Japan's Corporate Governance Code 2015–2021

Legitimacy and the Transition from Principles to Prescription

John BUCHANAN*

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I. INTRODUCTION

Japan's first Corporate Governance Code (hereafter the "Code" in general terms or the "2015 Code" in particular) was published in final form in June 2015 as a set of guidelines for listed companies which defined basic principles of good governance and permitted flexible implementation by each company according to its particular circumstances.[1] It was stressed by the Code's drafting committee[2] that these were not rigid rules requiring unquestioning compliance and the option was given either to comply or to explain non-compliance with the Code's principles and supplementary principles. It was also announced that there would be periodic revisions of the Code to ensure that it remained relevant to changing conditions. The first of these revisions was published in final form in June 2018 and the

* Research Associate, Centre for Business Research, University of Cambridge.
Internet links quoted were checked on 11 October 2021.

1 English translations from all versions of the Code hereafter use the text of the "Provisional Translations" published by the Tōkyō Stock Exchange.

2 コーポレートガバナンス・コードの策定に関する有識者会議 [The Council of Experts Concerning the Corporate Governance Code].

second in April 2021 (the "2018 Revision" and the "2021 Revision").[3] The 2018 Revision introduced recommendations which hinted at a desire to remedy faults perceived in current Japanese corporate governance practices more actively, and the 2021 Revision continued this trend and also introduced a new factor by aligning parts of the revised Code with qualification for the new Prime Market which was subsequently launched in April 2022 by the Tōkyō Stock Exchange ("TSE"), effectively introducing an element of coercion for any companies with ambitions to be listed on that market. The impression, across these three iterations of the Code, is that an initial exercise to define principles of sound governance and encourage their implementation has shifted its focus during the course of the revisions, first to a more didactic stance in 2018, and now to a more openly prescriptive stance in 2021, while becoming to some extent an adjunct to the Prime Market. This paper examines the progression of this transition, considers the possibility that the Code is developing away from its originally declared purpose towards precisely the kind of rigidity that it claimed to eschew, and proposes that the Code's perceived degree of legitimacy is a crucial factor which determines its need for prescription.

II. THE 2015 CODE

The 2015 Code was Japan's first corporate governance code and was further distinguished by its use of "comply or explain" rather than a prescriptive rules-based approach. A concerted effort was made to describe the Code's origins, place it in context with other initiatives, and explain its objectives. The 2015 Code contains an Appendix[4] which begins with an explanation of the political governance and procedural background from which the Code emerged. References are made to the Japanese Stewardship Code,[5] published in February 2014, and revisions to the Companies Act, enacted in June 2014 and implemented in June 2015. The Stewardship Code, in particular, is presented as a complement to the Code in that it is expected to motivate investors to involve themselves in corporate governance discussions with companies, making the two codes "the two wheels

3 The first version and subsequent revisions were all preceded by a consultation process so the content was generally understood before the final formats were announced.

4 The first draft of the Code (コーポレートガバナンス・コード原案 [Corporate Governance Code Draft]) was issued dated 5 March 2015 and contained an introduction which was reproduced almost unchanged as an appendix to the final version of the Code コーポレートガバナンス・コード [Corporate Governance Code] dated 1 June 2015.

5 「責任ある機関投資家」の諸原則《日本版スチュワードシップ・コード》 [Principles for Responsible Investors. "Japan's Stewardship Code"] published 26 February 2014 with revisions published 29 May 2017 and 24 March 2020.

of a cart".[6] The Code is then linked specifically to the Japan Revitalization Strategy's 2014 revision[7] which established a council of experts[8] to formulate a corporate governance code with the assistance of the TSE and the Financial Services Agency ("FSA") and specified that it "should be based on the OECD Principles of Corporate Governance".[9] It is also explained that the TSE will be expected effectively to adopt the Code by revising its listing rules and other regulations appropriately.

The objectives of the 2015 Code are stated clearly at its beginning as being the stimulation of economic growth and increasing corporate value: "It is expected that the Code's appropriate implementation will contribute to the development and success of companies, investors and the Japanese economy as a whole through individual companies' self-motivated actions so as to achieve sustainable growth and increase corporate value over the mid- to long-term". These objectives are explained further in the Appendix and it is emphasised that "The Code does not place excessive emphasis on avoiding and limiting risk or the prevention of corporate scandals. Rather, its primary purpose is to stimulate healthy corporate entrepreneurship, support sustainable corporate growth and increase corporate value over the mid- to long-term". Thus, unlike, for example, the UK's corporate governance code, whose origins certainly lay in the desire to avoid corporate misdemeanours,[10] Japan's 2015 Code aspires to promote the success of companies which comply with its principles, with the clear objective of improving the health of the entire economy. The expression "to achieve sustainable growth and increase corporate value over the mid- to long-term"[11] appears

6 車の両輪 [the two wheels of a cart].

7 「日本再興戦略」改訂 2014 ー未来への挑戦 [Japan Revitalization Strategy, Revised in 2014 – Japan's challenge for the future] published by the Japan Economic Revitalization Headquarters (日本経済再生本部) of the Liberal Democratic Party on 24 June 2014.

8 The Council of Experts Concerning the Corporate Governance Code, *supra* note 2.

9 OECD Principles of Corporate Governance, issued 1999, revised 2004 and 2015.

10 The Report of the Committee on Financial Aspects of Corporate Governance, which initiated the first UK corporate governance guidelines, explained its origins as follows: "The Committee was set up in May 1991 by the Financial Reporting Council, the London Stock Exchange and the accountancy profession to address the financial aspects of corporate governance …. Its sponsors were concerned at the perceived low level of confidence both in financial reporting and in the ability of auditors to provide the safeguards which the users of company reports sought and expected…These concerns about the working of the corporate system were heightened by some unexpected failures of major companies and by criticisms of the lack of effective board accountability for such matters as directors' pay.".

11 持続的な成長と中長期的な企業価値の向上 [sustainable growth and increased corporate value over the mid- to long-term].

throughout the Code and has been adopted as a set phrase by many listed companies in their corporate governance submissions.

The ways in which the Code is expected to operate are then explained. It is stressed that the Code seeks to establish a framework within which boards can exercise vigorous management, free from uncertainties regarding their responsibilities because the Code has already defined these for them. Thus "it would not be appropriate to view [the Code's calls for corporate self-discipline] as limits on companies' business prerogatives and activities". Above all, the Appendix stresses that the Code is based on principles, not rules: "the Code does not adopt a rule-based approach, in which the actions to be taken by companies are specified in detail. Rather, it adopts a principles-based approach so as to achieve effective corporate governance in accordance with each company's particular situation". The Code uses a "comply or explain" mechanism (defined therein as "either comply with a principle or, if not, explain the reasons why not to do so") and the Appendix stresses that "It is necessary to bear fully in mind that companies subject to the Code are not required to comply with all of its principles uniformly". Moreover stakeholders also are enjoined to understand that full compliance is not a necessity nor lack of it a fault: "it would not be appropriate to consider the literal wording of each principle of the Code superficially and conclude automatically that effective corporate governance is not realized by a company on the ground that the company does not comply with some of the principles".

