

## The need and convenience of harmonizing cross-border takeover regulation in the Pacific Alliance; Lessons from the U.S., U.K. and E.U. experience

## La necesidad y conveniencia de armonizar la regulación de las adquisiciones transfronterizas en la Alianza del Pacífico; Lecciones de los Estados Unidos, Reino Unido y la experiencia de la Unión Europea

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**Abstract:** This article will answer the question of whether or not it is necessary and/or convenient to harmonize cross-border takeover regulation in the context of a Latin American economic block such as the Pacific Alliance. To this effect an overview of what the Pacific Alliance is, and the way how multiple economic sectors and areas have been integrated during the recent years will be made, specifically focusing on the creation and legal framework of the Latin American Integrated Market. Also, a general overview of the current takeover regulations of the four member countries will be analyzed in order to see where supranational regulation and harmonization is further needed in order to enhance and deepen the integrated market and the economic block as such. An analysis of the main lessons rendered throughout recent history from takeover regulation systems such as the U.S., U.K. and E.U. will allow us to

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make closing remarks<sup>1</sup>.

Palabras clave: Adquisiciones transfronterizas; Globalización; Integración; Alianza del Pacífico; experiencia de los Estados.

Resumen : Este artículo responderá a la pregunta de si es necesario o no y/o conveniente armonizar la regulación de las adquisiciones transfronterizas en el contexto de un bloque económico latinoamericano como lo es la Alianza del Pacífico. A este efecto, se realizará una visión general de qué es la Alianza del Pacífico, y la forma en que se han integrado múltiples sectores y áreas económicas durante los últimos años, enfocado específicamente en la creación y el marco legal del Mercado Integrado Latinoamericano. Además, se analizará una descripción general de las regulaciones actuales de adquisición de los cuatro países miembros, para ver dónde es necesaria la regulación supranacional y la armonización, con el fin de mejorar y profundizar el mercado integrado y el bloque económico como tal. Un análisis de las principales lecciones extraídas a lo largo de la historia reciente de los sistemas de regulación de adquisiciones, tales como los Estados Unidos, Reino Unido y la Unión Europea, nos permitirá hacer comentarios finales.

Keywords: Cross-border takeovers; Globalization; Integration; Pacific Alliance; states experience.

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<sup>1</sup> This research was made by the author after having taken the “Take-over Regulation” course taught by Dr. David Kershaw at the London School of Economics Executive LLM Program.

## I. INTRODUCTION

U p until five years ago, the notion of “*market for corporate control*”<sup>2</sup> was practically inexistent in the Latin-American cross-border market place. This notion began to transcend when the Pacific Alliance became a priority for its member countries and for Latin-America as a key player in the world economy. The rise of tech and digital businesses (which can easily and rapidly expand throughout borders), the need to consolidate markets, the increase of foreign direct investment due –in part- to devaluation of the local currencies against the US dollar and the low returns on typical financial investments as opposed to the high returns of ongoing business, have opened the path for cross-border takeovers, as an alternative to Greenfield foreign direct investment, to develop in Latin-American countries. However, because of the scarcity of these types of operations in the region, Latin-American countries have not usually incorporated in their internal legislation cross-border takeover regulations, but only internal regulations which seem clearly insufficient for today’s ongoing cross-border M&A operations.

The moment has come for the Pacific Alliance member countries to agree upon key principles and regulations that will enable the market for corporate control to flourish, without jeopardizing basic shareholders’ rights. There is no clearer precedent, and non that applies so well to Latin-America, than that of the EU Takeover Directive. This, because of the integration process that is currently taking place through the Pacific Alliance. However, insights and lessons from well-developed takeover regimes such as

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<sup>2</sup> David Kershaw, *Principles of Takeover Regulation*, Chapter 1, Oxford University Press, 2016, when he states that “The market place within which corporations and their businesses are bought and sold in whole or in part”.

those from the United Kingdom and the United States can clearly serve a great purpose.

The opportunity seems to be quite unique; to be able to consciously draft a binding cross-border takeover regime using as precedent the historical lessons gained during the past century from the world's most industrialized nations and communities. This is a natural step after having consolidated the MILA -a common stock market for the Pacific Alliance- and having regulated the tax treatment of Pension Funds (Latin American biggest professional stock investors) in the Pacific Alliance. It will not be long until cross-border takeover operations emerge and, not having a clear regime on the subject, will only lead to cross-border disputes and litigation which could even trigger the member countries interest to remain in the Alliance.

## II. THE PACIFIC ALLIANCE; A GATEWAY TO CROSS BORDER TAKEOVER OPERATIONS

According to Sanín<sup>3</sup>,

The Pacific Alliance is a Latin American economic trade block composed primarily by Colombia, México, Chile and Peru –acting as full members -, which are all Latin American countries that border the Pacific Ocean. Its aim is to form a Latin American in-depth integration area that can jointly widen the existing trade relations with other world economic blocks –especially with Asia- and that can ensure the freedom in the movement of goods, services, capital and people within its borders, as well as to foster “the mechanisms for cooperation between member countries”.

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<sup>3</sup> SANIN, Juan E., “Taxation of Wealth under the Pacific Alliance; ¿a threat to global and regional economic growth or a chance to implement Piketty’s ‘global tax on capital?’”, *Universidad Nacional Autónoma de México’s Law Journal*, núm. 272, 2018, pp. 987-1001.

(...) The current full members of the Pacific Alliance have a joint 225 million population, and a 35% of Latin American Gross Domestic Product, and, as a block, it “will rank as the fourth contributor to the world’s growth in the next five years.

The Pacific Alliance has become, more than any other form of Latin-American integration system, a new form of political cooperation arrangement across national borders. This is what Scott<sup>4</sup> would have referred to as “*transboundary regionalism*”. It has also become a gateway for multiple endeavours such as cross-border takeover activism. In this sense, the transboundary regionalism reached as of today by the Pacific Alliance serves as a key platform for generating what Martynova<sup>5</sup> calls a “*positive spillover of corporate governance standards*” in cross-border mergers and acquisitions, between bidders and or targets in high corporate governance standards jurisdictions to those of not so strict standards.

Given the rapid sector changes, it is clear that investment through M&A is much more convenient in Latin-America than Greenfield foreign direct investment. Also, M&A’s “*offer the additional benefit that they involve (in cases where foreign ownership is partial) local shareholders directly in the process*”<sup>6</sup>, hence having a greater spillover of learning effects. OECD studies demonstrate that “*following a cross-border takeover, most target*

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<sup>4</sup> SCOTT, James, “Cross-border Governance in the Baltic Sea Region”. *Regional & Federal Studies* vol. 12, núm. 4, 2002, pp. 135-153.

<sup>5</sup> Marina MARTYNOVA, *et al.*, “Spillover of Corporate Governance Standards in Cross-Border Mergers and Acquisitions”, *Journal of Corporate Finance*, vol. 14, núm. 3, June, 2008: pp. 200-223.

<sup>6</sup> LALL, Sanjaya, “Implications of Cross-Border Mergers and Acquisitions by TNCs in Developing Countries: A Beginner’s Guide”, *QEH Working Paper Series*, núm. 88, June 2002: 1- 11.

