REFLECTIONS ON THE SPANISH COMMON INTEREST AND BENEFIT COMPANIES THROUGH A COMPARATIVE LENSE: AN ANALYSIS OF THE DELAWARE AND THE FRENCH HYBRID PURPOSE COMPANIES

REFLEXIONES SOBRE LAS SOCIEDADES DE BENEFICIO E INTERÉS COMÚN ESPAÑOLAS DESDE UNA PERSPECTIVA COMPARADA: UN ANÁLISIS DE LAS SOCIEDADES CON PROPÓSITO HÍBRIDO FRANCESAS Y DE DELAWARE

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ABSTRACT
Law 18/2022, of the 28th of September, on the creation and growth of companies introduces hybrid purpose companies under the name "sociedades de beneficio e interés común" (SBIC) in Spanish company law, though their regulation awaits a future legal instrument. Hybrid purpose companies aim to balance the traditional for-profit purpose with other non-profit purposes, that may have a social or environmental character. The introduction of SBIC in the shareholder value Spanish company law system, however, raises questions on how the legislator will approach their regulation. To provide some insights on the future SBIC regulation, this paper analyzes the Delaware and French hybrid purpose company regulations, and then delves into Spanish law to lay out the problems that the SBIC regulation will have to solve as well as some potential solutions and open questions that remained to be answered.

KEYWORDS: Common interest and benefit companies, hybrid purpose companies, company law, corporate social responsibility.

FECHA DE ENTRADA: 03/11/2023
FECHA DE ACEPTACIÓN: 17/06/2024

Cómo citar este artículo/How to cite this article: Afonso Bellod, Ana (2024). Reflections on the spanish common interest and benefit companies through a comparative lense: an analysis of the Delaware and the French hybrid purpose companies, *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa* (45), 13-45.
DOI: https://doi.org/10.7203/CIRIEC-JUR.45.27597

RESUMEN

La Ley 18/2022, de 28 de septiembre, de creación y crecimiento de empresas introduce las sociedades con propósito híbrido con la denominación "sociedades de beneficio e interés común" (SBIC) en el Derecho de sociedades español, aunque su regulación deberá esperar a su desarrollo por vía reglamentaria. Las sociedades con propósito híbrido tienen el objetivo de equilibrar el tradicional fin lucrativo con otros fines no lucrativos que pueden tener carácter social o medioambiental. La introducción de las SBIC en el sistema societario español *shareholder value,* plantea preguntas sobre cómo el legislador planteará su regulación. Para ofrecer algunas perspectivas sobre la futura regulación de las SBIC, este artículo analiza las regulaciones de sociedades con propósito híbrido de Delaware y Francia, y luego profundiza en el Derecho español para exponer los problemas que la regulación de las SBIC deberá resolver, así como algunas posibles soluciones y preguntas abiertas que quedan por resolver.

PALABRAS CLAVE: Sociedades de beneficio e interés común, sociedades con propósito híbrido, Derecho societario, responsabilidad social corporativo.

CLAVES ECONLIT / ECONLIT DESCRIPTORS: K22, L21, L31, L32, M14.

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FECHA DE ACEPTACIÓN: 17/06/2024

RESUMEN AMPLIO

La Ley 18/2022, de 28 de septiembre, de creación y crecimiento de empresas (en adelante, Ley 18/2022) introduce las sociedades con propósito híbrido con la denominación "sociedades de beneficio e interés común" (SBIC) en el Derecho de sociedades español. Aunque su regulación deberá esperar a su desarrollo por vía reglamentaria, la Ley 18/2022 adelanta que serán sociedades de capital que compaginarán la persecución del lucro con otros fines no lucrativos de tipo social o medioambiental y que, en consecuencia, deberán considerar los intereses de los *stakeholders* de la compañía sin dejar de lado la maximización de los intereses económicos de los socios. Ahora bien, las novedades que introduce el reconocimiento de las SBIC en el Derecho de sociedades *shareholder value* español plantea preguntas en torno a cómo el legislador societario abordará algunos problemas asociados con la figura de las sociedades con propósito híbrido: ¿son las SBIC compatibles con el modelo *shareholder value*? ¿qué mecanismos podrán asegurar el cumplimiento de sus fines no lucrativos para evitar el *greenwashing*? ¿a qué deberes deberán estar sometidos los administradores de las SBIC? Este artículo estudiará estas cuestiones desde una visión comparada. En particular, se analizarán las regulaciones de sociedades con propósito híbrido del estado de Delaware (en EE.UU.), las *public benefit corporations* (en adelante, PBC), y de Francia, las *société à mission*. Tras el estudio de las experiencias francesa y de Delaware, se expondrán los problemas que la regulación de las SBIC deberá resolver, así como algunas posibles soluciones y preguntas abiertas que quedan por resolver.