The 2015 Code has five General Principles: (1) Securing the Rights and Equal Treatment of Shareholders; (2) Appropriate Cooperation with Stakeholders Other Than Shareholders; (3) Ensuring Appropriate Information Disclosure and Transparency; (4) Responsibilities of the Board; and (5) Dialogue with Shareholders. These are expanded into 30 principles and 38 supplementary principles. Throughout the Code there are 13 principles or supplementary principles that require a total of 17 areas of disclosure, plus further instances that only arise in specific circumstances such as implementation of anti-takeover measures, response to tender offers, or changes in capital structure. In general, the Code lays down guidelines on policy but permits subjective judgement in implementation. This approach identifies key areas of concern where companies are enjoined to consider their positions but not compelled to conform, for example:

1.2.4 electronic voting and English language shareholder materials;
1.4 scrutiny of cross-shareholdings and explanation of their justification;
2.3 sustainability, including social and environmental matters;
2.4 diversity, including participation of women in management;
4.2.1 linking senior remuneration to mid- and long-term results;

4.10.1 involvement of independent directors in senior appointments and remuneration (with a suggested example of optional committees to oversee this);[12] and

4.14.2 disclosure of training systems for directors and *kansa-yaku*.

All of the above elements are recommended by the Code but there is no obvious pressure to stimulate compliance or to follow a specific route to achieving these objectives. Moreover, disclosure of what companies are actually doing in the seven areas selected above is only required regarding cross-shareholdings (1.4) and training systems (4.14.2). Even in these two cases, the style and depth of the explanations are not defined.

The only exception to this approach comes in Principle 4.8, where an element of prescription appears. Following a discussion of the roles and responsibilities of independent directors in the preceding Principle 4.7, Principle 4.8 states "Companies should therefore appoint at least two independent directors …". This, in turn, links with the revised Companies Act implemented in 2015 which tightens the definition of externality and requires either that an external director be appointed or reasons be disclosed for not doing so; however, the Act does not specify independent directors as such but only external ones, under the definition it supplies. The 2015 Code goes beyond the law both in its requirement for independence and in its insistence on at least two of them, although companies are of course permitted to explain non-compliance in this instance with not only the Code but also the Companies Act.

1. Compliance with the 2015 Code

The level of compliance by listed companies with the 2015 Code gives an indication of the degree to which companies were willing and able to cooperate. Many companies indicated compliance rates of 90% or more, although there was a clear divide between the First Section of generally larger companies and the Second Section, where companies tend to be smaller and have fewer personnel resources to implement new governance procedures. In the TSE's survey of compliance as at July 2016, published on 13 September 2016, the following pattern emerged. Chart 1 below refers.

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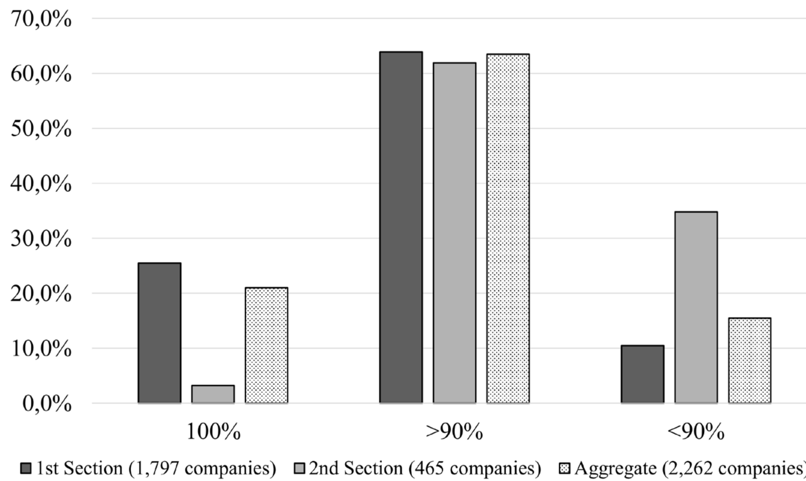
12 This applies if the company is "either Company with Kansayaku Board or Company with Supervisory Committee and independent directors do not compose a majority of the board", that is for a majority of listed companies. *Kansa-yaku* (監査役), often translated as either "corporate auditor" or "statutory auditor", is used hereafter untranslated. The *kansa-yaku* attend board and other management meetings and are responsible for overseeing corporate governance but do not vote at board meetings.

Chart 1: Compliance Ratios as at July 2016



Source: Tōkyō Stock Exchange, コーポレートガバナンス・コードへの対応状況 [How Listed Companies Have Addressed Japan's Corporate Governance Code], 13 Sept 2016, p. 3 会社別に見たコードの実施・説明状況 [Compliance with the Code]

2. *Qualitative Investigation on Reactions to the Code*

A limited exercise[13] comprising interviews with six listed companies, two being large and listed on the First Section of the TSE and four being smaller and listed on the First or Second Sections, provided qualitative information to interpret these and other data more effectively. Reactions to the 2015 Code and to the 2018 Revision were discussed effectively as separate topics. The interviews were held between January 2020 and February 2021, with the final one conducted by video link. All were in Japanese. They were semi-structured in that they began with a list of topics for discussion but diverged where interviewees chose to stress particular aspects or introduce new ones. Discussion was held on an unattributed basis to encourage

13 A larger exercise had been planned, covering more companies mostly in the Second Section of the TSE, but the spread of the Covid 19 epidemic and the travel restrictions that it caused precluded face to face interviews. Although video calls were possible as an alternative, this was not always ideal and the attention of many managers was naturally focused more towards concerns related to the epidemic. The main exercise was therefore abandoned but data from the first six interviews, while unavoidably narrower in scope than originally planned, provide useful qualitative empirical information to interpret the quantitative data from the TSE.

frank commentary on the issues. The meetings at the two larger companies were held with the management of their general affairs departments, while those at the four smaller companies were held with chief executive officers ("CEOs") or senior directors. Firstly, reactions to the 2015 Code are considered below.

A fundamental difference emerged between the larger and smaller companies in that the larger companies had well-resourced general affairs departments which saw the 2015 Code as a challenge which generated some hard work but by no means as a phenomenon beyond their experience or abilities. As the head of one of these departments observed: "In 2015, when we had to put together 73 items, well, that's a lot of items so it rather felt as though there was not enough time to do it". Nevertheless, he saw value in the Code because "I think, in the sense of revitalising our board of directors, there were surely areas where we learned from the Code in all sorts of ways". Smaller companies also emphasised the initial strain of the Code on their resources but focused more on the intellectual challenge. One director and head of general affairs, alluding to the foreign influences behind the Stewardship and Corporate Governance Codes, said: "…to tell the truth, from a Japanese viewpoint, we did not quite grasp it. There were quite a lot of concepts there that seemed translated. We did not really get the whole idea of the Code itself." The President of another company, who had been running a foreign subsidiary while the 2015 Code was being implemented, reported hearing from his colleagues regarding the whole process of analysing requirements and discussing them with the board: "At the time I hear that it really was a big strain to get it done". When asked whether his company had been complying with most of the Code's requirements already, both he and his head of legal and corporate social responsibility were quick to stress that this had not been the case.

