connected shareholders’ approval of defense measures to their judgment that a hostile takeover would damage corporate value.[[37]](#footnote-38) Thus, one can argue that there is a logical leap in the Supreme Court’s discussion.

### Nippo Sangyo Case (2021)

In the Nippo Sangyo case, where a defensive measure was introduced by an ordinary shareholders' meeting resolution and the acquirer initiated a partial takeover bid, the Nagoya High Court held that the poison pill, invoked by board resolution, was legal under the Companies Act. The Nagoya High Court held that the defensive measures' purpose was "not to prevent the takeover itself by board judgment, but to ensure shareholders have necessary and sufficient information and time to make appropriate judgments about selling their shares to the acquirer or keeping them, and to have an opportunity to negotiate with the person intending to make the large-scale purchase of the target company’s shares. This purpose is fundamentally to secure and enhance the common interests of shareholders."[[38]](#footnote-39)

### Japan Asia Group Case (2021)

In the Japan Asia Group case, the Tokyo High Court ruled that the poison pill introduced and triggered by board resolution only were illegal under the Companies Act. The Tokyo High Court held that it is reasonable to infer that the main purpose of the poison pill in this case was to maintain and secure the right to control management of the directors in charge of management or certain shareholders who support and exert de facto influence over them.[[39]](#footnote-40) One reason of such a conclusion the Tokyo High Court pointed out was that the target company did not plan to hold a shareholders' meeting to approve takeover defense measures.[[40]](#footnote-41)

### Fuji Kosan Case (2021)

In the Fuji Kosan case, the Tokyo High Court ruled 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 made the any and all tender offer subject to the minimum tender ratio condition at the level of 40% of voting rights, and planned to freeze out remaining shareholders at the same amount as the tender offer price through a reverse stock split if the tender offer is successful. When the acquirer requested an injunction against the poison pill, the Tokyo District Court rejected the request on June 23, 2021. The shareholders' meeting was scheduled for June 24, and at the time of the Tokyo District Court's decision, shareholder approval had not yet been given. However, the Tokyo District Court found that the target company's board planned to withdraw the defense plan if shareholders' approval was not obtained at the annual meeting on June 24, 2021, and that the board's response was to let the shareholders themselves, as the entities to whom the company's interests belong, decide whether the corporate value and, in turn, the common interests of shareholders would be harmed by inability to secure sufficient information and time to make appropriate tender offer decisions.[[41]](#footnote-42)

At the June 24, 2021 shareholders' meeting, 66% of present shareholders voted in favor of implementing the defense plan. The acquirer appealed to the Tokyo High Court, which upheld the Tokyo District Court's reasons and dismissed the appeal. One might question whether a defense measure would be allowed even with shareholder approval when the takeover method is not coercive (being a two-step takeover with the same freeze out price as the tender offer price). The Tokyo High Court found it problematic that the minimum tender offer condition was set at 40% rather than two-thirds which would ensure special resolution passage. It held that such an offer may coerce shareholders into tendering their shares to the offeror in fear of the case where the corporate value decreases without the shareholders meeting’s resolution of reverse stock split being passed.[[42]](#footnote-43) Furthermore, regarding confirming shareholder intention to approve the poison pill, the Tokyo High Court held that there is no such problem at the shareholders' meeting while the tender offer in this case is not entirely free from the problem of coercion.

In this case, unlike the Japan Asia Group case, the fact that shareholders actually approved implementing the poison pill at the shareholders meeting was a particularly important factor negating that the main objective was to maintain and secure management control.

### Tokyo Kikai Seisakusho Case (2021)

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

Prior court decisions (Nippo Sangyo, Japan Asia Group, and Fuji Kosan cases) were understood, in practice, that when defense measures were introduced and triggered by only the board, whether such measures were legal depends on whether they were subject to the condition that the shareholders’ meeting would be held afterwards and the pill would be canceled if shareholders meeting disapproves it.[[43]](#footnote-44) In cases like Tokyo Kikai Seisakusho case, where a poison pill is introduced in response to market purchase and such a pill is triggered, the shareholder composition itself changes in the acquirer's favor over time even if the board of directors wants to convene the shareholders meeting to confirm shareholders’ intent.[[44]](#footnote-45) The target company's board has no effective countermeasures against rapid market purchase before the shareholders meeting's record date.[[45]](#footnote-46) Therefore, in this case, the target company’s board held the shareholders meeting and made the pill subject to be approved by a majority of shareholders other than the voting rights held by the acquires and target company’s directors. About 79% of shareholders other than the acquires and target company’s directors voted in favor of triggering the defense measures at the meeting.

The Tokyo High Court held that the target company needs to prevent damage to the corporate value and, in turn, the common interests of its shareholders, and that shareholders who may suffer an infringement of their interests being unable to obtain sufficient information and time at the shareholders' meeting to confirm the shareholders' intent on the pill may cause damage to the corporate value and the common interests of shareholders. It held that, therefore, it is necessary to implement countermeasures to prevent such damage, and measures such as the poison pill are not lacking in reasonableness. The pill in this case is recognized to be primarily intended to prevent damage to the corporate value of the company and consequently to the common interests of its shareholders. The purpose of the shareholders' meeting is to confirm the intention of the shareholders, other than the acquirer and the directors, who face coercion in making a decision on the sale of shares, as to whether or not the lack of sufficient information and time to make an appropriate decision will damage the corporate value of the target company and thus the common interests of shareholders, and whether or not the poison pill should be invoked. The court held that in light of the nature and purpose of such a shareholders' meeting, it is not appropriate to allow the acquirers to exercise their voting rights. It held that it was lawful to exclude the acquirer and invoke the poison pill by confirming the intent of the shareholders other than acquirers.[[46]](#footnote-47)

### Mitsuboshi case (2022)

In the Mitsuboshi case, a poison pill was introduced by board resolution and triggered through an ordinary resolution at the shareholders' meeting to confirm shareholder intent of the target company, MITSUBOSHI CO., LTD. The Supreme Court[[47]](#footnote-48) approved the injunction against the defense measure, upholding the Osaka High Court's[[48]](#footnote-49) finding that while an inference of necessity was affirmed, the measure was not reasonable (too excessive[[49]](#footnote-50)). The issue was the target company's identification of acquirers in the defense measures. The target company, when holding the shareholders' meeting, announced it had classified a group of shareholders as targets of the poison pill because these persons had submitted proxies to the acquirers in favor of respective proposals at the shareholders' meeting, and such conduct was considered as an act favoring the acquirer. The Osaka High Court noted that these actions would cause shareholders attending the shareholders’ meeting to fear that if they did not vote in favor of the target company's proposals, they would be identified as defense measure targets and treated unfavorably. Because of this concern, the court held that even though the shareholders’ meeting approved the pill with 54.46% in favor, it remained questionable whether shareholders truly voted in favor with the intention to support current management, and that the resolution results do not immediately make the pill reasonable. The court concluded that the pill could not be considered reasonable solely because of the general meeting resolution.[[50]](#footnote-51)

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 in August 28, 2024 for violating large shareholding reporting regulations.[[51]](#footnote-52)While the target company understandably had difficulty identifying the scope of the acquirer group, it was misleading to explain that a shareholder is a target of a defensive measure simply for delivering a proxy to an acquirer. Therefore, the conclusion that the pill was enjoined is appropriate.

### Takeovers Guidelines (2023)

The Takeovers Guidelines names one of its three principles as “Principle2: 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."[[52]](#footnote-53) The Takeovers Guidelines is not only influential for practice but also theoretically interesting in that they attempt to organize thinking about defense measures in a logically consistent manner from the perspective of shareholder intent.[[53]](#footnote-54) For example, recent court decisions clarified that whether defense measures are evaluated as lawful depends on whether damage to corporate value is inferred depends on whether approval was obtained at a shareholders' meeting regarding the merits of the pills. However, the Tokyo High Court in the Nippon Broadcasting System case, in dicta, exceptionally allowed introducing and implementing the pills based solely on board judgment. There is no reference to this position in subsequent court decisions. In contrast, the Takeovers Guidelines acknowledges exceptional cases like those in Nippon Broadcasting, and argues that such exception can be justified with the principle of respecting the shareholders’ intent. It describes such exception as a “necessity” defense (a metaphor based on the concept of criminal law), and 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.”[[54]](#footnote-55) In short, the Takeovers Guidelines attempts to justify the legality of triggering defense measures solely by the board in cases where natural shareholder approval can be assumed and where it is difficult for shareholders to express their intent.[[55]](#footnote-56)

It is important to note that 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.”[[56]](#footnote-57) Actually, METI had issued similar guidelines regarding M&A in the past that significantly impacted M&A practice, but the 2023 Takeovers Guidelines differ somewhat in tone. For example, in 2005, METI jointly with the Ministry of Justice issued "Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders’ Common Interests."[[57]](#footnote-58) The 2005 Guidelines responded to concerns[[58]](#footnote-59) about a Companies Act bill scheduled for Diet debate which included enabling cash mergers and aimed to show that takeover defense measures, virtually nonexistent in Japan at that time, could be introduced under the new Companies Act, alleviating caution about its enactment.[[59]](#footnote-60) Therefore, the 2005 Guidelines had the mission of presenting an interpretation of takeover defense measures' legality. In contrast, the 2023 Takeovers Guidelines address takeover defense measures in only a small part, with content that is descriptive, refraining from proactively presenting new legal interpretations. [[60]](#footnote-61) Rather, the 2023 Guidelines provide a code of conduct not only for target companies but also acquirers. In this respect, they continue the approach of guidelines METI published regarding MBOs in 2007[[61]](#footnote-62) and 2019,[[62]](#footnote-63) with particular continuity between the 2019 Guidelines and the 2023 Takeovers Guidelines. The principle of shareholders’ intent has been set forth in METI documents since the 2005 Guidelines. However, no effort had been made to explain, in a manner consistent with the principle of shareholders’ intent, the exceptional case where introducing defense measures by board resolution alone is legal under the Companies Act, as pointed out by the Tokyo High Court in the Nippon Broadcasting System case. In this respect, the Guidelines for Corporate Takeover Behavior also consider theoretical rationality.[[63]](#footnote-64)