*companies are found to enjoy a significant increase in operational efficiency and, as a corollary, in international competitiveness*<sup>7</sup>.

#### A) LATIN-AMERICAS INTEGRATION AND THE CURRENT STATE OF BEING OF THE PACIFIC ALLIANCE

Latin-American integration has been a slow but inevitable process due to the fact that its people and countries share a same regional identity. According to LEONE<sup>8</sup> a region is more than a geographical zone, it is a social construction that exists from collective interactions or a feeling of community between its members. And, according to Hansen<sup>9</sup>, an identity is constructed in a discursive, political, relational and social manner. From a constructivist perspective<sup>10</sup>, it is possible to identify a Latin-American regional identity, formed by the sum of the individual countries identities and turns into an unmodifiable feature in a particular culture.

Up until the creation of the Pacific Alliance, considered by many to be the world's eighth economy<sup>11</sup>, there have been multiple efforts to integrate Latin-American countries throughout

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<sup>7</sup> OECD, "Economic and Other Impacts of Foreign Corporate Takeovers in OECD Countries", *International Investment Perspectives: Freedom Of Investment In A Changing World*, Part I, Chapter 4, 2007, <<https://www.oecd.org/daf/inv/investment-policy/40476100.pdf>>.

<sup>8</sup> LEONE, Mariana S., "La Integración Regional en el Mosaico Identitario Latinoamericano", in *América Latina: Un Nuevo Contrato Social*, MARTÍNEZ LILIO, Pedro A. et al. (ed.), Marcial Pons, 2016, pp. 181-217.

<sup>9</sup> Lene HANSEN, *Security as Practice: Discourse Analysis and the Bosnian War* (London: Taylor and Francis, 2006), 6.

<sup>10</sup> LEONE, "La Integración Regional en el Mosaico Identitario Latinoamericano", p. 186.

<sup>11</sup> GUERRA VÁSQUEZ, Ricardo, "Alianza del Pacífico se ubica como la octava economía más grande del mundo", *El Comercio Perú*, September 18 of 2018, : <<https://elcomercio.pe/economia/mundo/alianza-pacifico-ubica-octava-economia-grande-mundo-noticia-559166>>.

time. These have not had the expected results. In the context of the cold war, and because of CEPAL's<sup>12</sup> structural thesis and the need to integrate in order not to depend on international economies, the ALALC<sup>13</sup> was formed in 1960, which then in turn became the ALADI<sup>14</sup> in 1980. Also, a Central-American Common Market<sup>15</sup> (known today as the *Sistema de Integración Centroamericana*) was created as well as the still existing *Pacto Andino*, now known as the Andean Community of Nations (CAN) and the *Asociación de Libre Comercio del Caribe* (today CARICOM). In the 1990's, MERCOSUR<sup>16</sup> was created and further on integration attempts such as ALCA<sup>17</sup>, ALBA<sup>18</sup>, CELAC<sup>19</sup>, UNASUR<sup>20</sup> and OEA<sup>21</sup> have been pursued.

#### B) THE MARKET FOR CORPORATE CONTROL IN THE PACIFIC ALLIANCE

Latin American countries, and especially those belonging to the Pacific Alliance, have great differences regarding market depth, market capitalization and number of listed companies<sup>22</sup>. Despite these differences, a common feature among all Latin American countries is the high concentration of share ownership in publicly

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<sup>12</sup> *Comisión Económica para América Latina y el Caribe.*

<sup>13</sup> *Asociación Latinoamericana de Libre Comercio.*

<sup>14</sup> *Asociación Latinoamericana de Integración.*

<sup>15</sup> *Mercado Común Centroamericano (MCCA).*

<sup>16</sup> *Mercado Común del Sur.*

<sup>17</sup> *Acuerdo de Libre Comercio de las Américas.*

<sup>18</sup> *Alianza Bolivariana para los Pueblos de Nuestra América.*

<sup>19</sup> *Comunidad de Estados Latinoamericanos y del Caribe.*

<sup>20</sup> *Unión de Naciones Suramericanas.*

<sup>21</sup> Organization of American States.

<sup>22</sup> "Federación Iberoamericana de Bolsas", *Monthly Statistic Tables*, January 2018: <[http://www.fiabnet.org/inf\\_mensuales/IM-Ene2018.pdf](http://www.fiabnet.org/inf_mensuales/IM-Ene2018.pdf)>

listed companies<sup>23</sup>, as well as in closed companies. According to Gantiva<sup>24</sup>, this particular aspect has a significant impact on the applicable Corporate Governance policies, due to the fact that in markets with highly democratized ownership (such as the US and the UK), agency problems arise mostly between shareholders and corporate managers whilst in economies with concentrated share ownership (such as those in Latin American countries), agency problems arise mostly between controlling shareholders (who hand-pick<sup>25</sup> the managers) and minority shareholders.

Contrary to what occurs in Europe with the Takeover Directive<sup>26</sup>, Latin American countries do not have supranational legislation that regulates tender offers, corporate managers' behaviour and shareholder protection in the midst of an –agreed or hostile– takeover operation. Therefore, there are no common standards for these countries to enact legislation according a given set of principles<sup>27</sup>. Internal regulations in Ibero-American<sup>28</sup> States generally

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<sup>23</sup> GANTIVA, Camilo *et. al.*, “Capítulo 11. El Mercado de Control Societario en Iberoamérica”, *Estudio sobre Gobierno Corporativo en Iberoamérica*: <<http://www.iimv.org/estudios/estudio-sobre-gobierno-corporativo-en-iberoamerica/>>

<sup>24</sup> *Idem.*

<sup>25</sup> The Jurisprudence of the Delaware Courts has illustrated this point as the controlling shareholder being an “800 pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla”. In re Pure Resources Inc., Shareholder Litigation, 808 A. 2<sup>nd</sup> 421,436, cited by Gantiva (*vid. Supra*).

<sup>26</sup> EU Directive 2004/25/CE.

<sup>27</sup> GANTIVA, “Capítulo 11. El Mercado de Control Societario en Iberoamérica”, p. 403.

<sup>28</sup> 23 countries currently make up the Organization of Ibero-American States. These are mainly all Latin American countries as well as Spain, Portugal and Andorra.



divert from the *Unocal*<sup>29</sup> and *Revlon*<sup>30</sup> standards set up by Delaware Courts, and adopt a very passive roll (similar to the “non frustration rule”<sup>31</sup>) for corporate directors whenever a company is

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<sup>29</sup> *Unocal Corp. v. Mesa Petroleum Co.*, 493 A. 2<sup>nd</sup>. 946 (De. 1985). Under the *Unocal* standard (later modified by *Unitrin, Inc v. American General Corp.*), Delaware Courts have stated that under certain circumstances management fulfils its fiduciary duties when it undertakes defensive measures to maintain the companys’ independence and corporate policy. As stated by Cara “Under the *Unocal* test, directors must first justify their defensive action before receiving the benefit of business judgement rule protection”. CARA, Frank and LANE, Peter F., “The Business Judgement Rule and Unocal: Twin Barriers to Shareholder Welfare”, *Journal of Civil Rights and Economic Development* 5, núm. 1, 1989, Article 9.