Nevertheless, it is striking that all those interviewed were generally well-disposed towards the concept of the Code. At one of the two larger companies interviewed, the head of general affairs did not see the outcome as a transformation of his company's corporate governance but valued the fresh awareness of governance issues that it brought: "… after the Code was introduced in 2015, there were no sudden changes in our style of management or our thinking" but "… because of it, many aspects of our awareness about issues that had hitherto been vague were put in order." Even at smaller companies where adjustment to the new Code had required a greater effort, views were positive: "As a business I think we have to improve and strengthen our governance. This is very important. Moreover I feel that the speed at which we progress on this is probably key to the business's future prosperity". The company director quoted earlier, who admitted that the first reaction to the Code had been to see it as an alien imposition, accepted

its usefulness as an aid to globalisation, even though his company has little foreign exposure: "I feel that our way of thinking is perhaps a little different from that of, say, the UK or America or Europe but I have come to accept that henceforth it is essential for Japanese businesses to think globally and increase their value in this way". He further observed that his company had received pressure from investors, especially life insurers, to improve compliance with the Code, very much as envisaged in the image used in the Code and the Stewardship Code of "the two wheels of a cart".

3. *Consideration of the 2015 Code*

The Code announced in 2015 is thus a series of principles for good corporate governance, expressed explicitly as guidelines rather than as rules, with the theoretical option for listed companies to reject any or all of them as long as they offer satisfactory explanations for their non-compliance. The clear links to the Stewardship Code suggest that investor pressure is expected to encourage compliance or at least coherent and reasonable explanation of non-compliance; investors will engage in constructive discussions with companies whose shares they hold and will presumably challenge any explanations they consider to be unsatisfactory. This market pressure should, in theory, substitute for lack of formal requirements in a flexible manner that will make the mere appearance of compliance difficult to sustain. The 2015 Code's statement that two independent directors should be appointed, viewed in the context of the similar but less demanding requirement of the Companies Act, mentioned above, stands out as its most prescriptive element and the one most likely to stimulate companies to take action whatever their boards' true inclinations might be. But a vital characteristic of the 2015 Code is its adherence mostly to ideas already current in Japan: it is essentially a codification of good practice that most corporate directors would not find inherently contrary to their existing ideas of how to run a company. This is illustrated by the reaction at the two larger companies interviewed, where the requirements of the Code tended to create a clearer focus on governance issues rather than producing fundamental change. At some of the smaller companies, changes did occur, but they appear to have been accepted positively.[14] This wide acceptance reinforces the impression of the Code's legitimacy among corporate management.

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14 Although it is important to remember that those who are willing to discuss the Code tend to be those who accept its usefulness; conversely, those who tacitly reject the Code and prefer only formal compliance while they continue to operate much as before tend not to discuss their views with researchers.

III. THE 2018 REVISION

The 2018 Revision of the Code, published in final form on 1 June 2018, diverges from this position by increasing the pressure on listed companies to adhere to more specific aspects of governance, though still with the option to explain non-compliance. Three particular examples are as follows. Principle 1.4 moves from just scrutiny of cross-shareholdings and publication of their justification to a requirement that policies actively to reduce them be adopted, while warning companies not to hinder reductions by cross-holding counterparties and requiring disclosure of more detailed annual assessments of cross-holding portfolios, reviewing the benefits and risks in the light of cost of capital. Subsidiary Principle 4.1.3 proposes succession planning for the CEO and other senior figures, while Subsidiary Principles 4.3.2 and 4.3.3 seek to systematise appointment and dismissal procedures for CEOs and other senior members of management. Meanwhile, the optional independent committees in 4.10.1 cease to be cited as merely an example and become the recommended way forward for companies that do not have a majority of independent directors on their boards. In these instances, the Code has moved from being a set of relatively neutral guidelines for good governance to, firstly, issuing a clear directive to reduce rather than just scrutinise cross-shareholdings; secondly, requiring a CEO succession plan and formal mechanisms for appointment and dismissal, all of which are assaults on the tradition at most listed Japanese companies since the 1940s whereby the appointment and dismissal of the CEO is an internal matter for the company to decide in private, with appointments usually decided by the current CEO; and thirdly by pressing for supposedly optional independent committees to oversee senior appointments and remuneration, thereby potentially undermining the CEO's powers to promote and reward.

Several other new elements are introduced which have less immediate impact but could potentially prove disruptive if pursued vigorously in later revisions. Examples are:

- 2.6 corporate pension funds are enjoined to act as asset owners, implying a more aggressive stance towards low-yielding equity investments and dividend policies in general;
- 3. Environmental, Social, Governance ("ESG") is defined as an area of concern;
- 4.2.1 remuneration systems linked to mid- and long-term growth are more emphatically recommended;
- 4.8 raising the number of independent directors to one third of the board is given more impetus;
- 4.11 concern for "gender and international experience" among board members is recommended; and
- 5.2 awareness of cost of capital is promoted.

1. Compliance with the 2018 Revision

The reaction to the 2018 Revision can be gauged to some extent from the TSE's data on article-by-article compliance. In its study of compliance published on 21 February 2019, showing data as at the end of December 2018, nearly seven months after the implementation of the 2018 Revision, the TSE notes three revised principles and two revised subsidiary principles where compliance fell more than 10% against data from July 2017 and also two new subsidiary principles, 4.3.2 and 4.3.3, where compliance rates seem low despite the prescriptive tone adopted. The Table below refers.

Table 1: Compliance Ratios as at End December 2018

Revised Principle or Subsidiary Principle	Content	1st Section	2nd Section	Aggregate
		Compliance % (% change from 2017)		
1.4	Reduce cross-shareholdings	86.5% (-10.7%)	82.8% (-12.6%)	85.8% (-11.0%)
4.1.3	CEO succession planning	70.4% (-17.3%)	60.6% (-21.4%)	68.6% (-18.0%)
4.10.1	Independent nomination & remuneration committees	52.1% (-27.2%)	31.8% (-34.6%)	48.3% (-28.4%)
4.11	Board diversity etc.	69.9% (-27.0%)	64.5% (-30.3%)	68.9% (-27.6%)
5.2	Business strategy disclosure & cost of capital awareness etc.	82.7% (-10.4%)	67.1% (-14.4%)	79.8% (-10.9%)
New Subsidiary Principle		Compliance %		
4.3.2	CEO nomination structure	84.2%	78.7%	83.2%
4.3.3	CEO dismissal structure	86.4%	83.6%	85.8%

Source: Tōkyō Stock Exchange, コーポレートガバナンス・コードへの対応状況 [How Listed Companies Have Addressed Japan's Corporate Governance Code], 21 Feb. 2019, p. 4 改定・新設された原則のコンプライ状況 [Status of compliance with newly established and revised principles].