Furthermore, unlike the 2005 Guidelines, the 2023 Takeovers Guidelines states that passive confirmation of shareholders’ intent is not sufficient.[[64]](#footnote-65) The 2005 Guidelines, however, justified such passive approval, and stated 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).[[65]](#footnote-66) The 2023 Guidelines, while not rejecting this principle outright, states 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 facto confirmation of shareholders’ intentions for a response policy adopted solely based on the judgment of the board of directors.”[[66]](#footnote-67) In short, the 2023 Guidelines indicate that just making a defensive measure not a dead-hand pill is not enough. Rather, it basically requires the explicit shareholders’ approval on a defensive measure at which point the acquirer and acquisition nature have been identified.[[67]](#footnote-68) This doctrine was preceded by case law through a series of 2021 court cases, which the 2023 Guidelines organize retrospectively. As described above, the principle of shareholder intent occupies an important position in both case law and the METI’s Takeovers Guidelines.

## Relationship between Corporate Value and Acquisition Price

### Concept of Corporate Value

In legal precedents, whether corporate value is impaired is the dividing line for determining whether a takeover defense measure can be justified. Although corporate value is never clearly defined in precedents, the implicit assumption is that corporate value correlates with shareholders' interests. In the Bulldog Sauce case, the Supreme Court pointed out that a defense plan does not violate the principle of shareholder equality when the acquisition of management control by a particular shareholder is likely to impair the existence and development of the company, thereby undermining its corporate value and harming its interests and the common interests of its shareholders.[[68]](#footnote-69) The phrase that the corporate value of the company is impaired and the interests of the company and, in turn, the common interests of its shareholders are impaired implies that impairment of corporate value is the cause, with common interests of shareholders being impaired as a result.

The first principle of the 2023 Takeovers Guidelines states 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."[[69]](#footnote-70) This principle aims to ensure and enhance both corporate value and common shareholder interests. 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.”[[70]](#footnote-71) 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.”[[71]](#footnote-72) Thus, the Guidelines distinguish between corporate value and common shareholder interests. It defines corporate value as "a company’s assets, profitability, stability, efficiency, 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.”[[72]](#footnote-73) The Guidelines states that corporate value is “a quantitative concept,”[[73]](#footnote-74) a clarification made with awareness that the term "corporate value" is used in multiple senses in public discourse and should not be administered based on arbitrary understanding.[[74]](#footnote-75) The common interest of shareholders in the Takeovers Guidelines refers to takeover consideration, reflecting the goal that added value created by M&A that increases corporate value should not be unilaterally distributed to the acquirer but appropriately distributed to target company shareholders.[[75]](#footnote-76)

### When the best acquisition price offer maximizes corporate value

What is the relationship between the principle of shareholder intent and corporate value? Shareholders are primarily concerned with whether the acquisition price is high or low, not whether the target company's corporate value will increase or decrease under the acquirer's management. Are both principles compatible with?

The corporate value standard and shareholders’ intent principle are usually consistent. An acquirer proposes a higher acquisition price because it is usually able to increase corporate value of the target company.[[76]](#footnote-77) For simplifying the discussion, suppose that the acquisition is made on 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 not a single share is purchased unless the number of tendered shares by the target company shareholders exceeds the minimum tender condition.[[77]](#footnote-78) Suppose that there are two acquirers: A, who increases company value by 100, and B, who increases it by 50. An acquirer will not lose money if the offer price is within the increase of corporate value. Thus, A can reflect up to 100 in the purchase price, while B can only reflect up to 50. Therefore, A should be able to pay a higher price. The relationship should be that acquirers can pay higher acquisition prices because they can increase corporate value more. If this is the case, then adopting the norm of respecting shareholders' intent on takeover outcomes means that even when shareholders are only interested in purchase price, their decision will ultimately be consistent with the corporate value standard.

The same discussion is valid if we also consider synergies accruing to the acquirer. The question is whether to focus only on increasing the target company's corporate value or to base evaluation on increasing the overall corporate value of both target and acquirer. Since the standard that should be adopted is maximization of social wealth (the general standard of corporate law), the sum of synergies generated for both target company and acquirer should be considered. Then, the acquisition with the greatest synergy effect would be preferred. Even when considering this, the simplest model is that the acquirer with the greatest synergies is most likely to pay the highest acquisition price. This is because synergies generated in the target company can be enjoyed by the acquirer after acquisition, and synergies of both target and acquirer can be the source of acquisition price payment. Therefore, even when thinking in terms of maximizing synergies, the essence of the argument is not actually affected.

### When the best acquisition price offer does not coincide with maximizing corporate value

However, the relationship where maximum acquisition price offer maximizes corporate value (or synergies sum) 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 acquisition, but only in which 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 (Takeover Offer A), and one with higher takeover price but damaging to corporate value (Takeover Offer B). If we simply ask shareholders their will, Takeover Offer B, with the higher takeover price, is highly likely to be realized. However, from a normative standpoint based on the corporate value standard, Takeover Offer A should be realized. Therefore, it cannot be said that the corporate value standard and the shareholder will principle are always consistent.

When might such a case occur? First, B could be overconfident, believing it can increase corporate value by 150 when it can really only increase it by 50, and reflect 150 in the acquisition price. In this case, A would only pay up to 100, and B's acquisition price would be higher.[[78]](#footnote-79) Second, suppose A and B are competitors at their product market, 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 a price that is too high (e.g., resulting in a loss of 150), this loss will be smaller than the disadvantage in the product market. Then B would propose a higher acquisition price than A.[[79]](#footnote-80) Third, the acquisition might reduce stakeholder interests (e.g., employees) and increase shareholder share.[[80]](#footnote-81)

It is difficult to objectively observe how many real cases of acquisitions with high prices but not maximizing corporate value occur, since this can only be found by comparing potential acquisitions with realized ones. Thus, we can only say that sometimes the highest-priced acquisition maximizes corporate value, but sometimes it does not.

## If the best acquisition price offer does not coincide with maximizing corporate value, should the defensive measure without shareholders’ express approval be legal?

If the highest-priced acquisition proposal does not necessarily maximize corporate value, the framework of respecting shareholders’ intent could result in acquisitions that are undesirable by corporate value standards. Conversely, acquisitions that should be realized might be defeated because shareholders support the higher price offer which does not maximize corporate value. What should be considered when the corporate value standard conflicts with the shareholder intent principle?

If the board of directors, after serious consideration, believes a takeover proposal would reduce corporate value, it is permissible for the board to reject such a proposal, express opposition to the takeover, and call on shareholders not to accept it. The Financial Instruments and Exchange Act (hereinafter, “FIEA) naturally contemplates expressing a dissenting opinion in the target company's opinion report.[[81]](#footnote-82)

The question is whether the poison pills without shareholder approval can be triggered solely at the board's discretion. The Takeovers Guidelines does not seem to permit this. As mentioned, countermeasure implementation based solely on board judgment is permitted only in exceptional cases (acquisitions by antisocial forces or acquisitions where the acquirer will likely gain unfair advantage at the target company's or general shareholders' expense). Unless such exceptional circumstances exist, triggering countermeasures based solely on the board judgment would not be permitted.[[82]](#footnote-83)

In short, inefficiencies in the shareholder intent principle could result in takeovers that damage corporate value in some cases. However, allowing countermeasures to be triggered at the board's sole discretion on grounds that such cases may exist could result in greater inefficiency. If this is so, then a second-best solution can be achieved.

Logically, this principle that the 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 takeover desirability should depend on the corporate value standard. If offer price is the criterion, higher acquisition price offers are treated as more desirable, but higher prices are detrimental to acquirers to the extent they benefit target shareholders, and do not increase society's net welfare. So, we should favor the corporate value standard.[[83]](#footnote-84) Second, giving the board of directors the power to decide whether to accept takeovers would risk abuse, with directors using corporate value as a pretext to reject takeover bids when motivated by self-interest. The above principle should be supported because it serves as a safety valve against directors abuse of their power by allowing shareholders to retain final decision-making rights on takeover acceptance.[[84]](#footnote-85) Moreover, if the exercise of countermeasures based solely on the judgment of the board of directors is widely allowed, it will kill the incentive for potential acquirers to make takeover bids.

It is also possible to support this norm from the general idea that the corporate law does not intervene shareholders’ intent no matter how inefficiently shareholders make decisions, as long as there is no distortion in their decision-making. For example, if a special resolution of the shareholders' meeting decides to dissolve the company, the dissolution is valid and the law must respect that decision, no matter how inefficient it may be to dissolve the company at this point. Therefore, it is consistent with this basic rule of corporate law.

Given this, we can argue that legal and market systems should be designed to prevent such inefficiencies from occurring. For instance, one can argue that antitrust law should regulate the behavior of businesses that are willing to grab high prices in the market for corporate control in order to avoid disadvantages in the product market. Also, as for the transfer of profits from stakeholders to shareholders, it would be preferable to design a legal system, such as labor laws, so that such a transfer of profits cannot easily take place.