<sup>30</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173, 175-79 (Del. 1986). Under the *Revlon* standard, the Delaware Chancery Court has stated that, as a response to a hostile takeover, the director’s fiduciary duty involves transferring the companies control to the bidder that offers the best conditions. FAMULARI, Derek J “The *Revlon* Doctrine – The Fiduciary Duties of Directors when Targets of Corporate Takeovers and Mergers”, *The American Bar Association (n.d)*, : <[https://www.americanbar.org/content/dam/aba/administrative/young\\_lawyers/publications/101/fiduciary\\_duties\\_of\\_directors\\_coporate\\_takeover.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/publications/101/fiduciary_duties_of_directors_coporate_takeover.authcheckdam.pdf)> The author states there, that “The Court held that when the board decided to “sell the company,” its duty “changed from the preservation of *Revlon* as a corporate entity to the maximization of the company’s value at a sale for the stockholders benefit.” Ultimately, because the defensive measures undertaken by *Revlon*’s board prevented *Revlon*’s stockholders from accepting *Pantry Pride*’s superior offer, the *Revlon* board’s actions were inconsistent with the board’s duty to maximize the immediate value of their shares”.

<sup>31</sup> LIU, Han-Wei, “The Non-Frustration Rule of the UK City Code on Takeover and Mergers and Related Agency Problems: What are the implications for the EC Takeover Directive?”, *The Columbia Journal of European Law Online* 17, 2010: <[http://www.academia.edu/20924104/The\\_Non-Frustration\\_Rule\\_of\\_the\\_UK\\_City\\_Code\\_on\\_Takeover\\_and\\_Mergers\\_and\\_Re](http://www.academia.edu/20924104/The_Non-Frustration_Rule_of_the_UK_City_Code_on_Takeover_and_Mergers_and_Re)

in the centre of a takeover operation. The right time has come<sup>32</sup> for the Pacific Alliance to undertake an agreement between its members<sup>33</sup> in order to have a modern day harmonized takeover regulation. This would help to regulate (or self-regulate<sup>34</sup>) the market for corporate control in the region as well as enhance cross-border transactions between its member countries.

### C) The “MILA”: A Pacific Alliance milestone

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lated\_Agency\_Problems\_What\_are\_the\_Implications\_for\_the\_EC\_Takeover\_Directive>. The author here states that “*The non-frustration rule is established to serve the former purpose- to set management aside when hostile bids are imminent so that shareholders have the final say on the merit of the bids*”.

<sup>32</sup> Financial integration is one of the key pillars of the Pacific Alliance. In the Paracas Summit of 2015, the Minister Council for Financial Integration was created in order to promote financial and economic integration in the region. In 2017, a Public-Private Work Group was created by the XII Summit of Finance Ministers. Its task is to enhance financial integration between member countries by harmonizing taxation and regulatory standards. Many milestones have been reached, such as the creation of a passport for Investment Funds, whereby the units of such funds can be negotiated in any member country, and the harmonization of the tax treatment of interests and capital gains for pension funds that operate in the region. Alianza del Pacífico, *Integración financiera*, June 6 of 2017, <<https://alianzapacifico.net/integracion-financiera/>>

<sup>33</sup> DÍAZ-CEDIEL, Santiago, “La Alianza del Pacífico: Un escrutinio jurídico al tenor del derecho de las Organizaciones Internacionales”. *Anuario Colombiano de Derecho Internacional* (ACDI) 9, Universidad del Rosario, 2016. Given the fact that the Pacific Alliance is not an International Organization, and therefore –as opposed to what happens with the CAN System- cannot enact its own supranational binding legislation, the only way to harmonize its members regulation is throughout general or specific agreements reached by them.

<sup>34</sup> KERSHAW, David, “Corporate Law and Self-Regulation”. *LSE Law, Society and Economy Working Papers*, n° 5 (2015), : <<http://eprints.lse.ac.uk/61587/1/Corporate%20law%20and%20self-regulation.pdf>>.

The Latin American Integrated Market (MILA) is the result of the agreement reached in 2009, by the Stock Exchanges and Depositories of Chile, Colombia in Perú in order to have a public market regional integrated operation. In June 2014, Mexico, in the midst of the Pacific Alliance negotiation, joined this market having the first transaction made in December 2014<sup>35</sup>.

Significant advantages have arisen, both for investors as well as for issuers and listed companies, from the creation of MILA. While for issuers MILA provides a wider base of investors, more alternatives to raise capital, the opportunity to trade in international platforms and the chance to be listed on all member countries exchanges, for investors MILA provides the opportunity to choose investment alternatives within more financial instruments hence diversifying portfolios without the need of opening foreign brokerage accounts<sup>36</sup>. Official data<sup>37</sup> shows that MILA's market cap supersedes that of the sum of its member countries demonstrating the power and value that synergy brings.

Although for some academics MILA has not evolved at its full potential and key aspects of its integration, such as harmonized tax regimes, monetary policies (such as exchange and interest rates) are still pending<sup>38</sup>, the existence of this integrated market has had a significant impact in multiple sectors, including that of

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<sup>35</sup> "About us", *Mercado Mila* (n.d.), : <<http://mercadomila.com/en/who-we-are/our-history/>>

<sup>36</sup> "Investors", *Mercado Mila* (n.d.), : <<http://mercadomila.com/en/investors/>>

<sup>37</sup> "Market Cap", *Mercado Mila* (n.d.), : <<http://mercadomila.com/en/market-data/capitalization/>> According to the market capitalization data exposed by MILA, its market cap arises to 897.047 USD MM whilst Chile's market cap arises to 209.857 USD MM, Colombia's market cap arises to 103.770 USD MM, Peru's market cap arises to 124.044 USD MM, and México's market cap arises to 351.687 USD MM.

<sup>38</sup> LIZARZABURU BOLAÑOS, Edmundo *et al.*, "Emerging Markets Integration in Latin America (MILA) Stock market indicators: Chile, Colombia

security brokerage houses<sup>39</sup>, showing a clear trend towards internationalization. Given that countries such as Brazil, Panamá and Uruguay have expressed their interest in joining MILA<sup>40</sup>, and with the Pacific Alliance expanding rapidly, MILA could result in a truly integrated Latin-American Stock Exchange.

III. Deal structures on cross border takeovers; the need for new regulation

Latin-American countries have very similar takeover regulations, most of them lacking cross-border regimes. This section will analyse the current deal structures in the four current member countries of the Pacific Alliance and the way a new regulation on cross-border takeovers, based on regimes such as that of the UK and the US, could be of great value.

Colombia has a system in which “*takeovers of listed companies can be made only through public tender offers (“OPAs”)*”<sup>41</sup> but control over a listed company may also be acquired through a public sale offering in the means of a bid or auction, known as “*martillo*”. Given that ownership structure of listed companies in

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and Peru”, *Journal of Economics, Finance and Administrative Science*, núm. 20, 2015, pp. 74-83.