Evidence of weakness in the compliance process from an early stage is provided in a report from the NLI Research Institute in October 2018 which notes that a survey of First and Second Section listed companies by the Ministry of Economy, Trade and Industry ("METI") published in February 2018, before the 2018 Revision, revealed that 28% of the 941 respondent companies admitted that although they were formally in compliance with the requirements of the 2015 Code, some of their actual practices still dif-

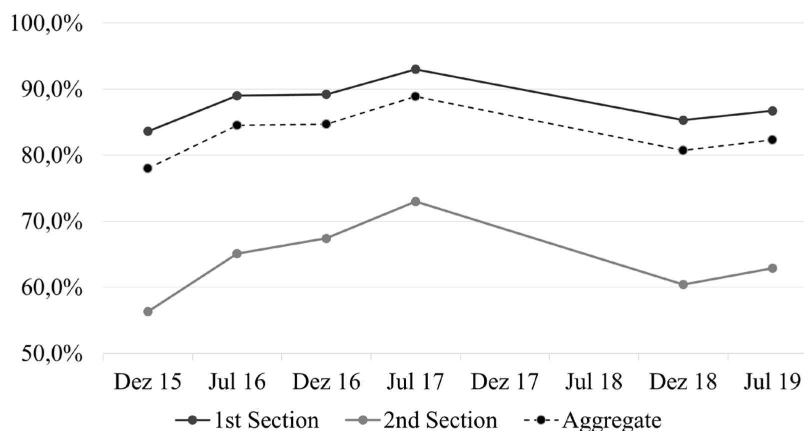
fered.[15] As the author of the report observed, there are probably many more companies in the same position which have kept silent. Consequently some care is needed here because the TSE can only measure formal compliance rather than wholehearted implementation, but variations in ratios of formal compliance at least indicate the direction of travel. The TSE's next survey, covering the period ended 12 July 2019 and published on 29 November 2019, showed small increases in compliance for nearly all the revised principles and subsidiary principles – suggesting that some companies had merely needed more time to organise their compliance – but only a 1.3% increase in compliance with 4.3.2 (CEO nomination structure) from First Section companies alone, and a decrease in compliance with 4.3.3 (CEO dismissal) from both Sections, especially the Second Section, where it fell 5.1%.

It is interesting that when the 2018 Revision adopted a more prescriptive approach to certain principles, the levels of compliance to these principles fell. With the exception of the cost of capital addition in 5.2 which did not appear in the 2015 Code but was already a topic of discussion from the Itō Review of August 2014, these were not new concepts because they had already been flagged in the 2015 Code, but they had moved from being general guidelines, which could be accommodated fairly easily even by boards which felt little enthusiasm for their content, to become more specific instructions which are harder to evade.

Largely because of the reaction to these specific changes to the Code, the 2018 Revision was followed by a lower general level of compliance. For example, the new Subsidiary Principles 4.3.2 and 4.3.3, discussed above, produced aggregate compliance ratios across the First and Second section companies as of December 2018 of 83.2% and 85.8% respectively, which is relatively high, but although aggregate compliance with 4.3.2 rose slightly by July 2019 to 84.3% on the strength of better compliance among First Section companies, compliance with 4.3.3 fell across both sections to produce an aggregate result of 83.3%. The situation for overall compliance with the Code from December 2015 until July 2019 is shown in the following Chart 2. A gradual but consistent rise in companies complying with 90% or more of the Code continues until December 2018 (when the effects of the 2018 Revision appear) with a partial recovery, though not to the levels of July 2017, as of July 2019.

15 S. EGI, コンプライ・オア・エクスプレイン開示のコンプライアンス [Compliance with Comply or Explain Disclosure], NLI Research Institute, 10 October 2018, commenting on CGS ガイドラインのフォローアップについて [Regarding the follow-up to the CGS guidelines], METI, 22 February 2018.

Chart 2: 90% to 100% Compliance



Source: Tōkyō Stock Exchange, コーポレートガバナンス・コードへの対応状況 [How Listed Companies Have Addressed Japan's Corporate Governance Code] 20 Jan. 2016, 13 Sep. 2016, 16 Jan. 2017, and 5 Sep. 2017, p. 2 or 3 会社別に見たコードの実施・説明状況 [Compliance with the Code] 21 Feb. 2019 and 29 Nov. 2019, p. 3 コンプライ／エクスプレインの状況 [Status of compliance or explanation].
Note: Data are not available for December 2017 or July 2018 so the exact progression of the trends between July 2017 and December 2018 is not known and is assumed here to be a straight line in all cases.

2. *Consideration of the 2018 Revision*

The TSE's data above further emphasise the divide between larger companies with sufficient resources to handle extra requirements and smaller ones which are perhaps less willing or able to repeat the hard work of 2015 on a regular basis. Reactions to the 2018 Revision from the six companies approached support this impression. As a director at one of the smaller listed companies observed in early 2020, comparing his company to a large company well-known for its attention to corporate governance protocols: "There is a bit of a feeling that the more these advanced firms keep on progressing their advanced handling of corporate governance, the more the gap with us widens".

In terms of awareness that the 2018 Revision made greater demands, there was some confirmation that this was indeed the case but a much greater tendency to sidestep the issues. Again, the larger companies seemed generally more relaxed about the implications, although the head of general affairs at one, despite stating that this Revision contained nothing especially radical, later admitted that the issue of mechanisms for appointment and dismissal of senior directors was "a bit delicate" and that the matter was still being

considered at a higher level within his organisation in early 2020 with no resolution as yet. At three of the four smaller companies, awareness of the full implications of the 2018 Revision seemed weak. When pressed regarding specific issues such as succession plans, systems for appointment and dismissal of CEOs, cross shareholdings, promotion of women, and awareness of cost of capital, the overall impression was that although the Revision had drawn their attention to these issues, they had taken no decisive action and preferred to leave matters as they were for the time being. At the fourth company, the head of legal, speaking in the presence of his CEO, commented "In 2015 our fundamental thinking was to maximise compliance so the tendency was more or less to go for comply where we could, but the more we looked at the 2018 Code, the more we shifted from comply towards explain". His CEO added "We see no problem in continuing with explain here" pointing out that, unlike larger companies, his company had only limited resources in terms of specialised staff to progress such matters.

It was not evident from these interviews that managements felt themselves pressured by the tone of the 2018 Revision. In fact, the CEO of one company actively welcomed the didactic tone of the 2018 Revision, contrasting it with what he described as the often "fuzzy" approach of the 2015 Code: "but with the 2018 Revision, in contrast, when they cut out this fuzziness, I think the wording and the instructions were clear-cut because they were saying 'Do this in order to raise corporate value and promote sustainability'". However, in early 2021, there were still numerous aspects of the new elements introduced by the 2018 Revision that had not been addressed fully at this company, suggesting that a more prescriptive tone does not necessarily produce more thorough compliance.

IV. THE 2021 REVISION

The 2021 Revision, published in final form on 6 April 2021, continues the didactic tone of the 2018 Revision and becomes even more prescriptive. This is notable in its declared linkage to the perceived needs of the TSE's Prime Market (whose structure and objectives had already been announced, and which was launched as scheduled in April 2022) and more generally in its growing tendency to define specific approaches that companies should adopt rather than indicating principles of conduct.