# Partial tender offers and corporate value

## Introduction.

Partial tender offers have been often used in practice for various strategic purposes, including maintaining the target company's listing after an 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.[[85]](#footnote-86)

A partial tender offer is defined as a tender offer in which the number of shares to be purchased is capped. For example, if a tender offer is made for up to 400,000 shares and 500,000 shares are tendered, the offeror purchases only 400,000 shares while declining to purchase the excess 100,000 shares. In such scenarios, if the 400,000 shares were purchased in order of tendering (i.e., first come, first served), target company shareholders might hastily tender their shares without deep consideration. To address this concern, regulatory frameworks typically require that shares be purchased on a pro rata basis. In the above example, where the total number of shares tendered is 500,000 and the total number to be purchased is 400,000, each shareholder would have 80% of their tendered shares purchased, with the remaining 20% returned. Thus, a shareholder who tendered 1,000 shares would have 800 shares purchased while 200 shares would be returned.[[86]](#footnote-87)

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 the corporate value under the acquirer's control. The greater this latter value as a percentage of the total value received, the more shareholders will focus on post-acquisition corporate value rather than merely on the offer price. Consequently, unlike all-or-nothing acquisitions, shareholders' decisions regarding partial offers are more likely to align with the corporate value standard. This reduces the potential conflict between the corporate value standard and the principle of shareholder intent discussed in Section II. Conversely, if most value shareholders receive derives from shares sold through the tender offer, the situation more closely resembles an all-or-nothing acquisition. Furthermore, shareholders face uncertainty regarding whether pro rata settlement will occur, as this depends on the number of shares tendered.

Japanese tender offer regulations permit partial offers under certain conditions while prohibiting them in others. Specifically, partial offers are permitted when the tender offeror's post-offer shareholding ratio remains below two-thirds. However, partial offers are prohibited when the shareholding ratio would reach or exceed two-thirds.[[87]](#footnote-88) For instance, a partial tender offer where the maximum number of shares to be purchased equals 70% of total outstanding shares is prohibited. When setting a maximum limit, it must be less than two-thirds of the target company's total shares. This represents a partial prohibition on partial purchases. This regulatory approach has been criticized by academics as inadequate. While the obligation to purchase all tendered shares when exceeding the two-thirds threshold aims to protect minority shareholders, this protection extends only to shareholders who tendered their shares. Minority shareholders who did not tender receive no protection.

This analysis addresses whether Japanese law's general permissiveness toward partial takeovers is reasonable. To evaluate this regulatory approach, we must consider the fundamental question of whether partial tender offers should be permitted at all. This section examines the theoretical foundations, advantages, and disadvantages of partial offers, and analyzes their impact on target company corporate value when control is acquired through such means.

The subsequent analysis introduces the features of Japanese partial tender offer regulations and examines associated issues. Section B provides an overview of general tender offer regulations. Section C overview the current rules on partial offers, highlighting that while certain jurisdictions (such as the UK) generally prohibit partial tender offers, they remain common in Japan. Section D summarizes the pros and cons of partial tender offers. Whether partial tender offers disadvantage target company shareholders remains unclear. Therefore, this paper presents an empirical analysis assessing the benefits and detriments of partial tender offers as a first step toward determining whether Japanese regulations require reform in Section E.

## Overview of Japanese Takeover Bid Regulations

### 1971 Amendment

In the Japanese legal system, takeover bid regulations are governed by the Financial Instruments and Exchange Act (FIEA) rather than the Companies Act. Japan's FIEA was enacted in 1948 under the direction of the General Headquarters of the Allied Powers (GHQ). The disclosure regulations within this law were modeled after the U.S. Securities Act of 1933 and the Securities Exchange Act of 1934, with Japanese translations of American legal provisions remaining throughout FIEA.

Tender offer regulations were introduced through the 1971 amendment, drawing inspiration not exclusively from U.S. law but also from regulatory frameworks in the United Kingdom, France, and other European jurisdictions. The 1971 Amendments introduced tender offer regulations to Japanese law, which had previously lacked such provisions despite their established presence in U.K. and U.S. markets. The 1971 amendment focused narrowly on establishing regulatory measures to ensure proper disclosure of material information regarding tender offers and promote fair treatment among investors. The tender offer rules not only formed part of the broader disclosure regulations, but also addressed transaction conditions, including mandatory pro rata settlement requirements for partial tender offers.

Regarding partial tender offers, the regulations established the following framework: A tender offeror could specify a maximum number of shares to be acquired. When tendered shares exceeded this limit, the acquirer was not required to purchase the excess. In such cases, the shares are settled on a pro rata basis. This pro rata requirement addressed several concerns with first-come, first-served approaches: (1) preventing hasty, 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.[[88]](#footnote-89) Tender offerors violating the pro rata rule face liability for damages to shareholders whose tendered shares were not purchased.[[89]](#footnote-90) The damages amount equals the number of shares that should have been purchased on a pro rata basis minus those actually purchased, multiplied by the difference between the tender offer price and the market price at the time of the damages claim.[[90]](#footnote-91) This liability provision compensates for the economic difference between the shareholder's actual condition and their position had settlement followed correct pro rata procedures.

### 1990 Amendment

Only three tender offers actually occurred between the 1971 and 1990 amendments. However, in the 1990 Amendment, the regulations governing takeover bids were significantly revised. The reason of the 1990 amendment was because during the Japan-U.S. Structural Consultations, it was pointed out that Japan was interested in increasing foreign direct investment, and a bill to review the tender offer system was included in the measures to be taken by the Japanese side. There were suspicions that the prior notification rule (where an offeror must files its tender offer documents to the regulator like disclosure documents before soliciting investors) constituted a restrictive rule against foreign capital, and it was necessary to dispel these suspicions. The 1990 amendment abolished such a prior notification rule. Additionally, the tender offer rule was fundamentally revised from the perspective of thorough shareholder protection.[[91]](#footnote-92) A notable example was the introduction of the so-called “one-third rule.”

The one-third rule established the following regulation: In cases where purchases of shares outside the stock exchange from significantly small number of persons (i.e., ten or less persons) and the ownership ratio exceeds one-third, a tender offer must be used for the purchase of shares.[[92]](#footnote-93) Under Japanese law at that time, it was mandatory to make a tender offer when a company intended to acquire more than 5% of shares by soliciting a large number of persons, and as an exception to this rule, a tender offer was not required for purchases from a significantly small number of persons. However, the one-third rule was introduced as an exception to this exception, requiring a tender offer even in cases of purchases from a significantly small number of persons. The rationale for setting the threshold at the level of one-third was that shareholders who own more than one-third of a company's shares can block special resolutions at shareholders' meetings under the Companies Act and can exercise a certain degree of corporate control over the company.

The one-third rule was introduced because even in the case of purchases from a small number of persons that are considered to be negotiated transactions, it is appropriate to require that such purchases be made under the tender offer since they are considered to have a significant impact on other remaining shareholders if they cause a change in control of the target company.[[93]](#footnote-94) The one-third rule compels takeover bidders to disclose in advance information such as the offer period, quantity of shares to be purchased, and purchase price, as well as to ensure that all shareholders have equal opportunities to sell their holdings by mandating a tender offer.

The 1990 amendment that introduced the one-third rule was developed with reference to UK regulations.[[94]](#footnote-95) However, although the Japanese one-third rule bears similarities to the mandatory takeover bid systems in the UK and the European Takeover Bid Directive (Directive 2004/25/EC), there are several important differences that make Japan's approach unique. First, while the European Directive implements ex post regulation (Article 5, Directive),[[95]](#footnote-96) Japan employs ex ante regulation. In Japan, an acquirer is prohibited from acquiring 40% of a company's shares in an off-market transaction with an existing major shareholder other than a tender offer. What is permitted is for the acquirer to initiate a tender offer and for major shareholders to tender their shares through this process. Under the European Directive, if an acquirer obtains 40% of shares, then, it is required to initiate a tender offer for the remaining 60% of shareholders. Thus, the timing at which a tender offer becomes mandatory differs significantly.

Second, in Japan, partial tender offers are permitted. In contrast, under the European Directive (Art. 5(1)) and in the UK (Rule 9.1, Takeover Code), partial takeover bids are not permitted in the mandatory bid rule, and in the UK, partial takeovers are prohibited in principle even for voluntary takeovers (Rule 36, Takeover Code). The European Directive requires that a takeover bid be made for all remaining shares when control changes hands. The rationale for requiring a takeover bid under the European Directive is to protect minority shareholders by providing them an opportunity to exit the company in the event of a control change. It can be analyzed that partial takeover bids are generally not allowed because permitting them would result in insufficient exit rights for minority shareholders. Conversely, when legislating with a policy that allows partial takeovers in Japan, this approach is compatible with ex ante regulation but incompatible with ex post regulation. This explains why Japan enforces tender offers ex ante when an acquirer seeks to exceed a certain ownership threshold.