<sup>39</sup> Beatriz YEPES-RIOS, et al., “The integration of stock exchanges: The case of the Latin American Integrated Market (MILA) and its impact on ownership and internationalization status in Colombian brokerage firms”. *Journal of Economics, Finance and Administrative Science*, núm. 20, 2015, pp. 84-93.

<sup>40</sup> Ulric RINDEBRO, “Three Latin American exchanges seen interested in joining MILA”, *BN Americas*, November 11 of 2013, : <<http://web6.bn-america.com/en/news/insurance/three-latin-american-exchanges-seen-interested-in-joining-mila1?position=1&aut=true&idioma=en>>

<sup>41</sup> “Colombian Takeover Guide”, *International Bar Association (IBA)*, 2008, <[https://www.ibanet.org/LPD/Financial\\_Services\\_Section/Securities\\_Law\\_Committee/TakeoverGuides.aspx](https://www.ibanet.org/LPD/Financial_Services_Section/Securities_Law_Committee/TakeoverGuides.aspx)>

Colombia is highly concentrated<sup>42</sup>, the market for corporate control in the country is based Pre-Arranged Transactions<sup>43</sup> rather than in hostile takeovers. Although there are no restrictions for foreign companies to bid or make tender offers, there are also no provisions that facilitate or encourage these transactions, hence resulting in a difficult environment for the development of cross-border market for corporate control.

Chile has a system in which the acquisition of control of publicly traded companies, although in principle having to be made by a tender offer for the acquisition of shares, can have multiple exceptions<sup>44</sup>. Ever since the famous *Chispas*<sup>45</sup> case, not only did corporate governance provisions changed in the country but also the Chilean market regulation for corporate control became highly based in equality considerations. From that point on, tender offer considerations have to be addressed “*to all the sharehol-*

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<sup>42</sup> “Gobierno Corporativo de las Empresas Colombianas”. *Harvard Business Review* Special Edition, núm. 45, October 2006.

<sup>43</sup> IBA *Ut. Supra*, “*As per decree 1807 of 2007, issued by the Ministry of Finance and Public Credit, the previous agreement between the parties of the essential elements of a transactions over shares, bonds or mandatory or convertible bonds, will not be regarded as an obstacle to the free concurrence to the securities market, nor an interference to other market participants (...) Pre-Arranged Transactions regulations apply concurrently with OPA regulations*”.

<sup>44</sup> In Chile, tender offers and the change of control of publicly traded companies is regulated by the Securities Market Act (Law 18,045 of 1981). Some exceptions to this principle are, for example, the change of control through shareholders agreements, the change of control of the parent company that controls the publicly traded company, among others.

<sup>45</sup> CLARKE DE LA CERDA, Álvaro *et al.*, “Reforming Corporate Governance: Experiences with Public Takeover Bids in Chile and Panama”, *International Finance Corporation*, 2009. :

<[https://www.ifc.org/wps/wcm/connect/f433f50048a7e6b4a80fe-f6060ad5911/Focus6\\_Eng\\_B.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/f433f50048a7e6b4a80fe-f6060ad5911/Focus6_Eng_B.pdf?MOD=AJPERES)>.

ders of the corporation or to all the shareholders of a given series of the corporation, and when subscriptions exceed the shares offered to be acquired, the offeror must purchase the shares pro rata to the subscriptions of each accepting shareholder”<sup>46</sup>. Likewise, no internal legal provisions facilitate or encourage cross-border corporate control transactions.

Peru’s takeover regulation is based on the principles of equality, disclosure and the guarantee of access to relevant information<sup>47</sup>. Acquisition on any rights (including shares) of a substantial<sup>48</sup> percentage of the target company, that enables a person or financial group (regardless of its nationality) to gain its control must be preceded by a public offer of acquisition (OPA).

México’s internal regulation “allows for friendly and hostile takeovers to take place”<sup>49</sup>. In the case of a hostile takeover, the board of directors cannot deploy any defensive measures and must maintain its neutrality during the acquisition, thus being only able to give its opinion on the fairness of the offered price<sup>50</sup>.

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<sup>46</sup> CAREY, Jaime and UGARTE, Jorge, “Mergers and Acquisitions in Chile: Approaching the Controlling Shareholder”, *Whos Who Legal*, February 2014, : <[https://www.carey.cl/download/getting\\_the\\_deal\\_through/whoswholegal-mergers-and-acquisitions-in-chile\\_jaime-carey\\_jorge-ugar-te\\_2.pdf](https://www.carey.cl/download/getting_the_deal_through/whoswholegal-mergers-and-acquisitions-in-chile_jaime-carey_jorge-ugar-te_2.pdf)>

<sup>47</sup> “Peru Takeover Guide”, *International Bar Association (IBA)*, (2008): <[https://www.ibanet.org/LPD/Financial\\_Services\\_Section/Securities\\_Law\\_Committee/TakeoverGuides.aspx](https://www.ibanet.org/LPD/Financial_Services_Section/Securities_Law_Committee/TakeoverGuides.aspx)>.

<sup>48</sup> More than 25%. *Ibid.*, 3.

<sup>49</sup> “Mexico: Mergers & Acquisitions 2018”, *International Comparative Legal Guides*, December 03 of 2018: <<https://iclg.com/practice-areas/mergers-and-acquisitions-laws-and-regulations/mexico>>.

<sup>50</sup> *Ibidem*.

#### IV. REGULATORY CROSS-ROADS: THE OECD MANDATORY GUIDANCE PRINCIPLES ON CORPORATE GOVERNANCE, TAKEOVERS, AND TENDER OFFERS

Takeovers create new wealth<sup>51</sup>; they do not simply reshuffle existing wealth<sup>52</sup> among the relevant players<sup>53</sup>. This wealth is primarily allocated in the target company shareholders<sup>54</sup>, but also in society at large<sup>55</sup>. If the premium paid out by bidders to gain control of the target, as a result of what is known as the “*winner’s curse*”<sup>56</sup>, is more “*than what the acquiring shareholders lose, net new value is created*”<sup>57</sup>. This position, however, is not shared by all academics<sup>58</sup>.

<sup>51</sup> MANNE, Henry G., “Mergers and the Market for Corporate Control”. *The Journal of Political Economy*, núm. 73 1965, p. 110.

<sup>52</sup> MAGNUSON, William, “Takeover Regulation in the United States and Europe: An Institutional Approach”. *Pace International Law Review*, vol. 21, núm. 1, 2009, p. 206.

<sup>53</sup> BAINBRIDGE, Stephen, *Mergers and Acquisitions*, Foundation Press, 3<sup>rd</sup> ed., 2012, 45.

<sup>54</sup> MCCHESENEY, Fred S., “Manne, Mergers, and the Market for Corporate Control”. *Case Western Reserve Law Review* vol. 50, núm. 2, 1999, p. 245.

<sup>55</sup> This argument is in line with what Nachemson-Ekwall (*vid. infra*) refers to as “*Manne’s idea that a market for corporate control is wealth accretive for society while at the same time it targets the difficulty of assuring a Berle and Means equal treatment of shareholders*”.