Delaware introdujo en su reconocido Derecho de sociedades *shareholder value* la figura de las sociedades con propósito híbrido como un tipo social al que denominó "PBC", y, el legislador francés, reconoció la figura de las *société à mission* como un estatus cuya adopción depende de la adaptación de los estatutos de la sociedad mercantil a los requisitos del Código de Comercio. Esta es precisamente la principal diferencia entre la PBC y la *société à mission*: uno es un tipo social y la otra es un estatus. El estudio comparado de la figura, sin embargo, revela otros puntos en su régimen jurídico en los que optan por mecanismos distintos. Este es el caso de los fines no lucrativos, el estatuto jurídico de los administradores y el control de la sociedad en la consecución de los fines no lucrativos. La regulación de Delaware y la francesa difieren en cómo el fin no lucrativo será perseguido. Las PBC deben incluir en sus estatutos uno o más fines no lucrativos concretos o "específicos" (los *specific public benefits*) en el ámbito en el que la compañía opte por concentrar su acción. En cambio, en Francia las *société à mission* persiguen dos tipos de fines no lucrativos, uno difuso (*raison d'être*) y otros más concretos (los objetivos sociales y medioambientales). Los fines concretos limitan los grupos de intereses de los *stakeholders* que deberán ser considerados por la sociedad y, por tanto, facilitan la toma de decisiones de los administradores. Los fines no lucrativos difusos parecen tener el efecto contrario.

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El estatuto jurídico de los administradores también presenta algunas diferencias entre ambas regulaciones. En Delaware los administradores de las PBC deben desempeñar su cargo conforme a la obligación de equilibrar los intereses de los socios, los *stakeholders* y el *specific public benefit* (la *balancing obligation*) y, en cambio, los administradores de las *société à mission* están sometidos a un deber genérico de gestionar la compañía conforme al interés social y teniendo en cuenta los problemas sociales y medioambientales derivados de su actividad (la *consideration clause*). Ninguna de las dos regulaciones identifica los grupos de *stakeholders* que deben considerar en su actuación ni prevén que otros *stakeholders* distintos de los socios tengan legitimación activa para hacer cumplir la *balancing obligation* o la *consideration clause* y los fines no lucrativos cuando sus decisiones sean contrarias a estos deberes o los fines.

Uno de los principales problemas asociados a las sociedades con propósito híbrido es la utilización de la figura con fines de *greenwashing*, por lo que ambas regulaciones prevén mecanismos para controlar la consecución de los fines no lucrativos. Las PBC deberán realizar (la propia sociedad o un tercero) un informe bienal a sus socios sobre la promoción de sus fines no lucrativos y de los intereses de sus *stakeholders*. Para las *société à mission*, sin embargo, el control es doble: uno anual por un comité de misión dentro de la compañía y otro bienal por un auditor independiente. Este mecanismo somete a las *société à mission* a niveles de transparencia más altos que el informe bienal de las PBC.

Finalmente, una vez señaladas las principales diferencias entre la regulación de sociedad con propósito híbrido de Delaware y Francia conviene retomar el caso español: las SBIC y su futura regulación en España. La primera pregunta que nos planteábamos es si es compatible con el modelo *shareholder value* español. El Derecho de sociedades español permite la adopción de fines distintos al lucrativo y, por tanto, no sólo es compatible el fin híbrido (lucrativo y no lucrativo) de las SBIC, sino también la consideración de los intereses de *stakeholders* distintos de los socios en la gestión de la compañía. Otra de las preguntas que señalábamos era qué mecanismos evitarían la utilización de las SBIC con fines de *greenwashing*. La Ley 18/2022 adelanta que las SBIC estarán sometidas a "mayores niveles de transparencia y rendición de cuentas", por lo que el legislativo podría optar por un mecanismo de control parecido al de la *société à mission* francesa. Ahora bien, conviene apuntar que su adopción en bloque podría solapar las competencias de los administradores de gestión de la compañía conforme a la *causa societatis* con las del comité de misión.