The reason for the link to the Prime Market is explained in the introduction to the 2021 Revision. "The Prime Market is expected to be a market attractive to both domestic and global investors, and global investors will be given good investment opportunities in Japan there. Therefore, it is important for companies listed on the Prime Market to advance efforts toward a higher level of corporate governance." This statement is interesting be-

cause it positions the Code explicitly not just as a set of guidelines for good corporate governance but as an adjunct to the Prime Market and as a means to make investments in that market more attractive to investors. Starting from the reasonable premise that the board "is required to support and effectively oversee management's prompt and decisive risk-taking as well as making important decisions" the introduction to the 2021 Revision concludes that "To do so, it is important for companies listed on the Prime Market, where investors could expect to find good investment opportunities in Japan, to appoint enough independent directors to account for at least one-third of the board". Effectively the Committee has decided that only companies that have at least one third independent directors on their boards are sufficiently well governed to merit listing on the new market; a dividing line has been drawn between those companies with "good" governance (by virtue of having a sufficient percentage of independent directors) and those whose governance is inferior (by virtue of having a lower percentage). Alluding to the need for companies to ensure that their supposedly optional nomination and remuneration committees are sufficiently independent, the Introduction states: "However, despite the fact that ensuring the independence of the committees is one of the important factors for it to fulfil its expected functions, it has been pointed out that it may not be sufficient at present, and that it is important to further enhance its independence in comparison with other countries. Accordingly, from the perspective of making the board more effective, it is important for companies listed on the Prime Market to establish a nomination committee and a remuneration committee that are comprised of a majority of independent directors." Prime Market listed companies should also establish electronic voting platforms (for institutional investors, as a minimum), issue investor information in English, and practice disclosure on climate related matters in line with the recommendations of the TCFD[16] or some equivalent body. The Introduction also makes clear that requirements for Prime Market listed companies are probably a foretaste of intentions for all listed companies: "It is desirable that companies listed on other markets also take voluntary initiatives to improve their governance by using the Code items for companies listed on the Prime Market as a reference".

The principal amendments and five new subsidiary principles in the 2021 Revision are as follows:

1.2.4 electronic voting platforms for Prime Market companies (as noted above);

2 (notes accompanying the Principle) and 2.3.1 more stress on global sustainability in the context of Sustainable Development Goals (SDGs) and ESG;

16 The Financial Stability Board's Task Force on Climate-Related Disclosures.

2.4.1 (new) disclosure of specific policies and measurable goals for personnel diversity;
3.1.2 English language disclosures for Prime Market companies (as noted above);
3.1.3 (new) disclosure of initiatives for corporate sustainability in management strategies, and, for Prime Market companies, linkage to TCFD recommendations (as noted above);
4 (notes accompanying the Principle) protection for minority shareholders;
4.2.2 (new) basic policy to ensure corporate sustainability;
4.3.4 effective internal control and risk management systems linked to internal audit;
4.8 one third independent directors for boards of Prime Market companies (as noted above) with a clear hint that a majority of independent directors should be considered too;
4.8.3 (new) one third independent boards or special committees at controlled listed companies;
4.10.1 more emphasis on independent nomination and remuneration committees and a requirement for them at Prime Market companies (as noted above) with disclosure of structures, roles and policies;
4.11.1 disclosure of nomination process for directors and a "skills matrix";
4.13.3 internal audit to report to board and *kansa-yaku* board; and
5.2.1 (new) statement of policy regarding business portfolio to be included in business strategy.

1. Forces Shaping the 2021 Revision

The 2018 Revision gave the impression that the revision process was focusing less on codification of accepted good practice but, instead, sought to rectify perceived weaknesses in current practices. The 2021 Revision reinforces this impression and suggests that this tendency is gaining momentum. The Follow-up Committee[17] which presided over these revisions did not have the same membership throughout and differs from that of the original Committee of Experts behind the 2015 Code (though there is some continuity[18]) so it may be that different personalities prevailed subsequently. In an interview with Nikkei Financial in August 2021, the chairman of Daiwa

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17 スチュワードシップ・コード及びコーポレートガバナンス・コードのフォローアップ会議 (frequently abbreviated to フォローアップ会議) [The Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code] abbreviated here in English as "the Follow-up Committee" is the body convened by the FSA to consider revisions to the Corporate Governance Code and the Stewardship Code.

18 For example, comparing the 2015 Council of Experts to the Follow-up Committee in July 2021, 5 members (24%) are unchanged and 16 (76%) are new.

Securities, Takashi HIBINO, observed that by the time of the 2021 Revision a commonality of consultants and advisers had come to dominate the committee so that "the feeling is that they are debating doing business from governance rather than how to reform it".[19] Equally, it is possible that once the basic guidelines had been established in 2015, the Follow-up Committee saw its task as a progressive rectification of unsatisfactory practices, dealing with the most egregious first in an openly prescriptive manner and listing others for future attention. A person involved in this process commented in 2021 that although, in his view, there had been no change to the approach envisaged in the original Code, "One unfortunate aspect may be that because there has been very little progress on deeply rooted issues such as improving the function of the board and managing with cost of funds in mind, which were identified as areas of concern right from 2015, drafting has become more detailed in order to resolve these issues. Perhaps this shows the limits of 'comply or explain'". Another involved party suggested, also in 2021, that some committee members have begun to favour the more prescriptive force of "comply and explain" rather than the original "comply or explain", despite the officially unchanged position that the Code is principle-based. Whatever the motivations of the committee members, as at 19 May 2021 only four of the 21 members represented non-financial commercial businesses,[20] which may explain Mr. HIBINO's concern and certainly seems seriously to underrepresent the interests of recipients of the Code.

2. *Consideration of the 2021 Revision*

The general impression from the changes and additions summarised above is that if there was once an intention that guidelines be established and that investors alone should oversee appropriate compliance or reasoned divergence, then that approach has either been abandoned or greatly modified. Instead an increasingly prescriptive and invasive approach has been adopted. For example, it is not sufficient that diversity should be promoted: companies must disclose policies and measurable goals (2.4.1); attention to corporate sustainability must be demonstrated (3.1.3); effective internal controls should be linked to internal audit (4.3.4) and although it is difficult to imagine any other kind of effective internal controls, the explicit nature of this requirement is nevertheless invasive; Prime Market companies must

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19 検証なくして統治改革なし [No governance reform without verification] Nikkei Financial, 4 August 2021 (online subscription service).

20 FSA,「スチュワードシップ・コード及びコーポレートガバナンス・コードのフォローアップ会議」のメンバー名簿 [List of Members of the Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code], 19 May 2021.

not only appoint nomination and remuneration committees, they must disclose their structures (4.10.1); internal audit should report directly to the boards of directors and *kansa-yaku* (4.13.1), which seems not unreasonable but is still invasive in the context of a principles-based corporate governance code; and companies should announce a basic policy regarding their business portfolios to drive their strategies (5.2.1) which seems logical but merely adds an invasive and fussy extra layer to the existing Principle 5.2.