<sup>56</sup> “Winner’s Curse”, *Investopedia*, March 20 of 2019: <<https://www.investopedia.com/terms/w/winnercurse.asp>> “The winner’s curse is a tendency for the winning bid in an auction to exceed the intrinsic value or true worth of an item. Because of incomplete information, emotions or any other number of factors regarding the item being auctioned, bidders can have a difficult time determining the item’s intrinsic value. As a result, the largest overestimation of an item’s value ends up winning the auction”.

<sup>57</sup> Bainbridge, *Mergers and Acquisitions*, 47.

<sup>58</sup> ROLL, Richard, “The Hubris Hypothesis of Corporate Takeovers”. *The Journal of Business* 59, núm. 2, Part 1 (Apr. 1986): 197-216. In a citation

On the contrary, there is no clear position<sup>59</sup> as to the impact on shareholder wealth and company value whenever an anti-takeover defence<sup>60</sup> or measure is executed, nor is there a clear position<sup>61</sup> on how management entrenchment affects market value.

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by Okanigbuan (*vid. Infra*) where it is stated that “Takeovers may not lead to any economic gains to the acquired company, possibly caused by paying too much (over-payment) to acquire a company, which often leads to losses or zero-gains to the acquiring companies”.

<sup>59</sup> Patrick A. GAUGHAN, *Mergers, Acquisitions and Corporate Restructurings*, John Wiley & Sons, 1996, p. 152. According to this author, there are two contrasting hypothesis that may be used whenever trying to determine if management actions contribute or not to overall wealth creation: *The Management Entrenchment Hypothesis* and *the Stockholder Interest Hypothesis*. While the first proposes that “non participating stockholders experience reduced wealth when management takes actions to deter attempts to take control of the corporation. This theory asserts that managers of a corporation seek to maintain their positions by actions such as greenmail or the installation of other active or preventive corporate defences”, the second implies that “stockholder wealth rises when management takes actions to prevent changes in control. The fact that management does not need to devote resources to preventing takeover attempts is considered a cost saving”.

<sup>60</sup> BEBCHUK, Lucian A. and COHEN, Alma, “The Costs of Entrenched Boards”. *Journal of Financial Economics*, núm. 78, 2005, pp. 409-433. These academics conclude that a company with a staggered board has less value than one without a staggered board.

<sup>61</sup> MORCK, Randall *et al.*, “Management Ownership and Market Valuation: An Empirical Analysis”. *Journal of Financial Economics*, núm. 20, 1988, pp. 293 -315. The authors examined the validity of the previously referred to hypothesis from a different perspective than that of an antitakeover defence. Their conclusions were that the *Tobin q*, an index that measures the market value of “all of the company’s securities divided by the replacement costs of all assets”, rises as ownership stakes rise. The positive relationship “was not uniform in that it applied to ownership percentages between 0 and 5% as well as



Given the fact that most Latin American companies, even if public<sup>62</sup>, are family owned or controlled<sup>63</sup>, agency problems between shareholders and directors, due to conflicts of interest, are a recurring issue. Also, the fact that corporate ownership and control in Latin Americas' public companies is highly concentrated<sup>64</sup> interferes with policy measures aimed at solving these same agency problems. Although Latin American countries have, to the most extent, legislation regulating directors' fiduciary duties, the *duty of loyalty* has not been so developed as in Anglo-American countries<sup>65</sup>. Given this, the "*wrongful profiting*

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*to those above 25% whereas a negative relationship applied for those between 5 and 25%*".

<sup>62</sup> According to the EY Family Business Yearbook of 2017, which takes as a source the Global Family Business Index of the University of St. Gallen, "of the world's 500 largest family business, 7.4% (37) are located in Latin America". Family business are defined as companies "*whenever they are public companies with a minimum shareholding or voting power of the owner family of 32%, or private companies with a minimum shareholding of the owning family of 50%*". "Family business in Latin America: facts and figures", *EY Family Business* (2017), <<https://familybusiness.ey-vx.com/pdfs/screen-ey-17-002-fby-2017-bk11705-002-v27-24-facts-and-figures-latin-america.pdf>>.

<sup>63</sup> *Idem*.

<sup>64</sup> BRIANO TURRENT, Guadalupe del C and SAAVEDRA GARCÍA, María L., "La composición del consejo de administración y la estructura accionaria como factores explicativos de la transparencia en el gobierno corporativo en Latinoamérica: evidencia de empresas cotizadas de Argentina, Brasil, Chile y México". *Estudios Gerenciales*, vol. 31, n°136, 2015, pp. 275-286. The authors emphasise the existence of an overall concentration of property in Latin American companies. According to their studies, in 2004, 100% of analysed companies in México and Chile had a high share concentration. Argentina reached a level of 90,2% and Brazil 89,3%.

<sup>65</sup> HOPT, Klaus J., "Conflict of Interest, Secrecy and Insider Information of Directors - A Comparative Analysis". *European Company and Financial Law Review- Law Working Paper*, n. 208, November 19 of 2012 - Last revised: December 17 of 2013, pp. 167-193, <<https://ssrn.com/abstract=2178152>> or <<http://dx.doi.org/10.2139/ssrn.2178152>>.

from position”<sup>66</sup> and “corporate opportunities”<sup>67</sup> doctrines have not yet had a wide enough application in Latin American jurisprudence.

Regarding takeovers, the target company board members have specific duties towards the company. These vary according to the different jurisdictions; while in the UK and Europe board members are bind by the “passivity” or “non frustration” rule, in the US, coupled with staggered boards<sup>68</sup> and other anti-takeover mechanisms<sup>69</sup>, board members are free to decline an offer<sup>70</sup>.

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<sup>66</sup> According to Hopt (*Ut. Supra*, at 13) this doctrine states that “directors are not allowed to use their position for their self-interest”. This doctrine gets blurred when the definition of self-interest comes into play, due to the fact that directors, given their position, could widely be benefited in non-financial ways from third parties.

<sup>67</sup> According to Hopt (*Ut. Supra*, at 11) this doctrine forbids directors to use, for themselves, “business opportunities that arise for the company”. It is rooted “in the trust analogy for directors as fiduciaries of the company”.

<sup>68</sup> “A staggered board of directors, also known as a classified board, refers to a board that consists of different classes of directors. In a staggered board of directors, only one class is open to elections each term. It is different from a normal board of directors, where all directors are elected at once”. “Staggered board of directors”, *Corporate Finance Institute* (n.d.), <<https://corporatefinanceinstitute.com/resources/knowledge/strategy/staggered-board-of-drectors/>>

<sup>69</sup> AGA, Saira, “A Review and Comparison of Takeover Defences in the U.S. and U.K.”, *SSRN*, June 27 of 2010, <<https://ssrn.com/abstract=1631432>> or <<http://dx.doi.org/10.2139/ssrn.1631432>>. While in the UK takeover defences are governed by the City Code on Takeovers and Mergers (and supplemented by the Companies Act 2006) and, under Rule 21.1 require shareholder approval prior to being exercised, in the US, under Delaware Law, the “business judgement rule” applies, requiring directors to demonstrate that “after a good faith and reasonable investigation they perceived a danger to corporate policy”. Takeover defences include Poison Pills, Shark Repellents, Greenmail, White Knights, Pac-Man defences, Leveraged Recapitalisations, Share Repurchases, among others colourful names.