### 2006 Amendment

The 2006 amendment introduced a partial prohibition on partial offers. Namely, if the shareholding ratio after the tender offer would reach two-thirds or more, all tendered shares must be purchased.[[96]](#footnote-97)

The rationale for this amendment was to ensure fairness among investors and to protect minority shareholders. If the ownership ratio of shares after the purchase becomes two-thirds or more, there is a risk that the number of shareholders and shares in circulation will fall below predetermined thresholds, potentially resulting in delisting by a stock exchange. Even if the company is not delisted, the liquidity of shares may be significantly reduced. If partial tender offers were allowed in such scenarios, tendering shareholders might not sell all of the tendered shares, which would inadequately protect these shareholders. Therefore, it was determined that in such cases, all tendered shares must be purchased.[[97]](#footnote-98)

### 2024 Amendment

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

First, while previously the purchase at the market transactions in a stock exchange was free to exceed the one-third threshold, the 2004 amendment makes such transactions subject to the tender offer rule. In other words, the scope of application of the one-third rule, which mandates that the one-third threshold be exceeded only through a tender offer, was expanded. The rationale for this change was as follows: the one-third rule focuses on the fact that securities transactions that materially affect control of a company 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) have information on the purpose, volume, and price of such transactions disclosed in advance, (2) ensure a deliberation period for investors, and (3) ensure that shareholders receive equal treatment. However, market transactions (1) only announce the volume and price after the fact without providing advance disclosure, (2) do not ensure investors' deliberation periods because transactions are executed on a first-come, first-served basis, and (3) do not guarantee equal treatment since selling prices vary due to auction mechanisms. These characteristics make it difficult to assert that market transactions ensure the transparency and fairness required by the one-third rule.[[98]](#footnote-99) When this threshold is exceeded, a tender offer can still be a partial offer with a maximum of less than two-thirds even after the 2024 amendment. This demonstrates that Japanese law does not attempt to guarantee minority shareholders complete exit opportunities, but rather focuses on ensuring prior disclosure, providing deliberation periods, and maintaining uniformity in purchase prices.

Second, the threshold was reduced from one-third to 30%. This change aligned with many foreign tender offer systems that set mandatory tender offer thresholds at 30%. Also, taking into account the typical percentage of voting rights exercised at 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.[[99]](#footnote-100)

## Discussion of Partial Tender Offers

The Japanese tender offer rule takes a distinctive third path. The US 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, which distinguishes the Japanese approach from that of the US. Furthermore, under the mandatory bid rule in Europe, an acquirer may obtain a control block first and subsequently launch a mandatory bid for the remaining shares. Such mandatory bids must not be partial offers. However, Japanese rules allow partial offers even when an acquirer is mandated to launch a tender offer to cross the threshold of 30%. 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 rules in the US, UK, and EU.

When focusing on the differences in tender offer rules between the UK/EU and Japan, the core issue is whether partial offers should be prohibited and exit rights granted to minority shareholders when control changes. One may argue that if minority shareholder protection under corporate law is insufficient, it is rational to grant exit rights to minority shareholders upon control changes through a mandatory bid rule. Indeed, controlling shareholders may derive unreasonable private benefits from companies at the expense of minority shareholders. However, it remains unclear whether minority shareholders' interests are severely impaired in Japan upon control changes. There are both advantages and disadvantages to partial tender offers. Therefore, this section provides a brief overview of both perspectives.

### The Pros

#### Cost of Finance

Allowing partial tender offers has the advantage of reducing financing costs for acquirers. Under a legal system that prohibits partial offers, potential acquirers who cannot raise sufficient funds to acquire all shares of the target company might abandon the takeover attempt. However, under a legal system that permits partial offers, such entities would have the opportunity to acquire a controlling interest in the target company. Thus, a system permitting partial tender offers has the advantage of considerably reducing 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.[[100]](#footnote-101)

It could also be argued that financially constrained acquirers will use their shares as a consideration (exchange tender offer).[[101]](#footnote-102) However, in Japan, there are no actual examples of exchange tender offers; all of the tender offer cases have been cash tender offers. This is because exchange tender offers are difficult to utilize as the rules are not sufficiently flexible, which makes exchange tender offers unpractical.

#### Acquiring a Large Share for a Business Alliance with a Listed Target Company

In Japan, it is common for an acquirer to wish to acquire control of the target company while simultaneously maintaining the target company's listing status. The delisting criteria of the Tokyo Stock Exchange include standards for the ratio of shares in circulation.[[102]](#footnote-103) Consequently, an unexpected delisting could occur due to a larger-than-anticipated number of tender acceptances if a full tender offer is made. In contrast, with a partial purchase, the target company can reliably remain listed. In Japan, we frequently observe cases where companies acquire substantial shareholdings for business alliances and capital tie-ups while keeping target companies listed on the exchange.

One might question whether it would be possible to create a situation equivalent to a partial takeover bid even if partial takeovers were prohibited. That is, the acquirer could simply acquire more shares than originally desired and subsequently sell excess shares until reaching the originally desired number. Since the Tokyo Stock Exchange's delisting criteria, such as the number of shares in circulation, are reviewed annually at the fiscal year-end, it would suffice to sell an adequate number of shares in the market by that time. Certainly, even if partial tender offers were forbidden, creating such a situation would be possible.

However, a counterargument is that compared to scenarios where 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 might not be particularly substantial.[[103]](#footnote-104)

#### Due Diligence Opportunity for a Hostile Bidder

Even when a buyer aims to acquire all shares, rules permitting partial tender offers can make the transaction more reasonable for the buyer. The buyer can acquire control of the target company through a partial tender offer, conduct due diligence for acquisition, and subsequently purchase the remaining shares at a reasonable price. Conversely, when any and all tender offer is obligatory, such arrangements are not possible. Thus, if 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.[[104]](#footnote-105)

### The Cons

#### Inefficient Takeovers Might Succeed

A disadvantage of partial offers is that they may be exploited for inefficient acquisitions. Some argue that the risk of undesirable takeovers due to coercion exists to a greater extent in partial purchases than in any and all offers.[[105]](#footnote-106) Additionally, if the shareholding structure of the target company is diversified (i.e., without controlling shareholders) and an entity attempts to acquire control through a tender offer, even takeovers that reduce corporate value could succeed if partial takeovers are permitted. However, if partial purchases are prohibited and any and all offers are required, such detrimental takeovers might be deterred.[[106]](#footnote-107)

A counterargument suggests that coercion issues can be addressed by introducing legal mechanisms to eliminate coercion (specifically, systems that separate approval or disapproval of the acquisition itself from the declaration of intent to tender) without prohibiting partial takeover bids. With such legal mechanisms in place, partial offers that reduce corporate value might not gain approval.[[107]](#footnote-108)

#### May harm minority shareholders

If partial tender offers are permitted, there is a risk that acquirers who become controlling shareholders in target companies may pursue private interests at the expense of minority shareholders. This occurs because controlling shareholders are interested not in maximizing the common interests of all shareholders, but in maximizing the sum of private benefits enjoyed exclusively by controlling shareholders plus the value corresponding to their shareholdings (public value). Theoretically, the objectives of controlling shareholders differ from those of shareholders as a whole.

However, this threat to minority shareholders will not be resolved merely by prohibiting partial purchases. The conflict of interest between controlling and minority shareholders will persist unless a cash-out or similar transaction occurs even after a full tender offer. In other words, the risk of controlling shareholders harming minority shareholders is not exclusive to partial purchases. Therefore, arguing for the prohibition of partial acquisitions based solely on this risk would be inadequate from the perspective of minority shareholder protection. For comprehensive protection of minority shareholders, a system could be introduced allowing them to exit the company by requesting that controlling shareholders or the company purchase their shares in the event of a control change, regardless of the acquisition method. However, no such system currently exists in Japan.

As outlined above, both pros and cons of partial offers are at least partly convincing but not decisive on theory. Therefore, in the next section, I conduct an empirical study to assess whether minority shareholders are disadvantaged under partial tender offers in Japan. If 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 needs not follow the EU approach, but may keep taking the unique third path.

## Empirical analysis

### The Data

The data is from SPEEDA by Userbase Corporation. Of the 1,015 tender offers from January 1, 2008, through December 31, 2024, 239 were partial tender offers, and 229 became unconditional. After excluding eleven cases where the target was an non-listed company and one case where the target's stock price information was unavailable, 195 cases remained for analysis.

The Table 1 reports the premiums. The average premium to the average market price one month before the announcement was 18.74%. The cases with pro rata settlement are particularly significant, as partial purchases that were not settled pro rata may have yielded the same result if they had been purchased in the any and all tender offers. Focusing solely on partial purchases settled pro rata, the average premium to the share price one month prior to the announcement was 25.93%.



The long-term stock price performance of target companies is notably positive, as shown in Table 2. This table summarizes the monthly returns and market-adjusted returns for the month following the end of the tender offer period, 12 months later (Return 1Y), 24 months later (Return 2Y), and 36 months later (Return 3Y). Panel A summarizes all samples. Examining the 118 cases for which stock price data are available, the average one-year, two-year, and three-year returns are 11.2%, 26.2%, and 55.7%, respectively, all statistically significant and positive at the 1% level. The market-adjusted returns are 5.6%, 12%, and 29.9% after 1, 2, and 3 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 where pro rata settlement occurred. The returns for this subsample average 5.7% after one year, 18.9% after two years, and 59.7% after three years, and are statistically significantly positive at the 5% level after two and three years. The market-adjusted returns are 3.4% after one year, 9.6% after two years, and 40.3% after three years, none of which are statistically significant.



Figures 1 and 2 display graphs of average ROA and ROE from the year preceding the tender offer (t=-1) to three years after (t=3). The ROA and ROE data were obtained from SPEEDA by User Base. The horizontal axis represents the time period, and the vertical axis shows the percentages of ROA and ROE. Figure 1 presents a sample of 80 cases for which ROA and ROE data for this period are included in the database. Figure 2 focuses on 50 of those cases with pro rata settlements. Both figures demonstrate that ROE and ROA tend to improve in the three years following the tender offer compared to the year before.

These findings suggest no evidence that partial takeover bids have systematically damaged corporate or shareholder value, whether measured by stock prices (Table 2) or by corporate management indices (Figures 1 and 2). At the very least, we cannot conclude that minority shareholders experience disadvantages after partial tender offers. These data indicate that shareholders who remained as minority shareholders of target companies after partial tender offers did not suffer value deterioration. There is no evidence suggesting that partial offers should be completely prohibited.

