

Comments on Goergen, Martynova and Renneboog (2005)

September 14, 2005

Research Institute of Economy, Trade and Industry

Kotaro TSURU

Two roles of takeover regulations

- Stimulate takeover activity (especially in a system of dispersed ownership)

Why?: The conflict between management and shareholders → a need for external monitoring via market for control (and facilitating a transfer of control towards more productive owners and management)

Example: the squeeze-out rule, the break-through rule, limitations to the use of takeover defense measures

- Protect minority shareholders' interests (especially in a system of concentrated ownership)

Why?: The conflict between controlling blockholders and minority shareholders → a need for exit opportunities for minority shareholders (and reducing the private benefits of control that the controlling shareholders can exploit)

Example: the sell-out rule, the mandatory bid rule, the equal-treatment principle

Main findings

- By examining the main changes in takeover regulation in 30 European countries over the past 15 years, there is convergence of takeover regulation toward the UK regime.
- However, regulatory changes, which may appear similar across countries, may have totally different effects within their national systems.

Theoretically convincing, but any concrete empirical evidence?

“De jure” convergence but no “de facto” convergence 1 : A global case

Khanna, Kogan, and Palepu (2002), “Globalization and similarities in corporate governance”:

- Proxies (8) for (pair-wise) economic integration = wage correlation, capital market correlation, FDI partner, FDI magnitude, trade partner, trade magnitude, geographic distance, common language
- “De jure” (law or formal) distance in corporate governance = the sum of differences along 13 dimensions of creditor and shareholder rights with data from LLSV (1998)
robust evidence of de jure similarity correlated with globalization (more among the same regions or developed countries but not driven by convergence to US standards)
- “De facto” distance in corporate governance = the sum of differences along 7 dimensions of corporate governance practices using the CLSA (Credit Lyonnais Securities Asia) ‘s firm-level data aggregated to the country level (a subjective rating on the strength of governance) virtually no evidence of de facto similarity driven by globalization
- Economically integrated countries have more similar rules-on-books regarding corporate governance, but This similarity of rule-on-books does not transfer into similarity in practice.

“De jure” convergence but no “de facto” convergence 2: A Japanese case

- Due to the 2002 amendment to the Commercial Code, Japanese (large) companies started to have the option to choose “US” board structures, featuring independent committees of the board for audit, compensation and nomination (a majority of outside directors), or to adhere to their traditional statutory auditor system from April 2003.
- However, the number of adopting firms (by the end of June 2005, Nikkei) are only 108 (including Sony, Toshiba, Hitachi).
- “The 2002 reform is an interesting illustration of formal but not functional convergence” (Gilson and Milhaupt (2004)).”

Convergence of a takeover defense system toward the UK regime 1

- (1) The UK system (“The City Code”)
 - Prevent the board of directors from taking actions that may frustrate a potential bid (“board neutrality”)
 - The board should remain neutral and limit the use of anti-takeover devices unless an anti-takeover strategy was approved by the shareholders at a general meeting and only once a bid has been made.
 - Takeover bids are regulated through the mandatory bid rule (the acquire must make a tender offer to all the shareholders once it has accumulated a certain percentage of the shares) to prevent unfair or coercive tactics.
 - Used in the UK and in most of Continental Europe
- (2) The US system (“poison pills”)
 - Provide the board with substantial power but to give the shareholders the possibility of vetoing its decisions
 - The board has the right to negotiate with a bidder on behalf of the shareholders
 - More flexibility to the target management to act against potentially undesired bids (prevent value-destroying takeover ex-ante) but more opportunity for the managers to pursue their own interests.
 - Additional corporate governance devices needed the strengthening of the independence of the non-executive directors, the use of executive compensation contracts
 - Used in the US and in some European countries (the Netherlands). Germany has opted for a mix of the two.

Convergence of takeover defense system toward the UK regime 2: Evidence from GMR(2005)

- The adoption of the requirement of shareholders' approval to install anti-takeover measures (20% in 1990 70% in 2004 in 30 European countries)
- The adoption of the mandatory bid rule (about 20% in 1990 about 90% in 2004)
- The use of “poison pills” is forbidden in most European countries (“board neutrality”).
- The UK takeover defense system a more “global” standard?
“The City Code represents a more attractive candidate for transplant into Japan than Delaware takeover law (“poison pills”).
Its relatively straightforward rules are much simpler to replicate and enforce than a complex body of foreign judicial doctrine.”(Milhaupt(2005), p 44)