<sup>70</sup> HOPT, “Conflict of Interest - A Comparative Analysis”, p. 11.

Given that all of the Pacific Alliance member countries<sup>71</sup> are OECD member countries<sup>72</sup> or are in process of becoming one, the Pacific Alliance becomes a unique forum in order to implement and harmonize the OECD's existing corporate governance policies<sup>73</sup> in order to enhance cross-border takeover transactions without risking or jeopardizing shareholders rights. These policies include, among others, standards governing the acquisition of corporate control and the use of anti-takeover devices<sup>74</sup>.

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<sup>71</sup> The member countries of the Pacific Alliance, as of today, are Colombia, Perú, Chile and México.

<sup>72</sup> Chile and México have long ago been OECD member countries. After complying with all of its standards, Colombia was invited to become the 37<sup>th</sup> member of the OECD. Peru is currently undertaking the path to become an OECD member country by implementing the OECD's recommendations and policy standards by means of enacting legislative decrees and by joining two major OECD Conventions; the Anti-Bribery Convention and the multilateral Convention of Mutual Administrative Assistance in Tax Matters. "A mutually beneficial relationship", *OECD*, May 28 of 2018, <<http://www.oecd.org/latin-america/countries/peru/>>.

<sup>73</sup> "G20/OECD Principles of Corporate Governance", *OECD Publishing*, 2015, <<https://www.oecd-ilibrary.org/doc-server/9789264236882-en.pdf?expires=1540383152&id=id&accname=guest&checksum=7B019A7EAD1B4F02999490C71B5E764F>>.

<sup>74</sup> *Ibidem*, The OECD states that "*rules and procedures governing the acquisition of corporate control (...) should be clearly articulated and disclosed so that investors understand their rights and recourse. Transactions should occur at transparent prices and under fair conditions (...). Anti-takeover devices should not be used to shield management and the board from accountability*".

## V. CROSS BORDER TAKEOVER OPERATIONS WITHIN NON HARMONIZED LEGAL REGIMES; THE U.S., E.U. AND U.K. EXPERIENCE

Europe and the US, having converged most of the corporate governance standards<sup>75</sup> that are applicable to transnational transactions, have not been able to do so with takeover regulation<sup>76</sup>. They have “*adopted strongly dissimilar laws governing the process and substance of hostile tender offers, and their respective paths seem to be diverging rather than converging*”<sup>77</sup>. Due to historical, political and traditional reasons<sup>78</sup>, it is quite unlikely that these regimes will ever be harmonized.

Whenever conceiving cross-border takeover regimes, legislators and policymakers usually come across a Hobson<sup>79</sup> choice; “*weak regulation increases the risk, and strong regulation the*

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<sup>75</sup> AQUILA, Frank *et. al.*, “Cross-Border Mergers & Acquisitions: A Study in Convergence and Cross-Fertilization”. *Bloomberg Law Reports* 4, n° 16, 2010, p. 2.

<sup>76</sup> MAGNUSON, William, “Takeover Regulation in the United States and Europe: An Institutional Approach”, *Pace International Law Review* 21, n° 1, 2009, pp. 208-239. Some Corporate Governance practices that have converged throughout the Atlantic Ocean are: (i) “having a majority on independent directors and a system of board and director committees that are comprised of expert and independent directors, and having a separate chairman and chief executive officer”.

<sup>77</sup> *Ibidem*, p. 239.

<sup>78</sup> *Idem*. “(...) *this can be explained by process and institutional competency: courts have played the primary role in the development of American law, while political (whether government or non-government) actors dominated the E.U. adoption of the Takeover Directive*”.

<sup>79</sup> According to the Merriam-Webster dictionary, the Hobson choice is “(2) *the necessity of accepting one of two more equally objectionable alternatives*”. “*Hobson choice*”, Merriam-Webster dictionary, (n.d.), <<https://www.merriam-webster.com/dictionary/Hobson's%20choice>>.

*cost, of investing, (...)*<sup>80</sup>. In the US, the SEC<sup>81</sup>, acting as the national takeover regulator<sup>82</sup>, has introduced rules intended to encourage cross-border harmonization<sup>83</sup>, such as the Tier I and Tier II exemptions<sup>84</sup>. Many proposals have been made, both by the SEC as well as by academics, to “*ease the regulatory conflict between takeover laws of the United States and the laws and practices of other countries and to create intersystem accord on takeover*

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<sup>80</sup> Julian T. PERLMUTTER, “The New Rules on Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings; Competition or Harmonization?” *Michigan Journal of International Law*, 22, n°1, 2000, pp. 169-202, <<http://repository.law.umich.edu/mjil/vol22/iss1/3>>.

<sup>81</sup> Securities and Exchange Commission.

<sup>82</sup> DAVIDOFF, Steven M., “The SEC and the Failure of Federal, Takeover Regulation”. Berkeley Law Scholarship Repository, Fla. St. U.L. Rev., n° 34, 2014, p. 211. According to the author “*the SEC regulates in a manner wholly different than the nation’s current takeover regulator, the Delaware courts. The SEC promulgates and enforces a rule-based takeover code, whereas Delaware regulates by court decisions (...)*” and “decisions of the Delaware courts, including Singer, Unocal, and Revlon were arguably crafted in response to SEC pressure or the threat of SEC intervention”.

<sup>83</sup> DAVIDOFF, Steven M., *Gods at War: Shotgun Takeovers, Government by Deal, and The Private Equity Implosion* (John Wiley & Sons, 2009), 329. “*Despite the federal threat, Delaware is still dominant in regulating corporations and takeovers. (...) Delaware is a court-driven takeover regulator. It cannot issue out rules and instead decides case based on the facts at hand. Because of this, there will always be ambiguity in Delaware’s jurisprudence and a need for an overlaid federal system*”.

<sup>84</sup> “Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combinations Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions”. *U.S. Securities and Exchange Commission (SEC)*, (n.d.), <<https://www.sec.gov/info/smallbus/secg/cross-border-secg.htm>>

rules<sup>85</sup>. These proposals have had a very critical response from the Company Law Subcommittee of the City of London Law Society<sup>86</sup>.

The greatest achievement regarding harmonization of takeover regimes was achieved with the enactment of the European Takeover Directive<sup>87</sup>. This granted the same protection and opportunities to all shareholders in European countries, as well as the “*same expectation of success*” for bidders that wished to enter the EU territory through a takeover acquisition<sup>88</sup>. The key pillars of the Directive, i.e., regulating the price of the compulsory tender offer, board neutrality and the *breakthrough rule*<sup>89</sup> provide

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<sup>85</sup> GREENE, Edward F., CURRAN, Andrew and CHRISTMAN, David A., “Toward a Cohesive International Approach to Cross-Border Takeover Regulations”, *U. Miami Law Review*, n. 51, 1997, pp. 823- 857. Such proposals include the 1990’s SEC proposal for foreign bidders to make offers into the U.S. “based on the procedural rules and disclosure practices of the bidders home market”. This was followed by the multi-jurisdictional disclosure system that enables Canadian companies “to proceed in the United States under Canadian procedural and disclosure rules if less than 40% of the targets securities are held by U.S. shareholders”.