### Discussion

There are both advantages and disadvantages to allowing partial offers. If corporate values commonly declined after partial takeovers, prohibiting them in principle would be preferable. However, as the data presented above demonstrates, this is not the case. Rather, corporate value and stock value tend to increase following partial takeover bids. Therefore, Japanese law, which generally permits partial takeovers, can be evaluated as having advantages that outweigh the disadvantages.

Logically, controlling shareholders can potentially 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 illegal acts have been committed. However, even if such a system were legislated, it might not function effectively. Consequently, some may argue that guaranteeing exit rights is necessary to protect minority shareholders during control changes.

However, there does not appear to be a 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 a new party. In either case, the future actions of the new controlling shareholder are uncertain, and the risk that they might act opportunistically to the detriment of minority shareholders cannot be dismissed. Nevertheless, control changes often increase corporate value and improve minority shareholders' interests. For example, in companies with dispersed shareholding structures, effective shareholder monitoring is impeded by rational apathy, whereas this problem can be mitigated in companies with controlling shareholders. Generally, no clear relationship exists between shareholder structure and corporate profitability.[[108]](#footnote-109) Moreover, if a traditional controlling shareholder existed previously, they may have already exploited minority shareholders' interests, and a new controlling shareholder might 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 old and new controlling shareholders. Therefore, the general theory that "changes in controlling shareholders are disadvantageous to minority shareholders" is not universally valid.[[109]](#footnote-110) Since the presence of a controlling shareholder can have both positive and negative effects, case-by-case assessment is more appropriate than adopting a uniform approach.

Under Japanese law, a poison pill is available if shareholders approve the pill to prevent corporate value-reducing takeover through a partial offer. This case-by-case approach may be more efficient than categorically prohibiting partial tender offers. However, in friendly partial takeovers, target company boards are unlikely to introduce poison pills, thereby depriving shareholders of opportunities to express their views on friendly takeovers that might reduce corporate value. Due to the coercive nature of partial tender offers, many shareholders may tender their shares regardless. 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. Once such a mechanism is introduced in future, partial tender offers need not be prohibited.

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

## Anti-activist pills

Although hostile takeovers and shareholder activism are two 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 request 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 or reducing fixed costs, enhance governance through the appointment of outside directors, or secure board positions for their nominees.[[110]](#footnote-111) This raises the question: are anti-activist pills similar to those in the U.S. employed in Japan?[[111]](#footnote-112)

We have not identified any cases where Japanese companies have 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 be difficult to justify the necessity of triggering such defensive measures. If activists make various proposals while only acquiring a 5% to 10% stake, they must submit shareholder proposals to the general shareholders' meeting 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 an activist submits various shareholder proposals. Even without specific defensive measures, the merits of an activist's proposals will be decided at the general shareholders' meeting, thereby upholding the principle of shareholder intent.

Conversely, provisions equivalent to the "acting in concert" clauses found in U.S. anti-activist pills were actually employed in the Mitsuboshi case. 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 board of directors of the target company retained reasonable discretion to determine whether such actions had occurred. The court in the Mitsuboshi case highlighted concerns that this formulation of a concerted action clause granted excessive discretion to the board of directors, enabling potentially arbitrary implementation. General shareholders might refrain from responding to proxy solicitations against such a pill if they fear becoming targets themselves, regardless of their actual intentions.[[112]](#footnote-113) Thus, the case law principle prohibiting methods that distort shareholders' genuine intentions regarding the merits of poison pill (or the desirability of a particular activist buyout) is reasonable in light of the principle of shareholder intent.

## Sustainability Impact

Under Japanese law, which defines corporate value as the sum of the present value of future cash flows a company will generate and favors M&A transactions that enhance corporate value, sustainability factors such as human capital and environmental considerations do not, in themselves, directly influence the evaluation of an acquisition's desirability. Rather, they are evaluated through their impact on the target company's corporate value.[[113]](#footnote-114) In other words, it is impermissible for boards of directors to introduce and invoke defensive measures to protect stakeholder interests separately from the common interests of shareholders.[[114]](#footnote-115)

Shareholders remain free to make triggering decisions if they believe the common interests of shareholders are affected by employee treatment or other factors.[[115]](#footnote-116) On the other hand, since corporate value as defined above serves as the criterion, it would be difficult to justify shareholders making decisions based on altruistic considerations of stakeholder interests that are not reflected in corporate value.[[116]](#footnote-117)

As described above, in situations where management is displaced through corporate takeovers, sustainability factors are considered to the extent they are reflected in the corporate value, but factors not incorporated into the corporate value are disregarded. This has no direct bearing on the question of how significantly sustainability factors should influence management's routine operations. However, it does indicate that Japanese corporate law provides relatively weak incentives for directors to engage in sustainability-oriented management. Under Japanese law, the principle of maximizing shareholder value remains fundamental to directors' duties. Of course, exceptional cases exist where donations that do not directly serve shareholders' interests may be recognized as lawful. According to 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.[[117]](#footnote-118) The Court also held that making disproportionate donations beyond appropriate scope constitutes a violation of directors' duties. Therefore, socially beneficial activities are permissible provided they meet these criteria, even if they potentially risk long-term shareholder interests. However, questions arise as to whether a framework permitting only this level of activity by individual companies constitutes an adequate response to global warming and other environmental challenges, for example. 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 are obligated to ensure compliance even when such compliance might not serve shareholder interests. Conversely, addressing sustainability factors that would not otherwise be reflected in corporate value remains at directors' discretion, provided such management decisions remain within reasonable limits considering the company's size and other relevant factors. In corporate takeover scenarios, sustainability factors not reflected in corporate value will not be considered. Therefore, promoting such sustainability activities cannot appeal solely to directors' economic rationality but must engage their ethical sensibilities. This represents a weak motivational framework provided by the Japanese corporate law and takeover rules. To effectively encourage sustainability management, we must acknowledge that, at least under Japanese law, motivation will remain insufficient unless supplemented by mandatory legal requirements.

# Conclusion.

This paper clarifies several key points. First, the corporate value standard is adopted, in cases in the context of takeover defense, with a framework that respects shareholders’ intent. Second, respecting shareholders’ intent may result in the highest purchase price offer, which do not necessarily maximize corporate value. Third, even when shareholders do not necessarily support corporate value-maximizing takeovers, a rule permitting boards to trigger the poison pills without shareholders’ approval would be undesirable. Fourth, Japanese law, which generally permits partial tender offers, tends to leverage benefits rather than harms, making it sufficient to address potential harms through case-specific takeover defenses without prohibiting partial takeovers as a general principle. This paper argues against 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 U.S. with lower triggering thresholds of 5% to 10%. Regarding sustainability management, factors not reflected in corporate value cannot justify directors' actions under corporate takeover laws. If sustainability management is to be encouraged, mandatory laws and regulations would be necessary, as current frameworks provide insufficient motivation.

As described above, this paper's central message is that while Japan can be characterized as taking a distinctive third path in corporate takeover law which is different from both the U.S. and European approaches, this approach is in fact reasonable. Due to historical context, Japanese law generally develops with reference to Western legal frameworks, making it tempting to argue that Japanese law should be reformed when it diverges from European and American standards. However, in the domain of corporate takeover law, I believe that a third approach remains entirely viable.