It seems that corporate managements are not to be trusted to follow their best judgement and to interpret guidelines as they see fit, despite the explanations that accompanied the 2015 Code. They now need to be supervised more closely through requirements to disclose specific matters and encouraged in suitable directions through didactic and sometimes invasive requirements that seem inappropriate for a code of corporate governance operated through the comply or explain mechanism. Whether intentionally or not, the 2021 Revision has tilted the Code towards prescription. A committee of experts whose members seem unrepresentative of most listed companies in Japan appear to have strong views on how corporate governance should be conducted; they also seem to be sensitive to any charge that Japanese systems are inferior to or even merely different from those of other markets and have decreed that companies should adhere to certain ways of doing things, sometimes down to a surprisingly detailed level, demanding disclosure in various instances to prove that these things are really being done. Most of the best-run companies in Japan are probably complying with many of these requirements already: they do not need this kind of didacticism. Some of the worst-run companies probably do not comply at all, but this approach is more likely to entrench a purely formal compliance which contributes very little to improved governance.

Furthermore, the 2021 Revision's link to the new Prime Market undermines the standing of the Code's comply or explain mechanism because many of the leading companies in Japan are likely to see compliance with these requirements as the price to be paid for a Prime listing. Whether rightly or wrongly, this level of listing is considered to be important to satisfy investors, to attract high-quality recruits, and in general to preserve companies' prestige, so it is likely that most major companies will make a big effort to comply, at least outwardly. Whether this will really make their governance better is not yet clear. The TSE's formal position is that companies seeking a Prime Market listing still have the right to comply or to explain their non-compliance with any part of the 2021 Revision, so that the stipulation of certain elements in the revised Code as requirements for eligibility to the Prime Market is in fact flexible. However it does seem likely that many companies will make an effort to comply, if only because they are accustomed to inflexible listing regulations and will be concerned

that institutional investors may lack patience to study explanations and instead expect the highest possible level of compliance.

A further interesting feature is the emphasis that the 2021 Revision appears to place on matters of interest to shareholders and other investors. This may seem logical to anyone familiar with the US or UK markets but it suggests a narrowing of focus compared to the broader aim declared in 2015 to "contribute to the development and success of companies, investors and the Japanese economy as a whole". As the 2015 Code makes clear, shareholders are recognised as an important audience for corporate governance, but the 2021 Revision goes further to link the Code explicitly to the Prime Market, promote the role of independent directors, and generally tilt the Code's focus towards shareholder primacy. In Japan this is generally seen as alignment with US or UK ideas but in fact there has been a reaction to shareholder primacy in both these markets which may eventually affect wider viewpoints there. In the UK, the Company Law Review Steering Group called in 2002 for "enlightened shareholder value", the 2006 Companies Act states that directors must consider:

> "(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others"

as well as shareholders' interests,[21] and the 2018 UK Corporate Governance Code refers specifically to this statutory requirement:

> "The board should understand the views of the company's other key stakeholders and describe in the annual report how their interests and the matters set out in section 172 of the Companies Act 2006 have been considered in board discussions and decision-making".[22]

In the USA, the Business Roundtable caused surprise among investment circles in 2019 when it released its "statement on the purpose of a corporation", signed by 181 CEOs, with the explanatory title "Updated Statement Moves Away from Shareholder Primacy, Includes Commitment to All Stakeholders".[23] While Japan is moving towards shareholder primacy, the UK and USA seem, at least superficially, to be retreating from it and showing concern for the interests of other stakeholders: a stance that has hitherto more often been associated with Japan.

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21 Sec. 172(1) Companies Act 2006.

22 The UK Corporate Governance Code, Provision 5, FRC July 2018.

23 Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans' 19 August 2019 *https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans*.

V. Discussion

There has evidently been a shift from principles to prescription but there have been no statements by the FSA or TSE that they have changed their policies regarding corporate governance. Officially, the position announced in 2015 that "the Code does not adopt a rule-based approach, in which the actions to be taken by companies are specified in detail" still pertains. Moreover, in conversations with involved parties, it has been stated that there has been no official change in strategy. The question thus arises, what could have driven this shift, which is remarkable for being both extreme and also unacknowledged by those concerned with the process of revision, and where might it lead? The explanation may pivot on the need for voluntary codes to possess legitimacy in order to be adopted sincerely by corporate managements, and a converse tendency for prescription to seem necessary to compensate for any lack of legitimacy.

Codes, in the sense of ostensibly voluntary and non-binding statements of best practice, need a degree of acceptance from their target audiences, who can otherwise evade them precisely because they are voluntary and non-binding. They need legitimacy. Moreover, inconvenient though it may seem to those who feel that corporate governance practices must be forced into specific channels, the voluntary nature of these codes is itself an important contributor to their legitimacy: "This is in line with general research on soft regulation which describes formal voluntariness as the principal means by which standard setters claim legitimacy".[24] This reality was acknowledged by the Cadbury Report when it established the foundations of the UK code of corporate governance in 1992. Statutory measures make life outwardly simpler for regulators but, if they lack legitimacy, their rules may be undermined by purely token compliance, paradoxically creating a less robust system than one based on voluntary and flexible compliance. In the words of the Cadbury Report:

> "We believe that our approach, based on compliance with a voluntary code coupled with disclosure, will prove more effective than a statutory code. It is directed at establishing best practice, at encouraging pressure from shareholders to hasten its widespread adoption, and at allowing some flexibility in implementation. We recognise, however, that if companies do not back our recommendations, it is probable that legislation and external regulation will be sought to deal with some of the underlying problems which the report identifies. Statutory measures would impose a minimum standard and there would be a

24 D. Seidl, Standard Setting and Following in Corporate Governance: An Observation-theoretical Study of the Effectiveness of Governance Codes, Organization 14(5) (2007) 705–727, 708.

greater risk of boards complying with the letter, rather than with the spirit, of their requirements".[25]

However, merely making a system voluntary is not sufficient to give it legitimacy unless its content is generally accepted by those who are intended to adopt it. The Cadbury Report pointed to this basis for legitimacy in its approach: "The principles are well known and widely followed. Indeed the Code closely reflects existing best practice".[26] British corporate managements were not being asked to do anything that they were likely to consider contrary to accepted good practice; even if they had not always followed such practice hitherto, they accepted its value. Of course, this statement in the Cadbury Report alone does not prove that its proposals really reflected best practice as accepted by a majority of corporate managements but the subsequent robustness of the UK corporate governance code suggests that this was indeed the case.

The issue of general acceptance as the underpinning for legitimacy is equally crucial in the case of Japan. Post-War Japanese corporate governance was shaped by reliance on bank funding, strong management autonomy, reliance on internal promotion, and a lack of attention to minority shareholders.[27] This created an organisation described variously as the "employee favouring firm",[28] as the "community firm"[29] and as "stakeholder-oriented value maximization"[30]. Corporate governance in Japan continues to evolve but many of these features remain strong. As TIBERGHIEN observes of the period since 1980: "the model that results from this process is less coherent than in 1980, partly modified, partly resilient".[31] The 2015 Code largely accommodated this system, partly through its emphasis on principles and partly through its explicit attention to stakeholders other than shareholders. Its General Principle 2 ("Appropriate Cooperation with Stakeholders Other Than Shareholders") states: "Companies should fully recognize that their sustainable growth and the creation of mid- to long-term corporate value are

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25 Report of the Committee on the Financial Aspects of Corporate Governance (the "Cadbury Report"), December 1992, 1.10.