<sup>86</sup> *Ibidem*, p. 857. Due to the U.S. high risk of litigation civil liability standards for officers and directors “*the Law Society indicated that U.K. bidders were not likely to adopt the SEC’s Concept Release approach as long as their domestic laws allowed them to exclude U.S. persons from participating in offers*”.

<sup>87</sup> Directive 2004/25/EC adopted by the European Parliament and the Council of the European Union.

<sup>88</sup> Christian CASCANTE, “European Directive Takeover Guide”. *International Bar Association*, September 29 of 2008, <<https://www.ibanet.org/Search/Search.aspx?query=European%20Directive%20Takeover%20Guide>>

<sup>89</sup> PAPAPOULOS, Thomas, “Legal Aspects of the Breakthrough Rule of the European Takeover Bid Directive”, in *Takeover Regulation: A Legal Approach*, edited by ICAFI University Press, 2008. “The Non-Frustration Rule (Art. 9), the Breakthrough Rule (Art. 11) and the Reciprocity Rule (Art. 12)

significant advantages for all member countries in the European Union and help provide an investment environment that creates overall value by enhancing deal making<sup>90</sup>. Given this harmonized treatment of takeovers in Europe, whenever this type of operations take place in either of both directions (either U.S. bidders trying to acquire EU companies or otherwise), effects can be easily predicted; U.S. based corporations –acting as raiders- might find the acquisition “*more expensive because of compulsory takeover rules*”<sup>91</sup> and might find “*less intense resistance through defensive measures*”<sup>92</sup> and EU Companies –acting as raiders- might find the acquisition less expensive because of “*the absence of the compulsory tender offer provision, as well as the more widespread ownership structure*”<sup>93</sup>. However, it is likely to find “*defences in corporate structures and managerial actions that are inconceivable in Europe*”<sup>94</sup>.

Questions arise, however, on the future of the U.K.’s market for corporate control and takeover regulation following the Brexit. According to a study by Moore Stephens<sup>95</sup>, following the Brexit vote “*the number of UK companies taken over by foreign buyers fell by 30 percent compared with the same period in 2015*”. Signi-

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of the EU Takeover Bid Directive (Directive 2004/25/EC) constitute the core regulation of the takeover bid process on EU level”.

<sup>90</sup> DAVIDOFF, “The SEC and the Failure of Federal, Takeover Regulation”, p. 336. “*Deal making provides added value by structuring and combining assets more efficiently to reduce the cost of capital and create value through, among other things, synergies and cost savings*”.

<sup>91</sup> VENTORUZZO, Marco, “Europe’s Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends”, *TX. INT’L L.J.*, n°41, 2006, pp. 171- 220.

<sup>92</sup> *Idem.*

<sup>93</sup> *Idem.*

<sup>94</sup> *Idem.*

<sup>95</sup> Cited by the Financial Times, <<https://www.ft.com/content/c0adf690-d439-11e6-9341-7393bb2e1b51>>.

ficant changes are imminent in U.K.'s takeover regulation, which do little but generate anxiety in investors which flee to the U.S. for undertaking their acquisitions as it is a growing economy with a tax friendly reform aimed at targeting overseas investors.

According to Skadden, "*The Conservative Manifesto proposes to make potentially significant reforms to the rules that govern takeovers and mergers in the UK. (...) it proposes to require bidders to be clear about their intentions from the outset of the bid process and to require that all promises and undertakings made in the course of a takeover bid are legally enforced afterwards*"<sup>96</sup>.

## VI. REGULATING AND HARMONIZING CROSS BORDER TAKEOVER OPERATIONS BY SUPRANATIONAL LEGISLATION; THE E.U. "LEVEL PLAYING FIELD" EXPERIENCE

The convergence of national governance regimes seeking a unitary approach to the discussion of market for corporate control was a key component, in the 1990's, for the European Commission to create a level playing field<sup>97</sup> where "European champions"<sup>98</sup> could

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<sup>96</sup> ADEBIYI, John and HOPKINS, Scott C., "The Future of Takeover Regulation and Corporate Governance in the UK", *SKADDEN* May 30 of 2017, <<https://www.skadden.com/insights/publications/2017/05/the-future-of-takeover-reg-and-corp-governance>>

<sup>97</sup> NACHEMSON-EKWALL, Sophie, "An Institutional Analysis on Cross-border Hostile Takeovers: Shareholder value, short-terminism and regulatory arbitrage on the Swedish stock market during the sixth takeover wave", *Stockholm School Of Economics*, 2012, p. 63, <<https://ex.hhs.se/dissertations/566226-FULLTEXT02.pdf>>

<sup>98</sup> The term "European Champion" was used as an inspirational term in September 27<sup>th</sup>, 2017, in a press conference given by Henri Poupart-Lafarge, chief executive of Alstom, and Siemens's chief executive Joe Kaeser, when announcing a deal to merge their rail operations and create a "European Champion". Lucy Bur-



flourish. According to Nachemson-Ekwall<sup>99</sup>, the pan-European<sup>100</sup> regulatory framework for a market for corporate control, later addressed in the Takeover Directive, was built over two governance features; the “principal-agent conflicts”<sup>101</sup> and the “principal-principal conflicts”<sup>102</sup>. Nevertheless, many academics have criticized the creation of this level playing field arguing, among other issues, that it would increase “*regulatory complexity and confusion*”<sup>103</sup> in European countries, and that “*regulatory changes in corporate governance might have different, sometimes opposite, effects in different countries*”<sup>104</sup>.

According to Nenova<sup>105</sup> certain elements of takeover laws<sup>106</sup> should always be applied when regulating these issues in developing countries. Aspects to be considered include the mandatory bid rule, corporate governance principles relating to the fiduciary duties of the directors involved, and the regulation of the “*contro-*

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ton, “European champions to form in next deal boom, City predicts”, *The Telegraph*, January 6 of 2018, <<https://www.telegraph.co.uk/business/2018/01/06/european-champions-form-next-deal-boom-city-predicts-boom/>>

<sup>99</sup> Nachemson-Ekwall, “An Institutional Analysis”, p. 64. “*These are conflicting interests that might emerge between the target shareholders as a group and the board of directors and management of the target company*”.

<sup>100</sup> DAVIES, Norman, *Europe: A History*, Oxford University Press 1996, p. 8. When referring to Pan-European effect as a cultural or political phenomenon where “*there are no longer any Frenchmen, Germans, Spaniards, or even Englishmen; there are only Europeans*”.

<sup>101</sup> Nachemson-Ekwall, “An Institutional Analysis”, p. 64.

<sup>102</sup> *Ibidem*, 64.

<sup>103</sup> *Ibidem*, 69, citing Becht, Bolton & Roell, (2002).

<sup>104</sup> *Idem*, 69, citing Goergen, Martynova and Rennenboog (2005).

<sup>105</sup> NENOVA, Tatiana, “Takeover Laws and Financial Development”. *World Bank Policy Research Working Paper* 4029, October 2006, <<http://documents.worldbank.org/curated/en/538361468323369802/pdf/wps4029.pdf>>.