1. Professor of Law, Graduate Schools for Law and Politics, the University of Tokyo. Professor Iida submitted an expert opinion for Nippo Sangyo, Japan Asia Group, and Tokyo Kikai Seisakusho in the poison pill litigation that is discussed in the text. This work was supported by Nomura Foundation and JSPS KAKENHI Grant Numbers JP 23H00033, 23K17537, 23K01160. [↑](#footnote-ref-2)
2. See, Hideyuki Sano, Lisa Du, Takako Taniguchi, and Winnie Hsu*, Activist Investing Booms in Japan, Led by Elliott's Successes: Japan has Become World 's Second-biggest Market for Activists*, Bloomberg (June 26, 2024). [↑](#footnote-ref-3)
3. See, Hideyuki Miyajima, *Corporate Governance Reform, and Ownership, and Control: Perspective from Japan*, 30 Asian Journal of Political Science 260 ( 2022). 2022). [↑](#footnote-ref-4)
4. See, Annie Linskey & Bob Tita, *Trump Backs Reworked Nippon-U.S. Steel Plan That Won't Involve Outright Purchase*, Wall Street Journal Feb. 7, 2025. [↑](#footnote-ref-5)
5. See, Kosaku Narioka, *Itochu Considering Investment in 7-Eleven Owner*, Wall Street Journal, Feb. 6, 2025. [↑](#footnote-ref-6)
6. 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), *available at* https://www.fsi.co.jp/e/press\_release/img/20241217.pdf. [↑](#footnote-ref-7)
7. See Revlon, Inc. v. Macandrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985). Of course, in the FUJISOFT case, the target company did not try to block the higher takeover bid with a poison pill based solely on the judgment of the board of directors, but merely expressed its opposition. Therefore, even if this case had occurred in Delaware, it could be said that the actions of the directors did not constitute a breach of the Revlon duty. [↑](#footnote-ref-8)
8. METI, *Guidelines for Corporate Takeovers – Enhancing Corporate Value and Securing Shareholder Interests* (2023), *available at* https://www.meti.go.jp/press/2023/08/20230831003/20230831003.html. [↑](#footnote-ref-9)
9. For example, in the FUJISOFT case, the target company's opinion expressly cites Takeovers Guidelines and relies on the principles and other modes of thinking presented in the Guidelines. 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), *available at* https://www.fsi.co.jp/e/press\_release/img/20241119\_02.pdf. [↑](#footnote-ref-10)
10. METI, *Guidelines for Corporate Takeovers－Enhancing Corporate Value and Securing Shareholders’ Interests－* (2023), at 10. [↑](#footnote-ref-11)
11. Mutsuhiko Yukioka, *Baishū o Meguru Taishō-gaisha no Torishimariyaku no Kōikihan [Code of Conduct for Directors of Target Company Concerning Takeover]*, 2367 Shojihomu 15, 21 (2024). [↑](#footnote-ref-12)
12. 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.”). [↑](#footnote-ref-13)
13. Tōkyō Kōtō Saibansho [Tokyo High Ct.] March 23, 2005, Hei 17 (ra) no. 429, 1899 Hanrei jihō [Hanji] 56 (Japan). In this case, the acquirer (Livedoor) acquired approximately 35% of the target company's (Nippon Broadcasting System, Inc.) shares by purchasing them through a special off-floor transaction on the Tokyo Stock Exchange, rather than through a tender offer. In response, the target company issued new share subscription rights to its existing major shareholder (Fuji Television Network, which held 22.5% of the shares of the target company). If the major shareholder were to exercise the rights, a huge number of shares, 1.44 times the current total number of outstanding shares, would be issued, and the shareholding ratio of the said major shareholder would be approximately 59% based on the number of shares, while the shareholding ratio of the acquirer would decrease from approximately 42% to approximately 17%. The Tokyo High Court enjoined the issuance of the new share subscription rights. [↑](#footnote-ref-14)
14. Tōkyō Kōtō Saibansho [Tokyo High Ct.], April 23, 2021, Rei 3 (ra) no. 798, 446 Shiryōban shōji hōmu [Shiryōshōji] 154 (Japan). In this case, an acquirer launched an unsolicited tender offer to compete with an ongoing MBO. This hostile bid exceeded the MBO's purchase price, causing the MBO to fail when only 38% of shares were tendered, short of the required 66.67%. After the hostile bid launched, the target company declared a large dividend, leading to the offer's withdrawal. When the acquirer began market purchases while announcing another tender offer, the target's board unilaterally triggered a poison pill without shareholder approval. The Tokyo High Court enjoined this as an unfair issuance, reasoning that the pill's main purpose was to preserve management control for incumbent directors or their supporting shareholders. [↑](#footnote-ref-15)
15. Saikō Saibansho [Sup.Ct.] August 7, 2007, Hei 19 (kyo) no. 30, 61 Saikō Saibansho minji hanreishū [Minshū] 2215 (Japan). In this case, acquirer Steel Partners launched a tender offer for all shares of Bulldog Sauce. The target company's board determined this would damage corporate value and harm both company and shareholder interests. The pill was triggered by the special resolution of the shareholders’ meeting. It granted three stock subscription rights per share to shareholders other than Steel Partners. The Supreme Court rejected the acquirer's request for an injunction against this pill. [↑](#footnote-ref-16)
16. Nagoya Kōtō Saibansho [Nagoya High Ct.], April 22, 2021, Rei 3 (ra) no. 138, 446 Shiryōban shōji hōmu [Shiryōshōji] 130 (Japan). The target company had obtained approval for its takeover defense plan as an advisory resolution at shareholders' meetings in the two most recent years, both by majority vote (approximately 66.64% and 64.64% of voting rights present, and approximately 75.32% and 85.22% of voting rights in favor, excluding the acquirer). This plan required potential acquirers to provide certain information to the board before attempting any purchase that would result in holding 20% or more of the company's shares. However, the acquirer initiated a partial tender offer without following these procedural rules. The maximum number of shares to be purchased was set so the acquirer's voting rights would reach approximately 27.57% of total outstanding shares. The acquirer deliberately chose this 27.57% threshold to single-handedly block any special resolutions at shareholders' meetings that might disadvantage them. This percentage was strategically calculated based on the 82.72% average voting participation rate at annual meetings over the previous two fiscal years. In response, the target company triggered its takeover defense pill. The Nagoya High Court denied the acquirer's request for an injunction against this defensive measure. [↑](#footnote-ref-17)
17. Tōkyō Kōtō Saibansho [Tokyo High Ct.], August 10, 2021, Rei 3 (ra) no. 1593, 450 Shiryōban shōji hōmu [Shiryōshōji] 143 (Japan). In this case, the acquirer proposed taking the target company private. After rejection, the acquirer initiated a tender offer for all shares, stating non-tendered shares would be cashed out at the same price. The minimum purchase condition was set at 40% of voting rights. The target company responded with a poison pill. The acquirer sought an injunction, which the Tokyo District Court rejected. The target company's shareholders’ meeting later approved these defense measures through an ordinary resolution. The Tokyo High Court subsequently also rejected the injunction request. [↑](#footnote-ref-18)
18. Tōkyō Kōtō Saibansho [Tokyo High Ct.], November 9, 2021, Rei 3 (ra) no. 2391, 453 Shiryōban shōji hōmu [Shiryōshōji] 98 (Japan). 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 Tokyo High Court rejected this request. [↑](#footnote-ref-19)
19. 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.”). [↑](#footnote-ref-20)
20. METI, *Guidelines for Corporate Takeovers－Enhancing Corporate Value and Securing Shareholders’ Interests－* (2023), at 10. [↑](#footnote-ref-21)
21. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). [↑](#footnote-ref-22)
22. In 2024, the Financial Instruments and Exchange Act was amended to partially revise tender offer regulations. Previously, these regulations did not apply to purchases of shares solely through market trading. After the amendment, rules were introduced to prohibit the purchase of more than 30% of shares through not only the off market trading other than a tender offer but also the market trading. The acquirer who will hold the target company’s shares more than 30% after the accumulation of shares is allowed to exceed 30% only through a tender offer (Article 27-2, Paragraph 1 of the Financial Instruments and Exchange Act). The effective date of the 2024 amendment to the Financial Instruments and Exchange Act is to be specified by Cabinet Order within a period not exceeding two years from the date of promulgation and has yet to be determined because that Cabinet Order has not yet been set.

In discussions by a Financial Services Agency working group (chaired by Hideki Kanda, professor emeritus at the University of Tokyo) considering how to revise tender offer regulations, the question of whether to move to European-style regulations that would prohibit partial takeovers in principle was discussed, but such a revision 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), available at <https://www.fsa.go.jp/en/refer/councils/singie_kinyu/20240130.html>.

While a tender offer is mandatory when exceeding 30%, the tender offer can still be a partial offer. There are basically no mandatory conditions for such a partial offer, and there are no regulations in Japan that require the approval of a majority of shareholders other than the acquirer, as is the case in the UK. See, Rule 36.5, Takeover Code (UK). [↑](#footnote-ref-23)
23. 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). [↑](#footnote-ref-24)
24. The corporate value standard was first clearly presented by the Corporate Value Study Group of the Ministry of Economy, Trade and Industry (chaired by Professor Hideki Kanda). The group's "Report on Takeover Defense Measures to Ensure or Enhance Corporate Value and Shareholders' Common Interests" (May 27, 2005) (available at https://www.meti.go.jp/policy/economy/keiei\_innovation/keizaihousei/pdf/shishin\_hontai.pdf) established the principle of ensuring or enhancing corporate value and shareholders' common interests as its primary principle. This principle essentially states that takeover defense measures should aim to maintain and enhance corporate value and, consequently, the common interests of shareholders.