26 The "Cadbury Report", *supra* note 25, 1.7.

27 M. OKUNO-FUJIWARA, Japan's Present-day Economic System: its Structure and Potential for Reform, in: Okazaki / Okuno-Fujiwara (eds.), The Japanese Economic System and its Historical Origins (1999) 266.

28 R. DORE, Stock Market Capitalism: Welfare Capitalism (2000) 26.

29 H. WHITTAKER / T. INAGAMI, The New Community Firm: Employment, Governance and Management Reform in Japan (2005) ch.1.

30 N. NAKAMURA, Adoption and Policy Implications of Japan's New Corporate Governance Practices after the Reform, Asia Pacific Journal of Management 2011, 28.

31 Y. TIBERGHIEN, Thirty Years of Neo-liberal Reforms in Japan, in: Lechevalier (ed.), The Great Transformation of Japanese Capitalism (2014) 26, 52.

brought as a result of the provision of resources and contributions made by a range of stakeholders, including employees, customers, business partners, creditors and local communities". But, at the same time, General Principle 1 (Securing the Rights and Equal Treatment of Shareholders") and General Principle 5 ("Dialogue with Shareholders") imply that at least some elements of shareholder primacy should be embraced.

This becomes problematical when stronger pressure is applied, as seems to be the intention of the 2021 Revision, because it is doubtful whether most Japanese board directors would accept the value of shareholder primacy as unquestioningly as the FSA's Committee of Experts appears to do. In 2006 the CEO of a listed company commented to the press, in response to a question about activist investment in his company: "There's not a single employee in our company who thinks he is working for the shareholders. The attitude is that this is all hard work and that we're doing it for our customers".[32] Even in 2006, this was a relatively outspoken comment but it probably reflects views that are still common. By contrast, the UK corporate governance code was introduced into a much more receptive environment. In a study conducted in 2002-3 at 13 of the Financial Times Stock Exchange 100 Index (FTSE 100) companies into meetings between companies and fund managers, ROBERTS, SANDERSON, BAKER and HENDRY concluded that "Some of the managers we met were in this way almost more dedicated to the pursuit of shareholder value than the fund managers they were meeting".[33] Clearly, a shareholder primacy element of "good practice" was already accepted in the UK and its legitimacy was strong.

The Code's most recent emphasis, particularly in 2021, is on the nature and function of boards. The TSE's announcement of the 2021 Revision[34] listed the first of this revision's four main categories as "Enhancing Board Independence". This is explained as four main points: firstly, to increase the number of independent directors on the boards of Japanese companies listed on the new Prime Market to at least one third of the total, secondly, to institute majority independent nomination and remuneration committees at Prime Market companies; thirdly, to publish a "skill matrix" for directors; and, fourthly, to appoint independent directors with managerial skills from other companies. These are all pressures on the mostly internalised and ex-

32 カイシャ異変・第１部　誰のためにあるのか [Changes in the company, part 1: Who is it there for?] 神戸新聞 [Kōbe Shinbun], 1 January 2006.

33 J. ROBERTS / P. SANDERSON / R. BARKER / J. HENDRY, In the Mirror of the Market: The Disciplinary Effects of Company/Fund Manager Meetings, Accounting, Organizations and Society 31(3) (2006) 291.

34 Publication of Revised Japan's Corporate Governance Code, Tōkyō Stock Exchange, 11 June 2021, *https://www.jpx.co.jp/english/news/1020/20210611-01.html.*

ecutive boards that still run the majority of listed companies in Japan and imply a desire for alignment with the values of foreign codes, such as the UK Corporate Governance Code, which states that "At least half the board, excluding the chair, should be non-executive directors whom the board considers to be independent".[35] However, in the UK, the shift to independent, or at least non-executive, directors, evolved more gradually and was nurtured rather than compelled by successive versions of the UK Corporate Governance Code and its predecessor guidelines.[36] The Higgs Review reported data from as early as July 2002 which showed that more than 60% of the boards of FTSE 100 companies and approximately 50% of the boards of FTSE 250 companies (excluding chairmen) were already non-executive.[37]

Such widespread acceptance of a need for independent non-executive directors is not yet present in Japan. In 2004, the CEO of a large listed company who had formerly worked in the USA gave his private view on external directors as he had experienced them there "…[they] will all be the CEO's friends – fellow students, friends from university, friends from football and that kind of thing. So, in practice, they are all 'yes-men'".[38] Since then, under pressure from the 2014 Companies Act and the Code, appointment of independent directors has expanded until 97% of First Section listed companies had two or more as of July 2021.[39] Nevertheless, in an interview in July 2021, the CEO of Toray responded to a question about the forthcoming need to increase the number of independent directors to one third of the board (at companies seeking a Prime Market listing in 2022) as follows: "The fact is, it's just a number dreamed up by people who have no experience of business, as though they were playing some kind of word association game. The ratio of independent directors should respect the autonomy of the firm. It's wrong to impose restrictions on firms through

35 UK Corporate Governance Code, FRC 2018, 11.

36 The Cadbury Report 4.10 states "The Committee believes that the calibre of the non-executive members of the board is of special importance in setting and maintaining standards" implying that the issue then was perceived to be one of quality rather than quantity.

37 Review of the role and effectiveness of non-executive directors (the "Higgs Review"), January 2003.

38 J. BUCHANAN. Japanese Corporate Governance and the Principle of Internalism, Corporate Governance: An International Review 15(1) (2007) 30.

39 東証上場会社における独立社外取締役の選任状況及び指名委員会・報酬委員会の設置状況 [Appointment of Independent Directors and Establishment of Nomination and Remuneration Committees by TSE-Listed Companies], Tōkyō Stock Exchange, 2 August 2021.

numbers decided on the basis of irresponsible ideas”.[40] Similar comments have been reported elsewhere in the press.[41]

In both these important instances, namely shareholder primacy and emphasis on board independence, the Code is not codifying accepted best practice, it is trying to change it. No code of corporate governance can be static, and periodic revision is needed, as the Japanese Code and the UK code of corporate governance both accept. But there is an important difference between promoting incremental improvements and forcing radical change; the former is likely to preserve legitimacy whereas the latter is more likely to destroy it. SEIDL observes primary and secondary reasons for adopting a code: “Primary reasons have to do with the content of the code itself. This is the case if actors use the code because they have analysed the individual code provisions and they appear justified to them. We speak of secondary reasons, if the actors use the code because they have observed other actors”.[42] Secondary reasons are likely to operate in Japan as corporate managements observe each other’s behaviour but, at least in these two instances, there are signs that primary reasons may be lacking.