<sup>106</sup> *Ibidem*, 4.

ling shareholder agency problem<sup>107</sup>” aimed at the protection of minority shareholders, especially in jurisdictions where “squeeze out” mechanisms are legally allowed. However, there seems to be a general understanding that “complete harmonisation of the concept of “control” is not only impractical, but it is also undesirable, as several domestic factors play a role in shaping the concept”<sup>108</sup>.

## VII. CORPORATE GOVERNANCE AND ITS ROLE IN PROTECTING STAKEHOLDERS IN TAKEOVER SITUATIONS

Modern day Corporate Governance (and especially regarding takeovers) has shifted from the protection of shareholders to the protection of stakeholders<sup>109</sup>. This is what academics call the flight from the “stewardship theory”<sup>110</sup> to the “enlightened shareholder

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<sup>107</sup> KERSHAW, David, *Company Law in Context; Text and Materials*, 2 ed., Oxford University Press, 2012, 646. “Where controlling shareholders use their control and influence in ways that benefit themselves but which are detrimental to the minority shareholders’ interests there is a controlling shareholders’ agency problem”.

<sup>108</sup> VAROTTIL, Umakanth, “Comparative Takeover Regulation and the Concept of ‘Control’”, *Singapore Journal of Legal Studies*, 2015, pp. 208-23. <<https://law.nus.edu.sg/sjls/articles/SJLS-Jul-15-208.pdf>>

<sup>109</sup> HOPT, Kalus J. et. al., *The Anatomy of Corporate Law; A Comparative and Functional Approach*, Oxford University Press, 2004, p. 189. When citing BLAIR, Margaret M. (Ownership and Control (1995)) as stating that “Some have argued that a substantial proportion of the gains to acquirers from takeovers are the result of wealth transfers from non-shareholder groups, especially the employees of the target”.

<sup>110</sup> TRICKER, Bob et. al., *Corporate Governance: Principles, Policies And Practice*, 3a ed., Oxford University Press, 2012, pp. 66. “Stewardship theory looks at governance through a different lens from agency theory (...) The shareholding members of the company nominate and appoint the directors,

*theory*<sup>111</sup>. Regarding these paradigms, however, an exception is often made whenever public companies in highly liquid markets such as the US or the UK are addressed. In these cases, directors feel that given the ownership dispersion, loyalty is basically owed to shareholders (namely institutional investors) who can, at any moment, sell their shares hence affecting directors' self-interest. As VIVES states it, all around the world corporate managers are disciplined by the market<sup>112</sup>, or more precisely “*by the prospect of hostile takeovers taking place unless they run their companies efficiently in the interest of their shareholders*”<sup>113</sup>.

Current takeover regulation, designed to protect shareholders from managerial excesses<sup>114</sup>, largely focuses on shareholder protection instead of stakeholder protection<sup>115</sup>. As stated in the hu-

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*who then act as stewards for their interests (...) Directors' legal duty is to their shareholders not to themselves, nor to other interest groups”.*

<sup>111</sup> *Ibidem*, p. 71.

<sup>112</sup> BREALEY, Richard A. and MYERS, Stewart C. *et al*, *Principles of Corporate Finance*, New York, McGraw-Hill/Irwin 2008, p. 887. In a citation by Okanigbuan (*vid. Infra*) where it is stated that “*Takeovers are a disciplinary tool for a poorly performing management board of a company. Often, a takeover leads to the dismissal of company managements of acquired companies who have failed to improve the performance of their companies, thus making their companies to be easy targets for takeovers*”.

<sup>113</sup> VIVES, Xavier, *Corporate Governance: Theoretical and Empirical Perspectives*, Cambridge University Press, 2000, 111.

<sup>114</sup> OKANIGBUAN, Francis, “Corporate Takeovers and Shareholder Protection: UK Takeover Regulation in Perspective”. *Manchester Student Law Review* 2, n° 267. University Of Manchester, 2013, <[https://www.humanities.manchester.ac.uk/medialibrary/law/main\\_site/Research/Student\\_Law\\_Review2/MSLR\\_Vol2\\_11\(Okanigbuan\).pdf](https://www.humanities.manchester.ac.uk/medialibrary/law/main_site/Research/Student_Law_Review2/MSLR_Vol2_11(Okanigbuan).pdf)>

<sup>115</sup> Skadden, “The Future of Takeover Regulation”. Nevertheless, as of today, “*the UK Takeover Code (the Code) already includes provisions requiring bidders to explain the long-term commercial justification for an offer and*

bris hypothesis<sup>116</sup>, not only stakeholders from the target company can result affected but also stakeholders from the acquiring company, due to overpayments which are “*made by management of the acquiring company to the target company in pursuit of a takeover*”<sup>117</sup>. According to Kacperczyk<sup>118</sup> “*because catering to non-shareholding stakeholders contributes to the long-term value of the firm, managers will be more likely to attend to those stakeholders when relieved from short-termism triggered by the threat of hostile takeovers*”.

Harmonizing corporate governance principles, in the midst of cross-border takeover operations, can be a paramount challenge, especially when cultural issues collide. Following the takeover of Cadbury by Kraft, the UK Government issued a public response<sup>119</sup> in which it laid out the fact that the Companies Act 2006 had not resolved the major issues in corporate governance principles that should be followed when foreign takeovers of UK companies occur. Therefore, cross-border takeover policy making shall take into account harmonized corporate governance principles.

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*its intentions in a number of areas, including the future business of the target company and the repercussions on employees”.*

<sup>116</sup> See citation No. 57.

<sup>117</sup> Okanigbuan, “Corporate Takeovers”, 292.

<sup>118</sup> KACPERCZYK, Aleksandra, “With greater power comes greater responsibility? Takeover protection and corporate attention to stakeholders”. *Strategic Management Journal* 30, n° 3, 2008.

<sup>119</sup> “Government Response to the Business, Innovation and Skills Committee’s Report on “Mergers, Acquisitions and Takeovers: The Takeover of Cadbury by Kraft””, presented to Parliament by the *Secretary for Business, Innovation and Skills* (July 2010), <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228969/7915.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228969/7915.pdf)>.

## VII. CONCLUSIONS

Latin America is currently living its integration dream due to the existence of the Pacific Alliance. Legal harmonization is a key aspect in the long term success of this hemispheric project<sup>120</sup>. Within this aspect, harmonizing cross-border takeover regulation is an essential component in order to promote regional M&A transactions and to encourage growth.

The century long experience of the U.K., U.S. and E.U. in these matters, will be crucial in order to help draft and design a harmonized cross-border takeover regulation in which these experiences are capitalized.

Harmonization of takeover regulations within the Pacific Alliance member countries will help implement the OECD's Corporate Governance principles regarding the roles of directors, officers and boards whenever facing a hostile acquisition. It will also create certainty and assurance for minority shareholders, that their fundamental rights will not be disregarded. Lastly, it will encourage the creation of the Latin American champion.

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<sup>120</sup> According to Reyes, "Mandatory harmonization would be a sensible step to be undertaken in the process of integration". REYES, Francisco, "Corporate Governance in Latin America: A Functional Analysis". University of Miami Inter-American Law Review 39, n° 2, August 1, 2007.