Since then, METI has formed similar study groups and published various documents, consistently adhering to this corporate value standard. For example, METI's "Guidelines on Fair M&A Practices - Toward Enhancing Corporate Value and Securing Shareholder Profit" (June 28, 2019), p. 14 (available at https://www.meti.go.jp/policy/economy/keiei\_innovation/keizaihousei/pdf/fairmaguidelines\_english.pdf), maintains that the desirability of M&A transactions should be judged based on whether they enhance corporate value. [↑](#footnote-ref-25)
25. METI, Takeovers Guidelines, at 8 (defines the 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."). [↑](#footnote-ref-26)
26. Saikō Saibansho [Sup.Ct.] August 7, 2007, Hei 19 (kyo) no. 30, 61 Saikō Saibansho minji hanreishū [Minshū] 2215, 2223-2224 (Japan). [↑](#footnote-ref-27)
27. *Id*., at 2224. [↑](#footnote-ref-28)
28. See Section II, Subsection C for details. [↑](#footnote-ref-29)
29. Wataru Tanaka, Kigyou Baishu to Boueisaku [Corporate Takeover and Defense Measures] 247 (Shojihomu, 2012). [↑](#footnote-ref-30)
30. Yasushi Ito, *Hanhi [Case Notes]*, 1923 Shojihomu 37, 41 (2011) states that courts do not necessarily have expert knowledge of corporate takeovers and that a framework that basically respects the judgment of the shareholders meeting is less problematic than one in which the court itself makes the judgment. [↑](#footnote-ref-31)
31. Tōkyō Kōtō Saibansho [Tokyo High Ct.] March 23, 2005, Hei 17 (ra) no. 429, 1899 Hanrei jihō [Hanji] 56, xxx (Japan). [↑](#footnote-ref-32)
32. Tōkyō Kōtō Saibansho [Tokyo High Ct.] March 23, 2005, Hei 17 (ra) no. 429, 1899 Hanrei jihō [Hanji] 56, xxx (Japan). [↑](#footnote-ref-33)
33. Tōkyō Kōtō Saibansho [Tokyo High Ct.], March 23, 2005, Hei 17 (ra) no. 429, 1899 Hanrei jihō [Hanji] 56, xxx (Japan). [↑](#footnote-ref-34)
34. See, the main text around *supra* note 26. [↑](#footnote-ref-35)
35. Tōkyō Kōtō Saibansho [Tokyo High Ct.], July 9, 2007, Hei 19 (ra) no. 917, 61 Saikō Saibansho minji hanreishū [Minshū] 2306 (Japan). [↑](#footnote-ref-36)
36. Peng Xu & Wataru Tanaka, *Baishu Boueisaku Inn Za Shado Obu Kabushiki Mochiai – Jirei Kenkyu [Takeover Defense Measures in the Shadow of Cross-Shareholding--A Case Study]*, 1885 Junkan shōji hōmu [Shōji] 4 (2009) (found the fact that the 58% of the shareholders in this case were cross-shareholders, which was not claimed by the parties in this case). [↑](#footnote-ref-37)
37. The Supreme Court held that the shareholders' judgment was based on the acquirer’s failure to specify their management policy after acquisition, despite intending to acquire all outstanding shares. The acquirer neither planned to manage the target company nor clarified how they would recover their invested capital. The Court found no serious defect in this shareholders’ judgment that would invalidate it. Rather than independently assessing damage to corporate value, the Court deferred to the shareholders' reasonable judgment. Some may argue that an acquirer's failure to specify post-acquisition management plans or exit strategy suggests potential harm to corporate value or indicates greenmail intentions. However, this isn't necessarily true. Disclosing such policies could advantage the target company's defense efforts or attract competing bidders, so withholding this information isn't inherently unfair. [↑](#footnote-ref-38)
38. Nagoya Kōtō Saibansho [Nagoya High Ct.], April 22, 2021, Rei 3 (ra) no. 138, 446 Shiryōban shōji hōmu [Shiryōshōji] 130, xxx (Japan). [↑](#footnote-ref-39)
39. Tōkyō Kōtō Saibansho [Tokyo High Ct.], April 23, 2021, Rei 3 (ra) no. 798, 446 Shiryōban shōji hōmu [Shiryōshōji] 154, xxx (Japan). The Tokyo High Court compared two purposes: maintaining management control versus eliminating coercive takeover techniques, then determined which was primary. This comparative approach is understandable, as target companies might cite eliminating coercion to justify defensive measures while actually serving management's self-interest. However, since target management invariably aims to maintain control when implementing defenses, it seems unreasonable to use a framework that asks which objective is primary than the other objectives. [↑](#footnote-ref-40)
40. Tōkyō Kōtō Saibansho [Tokyo High Ct.], April 23, 2021, Rei 3 (ra) no. 798, 446 Shiryōban shōji hōmu [Shiryōshōji] 154, xxx (Japan). [↑](#footnote-ref-41)
41. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.], June 23, 2021, Rei 3 (yo) no. 20089, 450 Shiryōban shōji hōmu [Shiryōshōji] 151 (Japan). [↑](#footnote-ref-42)
42. Tōkyō Kōtō Saibansho [Tokyo High Ct.], August 10, 2021, Rei 3 (ra) no. 1593, 450 Shiryōban shōji hōmu [Shiryōshōji] 143, xxx (Japan).

Some critics argue there's no coerciveness in two-step acquisitions because shareholders who oppose the tender offer can simply vote against the second-stage cash-out. See Wataru Tanaka, *Boueisaku to Baishuhousei no Shourai – Toukyou Kikai Seisakusho Jiken no Houteki Kentou—[Defense Measures and the Future of Takeover Legislation: Legal Analysis of the Tokyo Kikai Seisakusho Case]*, 2286 Junkan shōji hōmu [Shōji] 4, 14 (2022)).

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.

Even if these concerns are dismissed, when the minimum threshold is set at 40%, an acquisition opposed by 60% of shareholders could still proceed. Of course, from a shareholders’ intent perspective, a tender offer attracting majority support clearly indicates shareholder approval. But when less than half the shares are tendered, majority opposition remains possible. This could allow control changes despite majority opposition. [↑](#footnote-ref-43)
43. Hideki Kanda, Kaishahou [Corporate Law] 187 (26th ed., Kobundo, 2024). [↑](#footnote-ref-44)
44. Id. [↑](#footnote-ref-45)
45. Id. [↑](#footnote-ref-46)
46. Tōkyō Kōtō Saibansho [Tokyo High Ct.], November 9, 2021, Rei 3 (ra) no. 2391, 453 Shiryōban shōji hōmu [Shiryōshōji] 98, xxx (Japan). Since the Bulldog Sauce case, case law has established that when shareholders approve a takeover defense measure, courts infer the acquisition would damage corporate value. The burden then shifts to the acquirer to prove otherwise. However, in the Tokyo Kikai Seisakusho case, the court merely confirmed the intent of non-acquirer shareholders without inferring damage to corporate value. See Hideki Kanda, Kaishahou [Corporate Law] 187 (26th ed., Kobundo, 2024). [↑](#footnote-ref-47)
47. Saikō Saibansho [Sup.Ct.], July 28, 2022, Rei 4 (kyo) no. 12, 1667 Kin’yū shōji hanrei [Kinhan] 56 (Japan). [↑](#footnote-ref-48)
48. Osaka Kōtō Saibansho [Osaka High Ct.], July 21, 2022, Rei 4 (ra) no. 750, 1667 Kin’yū shōji hanrei [Kinhan] 30 (Japan). [↑](#footnote-ref-49)
49. Hideki Kanda, Kaishahou [Corporate Law] 186 (26th ed., Kobundo, 2024). [↑](#footnote-ref-50)
50. Osaka Kōtō Saibansho [Osaka High Ct.], July 21, 2022, Rei 4 (ra) no. 750, 1667 Kin’yū shōji hanrei [Kinhan] 30, xxx (Japan). [↑](#footnote-ref-51)
51. FSA, FSA Weekly Review No.601 (September 5, 2024), https://www.fsa.go.jp/en/newsletter/weekly2024/601.html#e05. [↑](#footnote-ref-52)
52. Takeovers Guidelines, at 10. [↑](#footnote-ref-53)
53. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14 (2024). [↑](#footnote-ref-54)
54. Takeovers Guidelines, at 58. [↑](#footnote-ref-55)
55. Manabu Matsunaka, *Kigyo Baishu ni okeru Koudou Shishin no Rironteki Kentou (2) [Theoretical Analysis of Takeovers Guidelines (2)]*, 1592 Juristo 26, 27 (2024).