There were already indications that some companies were maintaining only an outward display of compliance where the requirements of the 2015 Code impinged too harshly on their preferred practices, as indicated by the METI survey in early 2018 reported by NLI above. This impression was reinforced by responses at the interviews held in 2020-1 where unwelcome elements of the 2018 Revision appeared to have been finessed or simply set aside for later study. There is therefore a danger that elements of the 2021 Revision will be handled through what SEIDL calls “talk” rather than “action”.[43] This problem worsens as the sense of legitimacy weakens because one solution is to rely less on voluntary adoption of principles and more on prescriptive rules. This is an obvious route if the FSA’s expert committee members genuinely feel that they have reached the limits of “comply or explain” voluntarism and that sterner measures are needed to guide Japanese companies to virtuous corporate governance. Unfortunately prescription, especially in the detailed manner proposed in the 2021 Revision, further undermines legitimacy and runs the risk of encouraging purely formal compliance. In time, this kind of compliance can generate familiarity so

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40 東レ社長が嫌悪する「欧米流」企業経営への迎合『ルール作りは海外がやる、という感覚はいけない』[Toray CEO abhors accommodation of business management to ‘Euro/American fashion’: ‘The idea that rules are made in foreign countries is wrong’], 東洋経済 [Tōyō Keizai], 10 July 2021.

41 For example, the Nikkei Financial interview, *supra* note 19.

42 SEIDL, *supra* note 24, 711.

43 SEIDL, *supra* note 24, 713.

that its forms acquire their own legitimacy but, in the medium term, at least, it seems more likely to create a façade of compliance at many companies to disguise a continuing adherence to established practices.

VI. Conclusions

The 2015 Code and its comply or explain mechanism introduced the unfamiliar concept of principles-based guidance to the Japanese market, as well as raising awareness of corporate governance by codifying many practices that had hitherto been widely observed but seldom analysed. To many listed companies this was a major development which necessitated a detailed exercise to compare existing practices with the Code's principles and determine what changes, if any, were needed. Despite a degree of purely formal compliance, the Code appears to have achieved its main objectives. Awareness grew that the way a company governed itself should meet certain minimum standards and the Code provided a benchmark against which the quality of corporate governance could be measured. Most importantly, the Code was received by many CEOs and senior directors as a positive development. It had sufficient legitimacy to sustain widespread and largely genuine compliance.

After this propitious start, the revision process seems to have veered increasingly towards didacticism and prescription. The 2018 Revision gave indications of this and the 2021 Revision has accelerated the process while taking the unexpected step of linking what is officially principles-based guidance specifically to the listing requirements for the Prime Market. Following the 2021 Revision, the Code is decreasingly a principles-based codification of accepted good practice and increasingly a series of requirements apparently designed to please the investment community. Instead of focusing only on encouraging companies to foster sound corporate governance among themselves in the hope of stimulating greater corporate value over the longer term, the Code seems to have been redefined as a mechanism to stimulate investment into the Japanese market. In order to achieve this it has particularly emphasised two aspects of corporate governance that institutional investors consider important: shareholder primacy and board independence. Because these aspects are at variance with the tacit views of many senior managers, this emphasis is undermining the Code's initial legitimacy and encouraging reliance on coercion. As observed earlier "Perhaps this shows the limits of 'comply or explain'" and, indeed, if the Code becomes a mechanism to direct corporate governance towards specific targets rather than to lay down general principles, 'comply or explain' may well be inadequate.

Given this direction of development, it would seem logical for the Code ultimately to dispense with any pretence at permitting explanations in any

areas where cooperation is not perceived to be forthcoming and to declare itself as a prescriptive rulebook which tells companies exactly what they must and must not do in order to please institutional investors. In the light of the evident achievements of the 2015 Code, and the dangers of provoking purely formal compliance when the demands of the Code lose legitimacy by diverging too far from current practice, such a development could prove counter-productive. Voluntary codes have limited reach if they are to maintain their legitimacy but prescriptive codes without legitimacy are an invitation for corporate managements to display only formal compliance.

SUMMARY

In 2015 Japan introduced its first corporate governance code for listed companies. This was presented as a principles-based code with the option either to comply with its principles or to explain reasons for non-compliance, and it was stressed that these were not rigid rules. Reference was made to the code's complementarity to the Stewardship Code of 2014, implying that pressure from investors, rather than regulators, was expected to encourage implementation. The code appears to have been generally well received, despite signs of some purely outward compliance. However, in subsequent revisions of the code, in 2018 and 2021, the tenor of its requirements has changed. Despite officially continuing the principles-based style of the 2015 code, the subsequent reiterations introduced an increasingly didactic and prescriptive style. Also noteworthy is an increased emphasis on shareholder primacy and other elements commonly associated with US or UK governance models. This is especially evident in the 2021 revision, where certain provisions are now specifically linked to qualification for listing on the TSE's new Prime Market, which was launched in April 2022, and explained as being of value in attracting investors. Moreover, in some instances, intrusive details of corporate organisation are now required to be disclosed. The overall impression is that principles are being put aside in favour of rules in order to channel Japan's corporate governance towards shareholder primacy, while the code itself is becoming less of a codification of existing good governance practice and more of a goal to bring about the objectives that regulators seek.

ZUSAMMENFASSUNG

Im Jahre 2015 führte Japan seinen ersten Corporate Governance Kodex ein. Dieser wurde als ein prinzipienorientierter Kodex vorgestellt, welcher die Option eröffnete, entweder dessen Prinzipien zu befolgen oder deren Nichtbefolgung zu erklären; es wurde seinerzeit betont, dass es sich um Prinzipien und

keine zwingenden Regelungen handele. Dem entsprach die Bezugnahme auf den japanischen Stewardship Kodex von 2014, welche der Erwartung Ausdruck gab, dass der Druck der Investoren und nicht die Aufsichtsinstitutionen die Unternehmen zur Befolgung des Kodex motivieren sollten. Der Kodex scheint ursprünglich positiv aufgenommen worden zu sein, auch wenn es Anzeichen für eine gelegentlich lediglich formale Befolgung gab. Die Novellierungen der Jahre 2018 und 2021 haben dann jedoch den Charakter der Kodex-Anforderungen verändert. Zwar wurde der ursprüngliche prinzipienorientierte Ansatz offiziell beibehalten, aber tatsächlich haben die späteren Überarbeitungen zu einem stärker didaktisch geprägten und präskriptiven Regelungsstil geführt. Bemerkenswert ist ferner eine zunehmende Betonung des Vorrangs der Aktionärsinteressen und anderer Kriterien, die allgemein mit dem britischen oder dem US-amerikanischen Modell der Corporate Governance in Verbindung gebracht werden. Dies ist besonders deutlich bei der Novellierung von 2021 zu erkennen, welche bestimmte Anforderungen des Kodex mit den Voraussetzungen für eine Börsennotierung an dem neuen „Prime Market" der TSE, der im April 2022 eröffnet wurde, verknüpft. Dies wurde als wichtig für die Gewinnung neuer Investoren angesehen. Ferner wird nunmehr teilweise eine weitgehende Offenlegung von Einzelheiten der Unternehmensorganisation verlangt. Der Gesamteindruck ist, dass die Prinzipien zunehmend durch Regelungen ersetzt werden, um so eine vorrangige Orientierung der japanischen Corporate Governance an den Aktionärsinteressen zu erreichen. Dabei wandelt sich der Kodex von einer Niederlegung der bestehenden Grundsätze guter Unternehmensführung hin zu einem Regulierungsinstrument, mithilfe dessen von den Aufsichtsinstitutionen gewünschte Vorgaben umgesetzt werden sollen.

(Die Redaktion)