However, in an all-or-nothing offer (a two-step takeover with a minimum condition of two-thirds to acquire all shares), target shareholders need not worry about post-takeover damage to corporate value, as they will cash out upon completion. Therefore, the main text's explanation aligns with the principle of shareholder intent only for takeovers that are not all-or-nothing offers. [↑](#footnote-ref-56)
56. Takeovers Guidelines, at 5. [↑](#footnote-ref-57)
57. https://www.meti.go.jp/shingikai/economy/kosei\_baishu/pdf/20230831\_3.pdf. [↑](#footnote-ref-58)
58. Nippon Keidanren, *Kigyo Baishu ni taisuru Gouriteki na Boueisaku no Seibi ni Kansuru Iken [Opinion on the Development of Reasonable Defense Measures Against Corporate Takeovers]* (November 16, 2004). [↑](#footnote-ref-59)
59. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14, 15 (2024). [↑](#footnote-ref-60)
60. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14, 15 (2024). [↑](#footnote-ref-61)
61. METI, Guidelines for Management Buyouts (MBO) to Enhance Corporate Value and Ensure Fair Procedures (2007), *available at* https://www.meti.go.jp/policy/economy/keiei\_innovation/keizaihousei/pdf/MBOshishin2.pdf. [↑](#footnote-ref-62)
62. METI, Fair M&A Guidelines – Enhancing Corporate Value and Securing Shareholders’ Interests– (2019), *available at* https://www.meti.go.jp/policy/economy/keiei\_innovation/keizaihousei/pdf/fairmaguidelines\_english.pdf. [↑](#footnote-ref-63)
63. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14, 15 (2024). [↑](#footnote-ref-64)
64. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14, 18 (2024). [↑](#footnote-ref-65)
65. 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. [↑](#footnote-ref-66)
66. Takeovers Guidelines, at 58. [↑](#footnote-ref-67)
67. Manabu Matsunaka, *Kigyo Baishu ni okeru Koudou Shishin no Rironteki Kentou (2) [Theoretical Analysis of Takeovers Guidelines (2)]*, 1592 Juristo 26, 27 (2024). [↑](#footnote-ref-68)
68. Saikō Saibansho [Sup.Ct.] August 7, 2007, Hei 19 (kyo) no. 30, 61 Saikō Saibansho minji hanreishū [Minshū] 2215, 2223-2224 (Japan). [↑](#footnote-ref-69)
69. Takeovers Guidelines, at 10. [↑](#footnote-ref-70)
70. Takeovers Guidelines, at 13. [↑](#footnote-ref-71)
71. Takeovers Guidelines, at 14. [↑](#footnote-ref-72)
72. Takeovers Guidelines, at 8. [↑](#footnote-ref-73)
73. Takeovers Guidelines, at 12. [↑](#footnote-ref-74)
74. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14, 16 (2024). [↑](#footnote-ref-75)
75. Id. [↑](#footnote-ref-76)
76. METI, Fair M&A Guidelines – Enhancing Corporate Value and Securing Shareholders’ Interests –, 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”). [↑](#footnote-ref-77)
77. In reality, the company may not aim to acquire 100% of the shares, for example, by making a partial tender offer. In these cases, the target company's shareholders consider the sum of the profit they would receive by tendering their shares in the tender offer and the value of the shares remaining in their hands. The latter value is the value of the company under the acquirer. The greater the latter value as a percentage of the total sum that shareholders will receive, the more the target company's shareholders will be interested in the post-acquisition value of the company rather than in the merits of the purchase price. In this case, unlike an acquisition with all-or-nothing terms, the shareholders' decision on the consequences of the acquisition is more likely to be made in accordance with the corporate value standard. In contrast, when the majority of the value received by shareholders consists of the portion that can be sold through the tender offer, the situation is closer to that of an acquisition with all-or-nothing terms. [↑](#footnote-ref-78)
78. 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). [↑](#footnote-ref-79)
79. 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). [↑](#footnote-ref-80)
80. METI, Fair M&A Guidelines – Enhancing Corporate Value and Securing Shareholders’ Interests –, at 41(“it has been observed that this lack of alignment can occur in cases such as (i) an acquisition proposal that has significant benefits to general shareholders reduces the benefits to other stakeholders (for example, employees) at the expense of increases to the benefits to shareholders”). [↑](#footnote-ref-81)
81. Article 27-10, FIEA. [↑](#footnote-ref-82)
82. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14, 17 (2024). [↑](#footnote-ref-83)
83. Wataru Tanaka, *Souron – M&A Housei no Kentou Kadai [General Remarks --M&A Legislation Issues]*, 2367 Shōjihomu 4, 6 (2024). [↑](#footnote-ref-84)
84. Id., at 6-7. [↑](#footnote-ref-85)
85. For more information on this case, see Wataru Tanaka, *Jugyouin to Kaishahou ni tuite no Ichi Shiron – Itouchu no Desanto ni taisuru Koukaikaituke 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). [↑](#footnote-ref-86)
86. Article 27-13, Paragraph 4, Item 2 and 5 of FIEA. [↑](#footnote-ref-87)
87. Article 27-13, Paragraph 4 of FIEA; Article 14-2-2 of the Financial Instruments and Exchange Law Enforcement Order. [↑](#footnote-ref-88)
88. Takashi Matsukawa, *Yukashouken no Koukaikaituke no Todokede Seido [Notification System for Tender Offers for Securities]*, 556 Shoji Homu Kenkyu 2, 8 (1971). [↑](#footnote-ref-89)
89. Article 27-18, Paragraph 1, FIEA. [↑](#footnote-ref-90)
90. Article 27-18(2)(ii), FIEA. [↑](#footnote-ref-91)
91. Junichi Naito, *Atarashii Kabushiki Koukaikaituke Seido (Jou) [New Takeover Bid System (1)]*, 1219 Shojihomu 2 (1990). [↑](#footnote-ref-92)
92. Article 27-2, Paragraph 1, Item 2 of the FIEA; Cabinet Order Article 6-2, Paragraph 3. [↑](#footnote-ref-93)
93. Junichi Naito, *Kabushiki Kounakikaituke Seido no Kaisei [Reform of the Takeover Bid System]*, 1208 Shojihomu 2, 5 (1990). [↑](#footnote-ref-94)
94. Id. [↑](#footnote-ref-95)
95. Even in the UK's primarily ex post regulatory system, some ex ante regulation exists. 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), which then require a mandatory takeover bid (Rule 9). However, purchasing from multiple persons to exceed 30% remains prohibited, requiring a tender offer similar to Japan's system. Most UK takeover bids are voluntary, with few mandatory bids annually. Thus, certain aspects of the ex post framework effectively function as ex ante regulation in practice. [↑](#footnote-ref-96)
96. Article 27-13, Paragraph 4 of the FIEA, and Article 14-2-2 of the Enforcement Order. [↑](#footnote-ref-97)
97. Shiro Ohkita, *Koukaikaituke Seido, Tairyou Hoyu Houkoku Seido [Tender Offer System and Large Shareholding Reporting System]*, 1774 Shojihomu 38, 39 (2006). [↑](#footnote-ref-98)
98. Akira Nozaki, et al., *Koukaikaituke Seid oni kakaru Kinyuushouhinntorihikihou tou no Kaisei [Amendments to the Financial Instruments and Exchange Act, etc., Relating to Tender Offer Systems]*, 2363 Shojihomu 11, 12 (2024). [↑](#footnote-ref-99)
99. Id. [↑](#footnote-ref-100)
100. 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 to Kyousei Koukaikaituke – Kyousei Koukaikaituke Seido no Kinou [Acquisition of Controlling Shares and Compulsory Takeover Bids -- The Function of the Compulsory Takeover Bid System]*, in Shinsaku Iwahara et al., eds, Kaisha, Kinyuu, Hou (Gekan) [Companies, Finance, and Law (Vol. 2)] 33, 59 (Shojihomu, 2013). [↑](#footnote-ref-101)
101. Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693, 1736 n.108 (1985). [↑](#footnote-ref-102)
102. Tokyo Stock Exchange Securities Listing Regulations, Rule 601, Paragraph 1, Item 2c. [↑](#footnote-ref-103)
103. Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693, 1737 n.108 (1985). [↑](#footnote-ref-104)
104. Etsuro Kuronuma, Kinyushouhin Torihiki Hou [Financial Instruments and Exchange Act] 281 (Yuhikaku, 2016). [↑](#footnote-ref-105)
105. Wataru Tanaka, Kigyobaishu to Boueisaku [Corporate Takeovers and Defense Measures] 387-391 (Shojihomu, 2012). [↑](#footnote-ref-106)
106. Tomotaka Fujita, *Shihai Kabushiki no Shutoku to Kyousei Koukaikaituke – Kyousei Koukaikaituke Seido no Kinou [Acquisition of Controlling Shares and Compulsory Takeover Bids -- The Function of the Compulsory Takeover Bid System]*, in Shinsaku Iwahara et al., eds, Kaisha, Kinyuu, Hou (Gekan) [Companies, Finance, and Law (Vol. 2)] 33, 55-58 (Shojihomu, 2013). [↑](#footnote-ref-107)
107. Let me illustrate with a numerical example. Suppose that the target company's corporate value is 100 million yen. The total number of shares outstanding is 1 million shares. There are no controlling shareholders. So, the value of each share is 100 yen. If X, who is inefficiently managing the company, makes a partial tender offer for up to 510,000 shares, the value of the target company decreases to 95 million yen, the controlling shareholder receives a private profit of 20 million yen, and the remaining 75 million yen is the public value that all shareholders can receive, and the value per share is 75 yen. In this case, the value that the acquirer can enjoy is the sum of the [private value] and the [common value of 510,000 shares], which is:

[private value of the acquirer] + [common value of 510,000 shares].

＝20 million yen + 75 million yen x 51

＝58.25 million yen.

The acquirer can make a profit even by paying up to 58.25 million yen. Considering this as the upper limit of the purchase price, the tender offer price per share can be calculated as approximately 114 yen (58.25 million yen divided by 510,000 shares). Since this exceeds the post-acquisition common value of 75 yen, all shareholders might tender their shares. Then, 51% of the tendered shares would be purchased, while 49% would be returned. Shareholders would receive 114 yen for 51% of their shares and retain 49% worth 75 yen per share. Overall, shareholders would receive approximately 95 yen per share (114 × 51% + 75 × 49%) after the tender offer, which is lower than the pre-takeover value of 100 yen.

Without anti-coercion mechanisms, this takeover could succeed as shareholders would rationally tender their shares. However, with appropriate anti-coercion measures, the shareholders could oppose this bid because 95 yen per share represents a worse outcome than the current 100 yen per share. Thus, even while maintaining a system permitting partial tender offers, introducing anti-coercion mechanisms could prevent value-reducing takeovers from succeeding. [↑](#footnote-ref-108)
108. See Yoshiro Miwa & J. Mark Ramseyer, Keizaigaku no Tukaikata [How to Use Economics] 187-225 (Nippon Hyoronsha, 2007). [↑](#footnote-ref-109)
109. 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 (G. Ferrarini et al. eds., 2004). [↑](#footnote-ref-110)
110. Akio Hoshi, *Baishu Boueisaku no Akutibisuto Taikousaku he no Henyou to sono Shihou Shinsa [Takeover Defense Measures’s Transformation into Anti-Activis Countermeasures and Their Judicial Review]*, in Hideyuki Matsui et al. eds., Shouhougaku no Saikouchiku, 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 (Yuhikaku, 2023). [↑](#footnote-ref-111)
111. 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 Columbia Business Law Review 206 (2022). [↑](#footnote-ref-112)
112. Akio Hoshi, *Baishu Boueisaku no Akutibisuto Taikousaku he no Henyou to sono Shihou Shinsa [Takeover Defense Measures’s Transformation into Anti-Activis Countermeasures and Their Judicial Review]*, in Hideyuki Matsui et al. eds., Shouhougaku no Saikouchiku, 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, 284-286 (Yuhikaku, 2023). [↑](#footnote-ref-113)
113. Tomotaka Fujita, *Kigyo Baishu ni okeru Koudou Shishin no Igi [The Significance of Takeovers Guidelines]*, 1592 Juristo 14, 17 (2024). [↑](#footnote-ref-114)
114. Manabu Matsunaka, *Kigyo Baishu ni okeru Koudou Shishin no Rironteki Kentou (2) [Theoretical Analysis of Takeovers Guidelines (2)]*, 1592 Juristo 26, 28 (2024). [↑](#footnote-ref-115)
115. Id., at 29. [↑](#footnote-ref-116)
116. Manabu Matsunaka, "Theoretical Examination of 'Guidelines for Conduct in Corporate Takeovers' (2) - Policy and Countermeasures against Takeovers," Jurist No. 1592 (2024), pp. 26, 29. [↑](#footnote-ref-117)
117. Saikō Saibansho [Sup.Ct.], June 24, 1970, Sho 41 (o) no. 444, 24 Saikō Saibansho minji hanreishū [Minshū] 625 (Japan). [↑](#footnote-ref-118)