La tercera cuestión que apuntábamos era sobre el estatuto jurídico de los administradores de las SBIC. La Ley 18/2022 prevé que estas sociedades considerarán los intereses de terceros distintos de los socios y que perseguirán objetivos sociales y medioambientales. Es decir, al igual que sucedía en Delaware y Francia, la regulación española no parece que vaya a facilitar a los administradores de las SBIC la adopción de decisiones: de momento, el legislador no

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identifica *qué* grupos de *stakeholders* deberán considerar en su actuación ni señala *cómo* deberán ser considerados estos intereses. Además, en el Derecho de sociedades español también se presenta el problema de la falta de legitimación activa de todos los *stakeholders* (y no sólo de los socios) para instar una acción de responsabilidad contra los administradores de las SBIC cuando adopten decisiones que impacten negativamente a la sociedad. Sin embargo, frente a este problema señalamos que algunos autores identifican entre los *stakeholders* y la sociedad y sus socios una relación de principal y agente, en la que los primeros (los *stakeholders*) son el principal y los segundos (la sociedad y sus socios) son el agente.

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SUMMARY[1]

I. Introduction. II. A brief history of the Delaware and the French hybrid purpose companies. 1. Delaware's public benefit corporation. 2. The French *société à mission*. III. Comparative analysis of public benefit corporations in Delaware and *sociétés à mission* in France. 1. Company formation and status adoption. 2. Designation. 3. Not-for-profit value creation: specific public benefit, *raison d'être*, and social and environmental objectives. 4. Directors: duties, accountability, and liability. 5. Accountability: reporting requirements, the mission committee, and third-party assessment. IV. The Spanish case: The introduction of hybrid purpose companies by Law 18/2022, of the 28th of September, on the creation and growth of companies. V. Conclusion. Bibliography.

I. Introduction

In recent years, demands for companies to not only serve a profit purpose, but also a social or communal one, have increased significantly. This has led to the growing recognition that companies are responsible for the impact they have in the environment and social systems where they operate[2]. Instruments such as the European Union (EU) Directive 2022/2464 on corporate sustainability reporting have supported the view that company law is drifting away from the notion that the company should focus on embracing the interests of shareholders above all other stakeholders[3]. Indeed, many jurisdictions have started to adopt a new legal form or status of hybrid legal company that claims to balance profit-making with a not-for-profit purpose[4]. It is known as benefit corporation or hybrid purpose company. Benefit corporations are purpose-driven companies that, by nature, aim to deliver value to all stakehold-

1. This paper is part of the research project "Sostenibilidad ambiental, social y económica de la administración de justicia. Retos de la Agenda 2030 (SOST JUST 2030)" (PID2021-126145OB-I00), funded by "MCIN/AEI/10.13039/501100011033/" and "FEDER Una manera de hacer Europa"; and it is cofunded by the "Agencia Canaria de Investigación, Innovación y Sociedad de la Información de la Consejería de Universidades, Ciencia e Innovación y Cultura" and by the "Fondo Social Europeo Plus (FSE+) Programa Operativo Integrado de Canarias 2021-2027, Eje 3 Tema Prioritario 74 (85%)".

2. ABELA, Mario (2020): "Look Again: Company Law Has Changed", *European Company Law*, 5 (17), p. 183.

3. ABELA, Mario (2020): "Look Again (…)", op. cit., p. 183.

4. DEL VAL TALENS, Paula (2023): "Social Enterprises and Benefit Corporations in Spain". In: Peter, H., Vargas Vasserot, C., Alcalde Silva, J. (eds) *The International Handbook of Social Enterprise Law*, p. 807. DOI: https://doi.org/10.1007/978-3-031-14216-1_39.

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ers, including shareholders, customers, creditors, employees, local communities, and society in general[5].

"Ley 18/2022, de 28 de septiembre, de creación y crecimiento de empresas" [Law 18/2022, of the 28th of September, on the creation and growth of companies] (CCE Law) recently introduced "sociedades de beneficio e interés común" (SBIC) or hybrid companies in the shareholder-centric Spanish company law. SBIC aim to consider the interests of most stakeholders to pursue their for-profit goal as well as their social and environmental objectives. The Spanish legislator will determine in a future legal instrument the requirements that limited liability companies will have to comply with in order to be become a SBIC. The recognition of this stakeholder-friendly vehicle is the most important corporate social responsibility (CSR) development in Spanish company law in the last few years, and thus there are questions on the approach that the future SBIC regulation will adopt on certain issues: is a SBIC regulation compatible with the Spanish shareholder model? How will the regulation ensure that "greenwashing" is avoided? What duties should SBIC directors have to comply with? Should stakeholders have a say in the governance of the company? In this paper, I will focus on approaching these questions from a comparative law perspective. I will analyze two company law traditions that have successfully incorporated hybrid companies by way of different legal frameworks, namely, the United States' (US) state Delaware (public benefit corporations or PBCs) and France (*sociétés à mission*), to then lay out some of the problems that the SBIC regulation will have to address and try to provide some insights based on the Delaware and the French experiences as well as some open questions that remain to be answered.

In 2013, Delaware incorporated PBCs as a new *legal form* in its shareholder value[6] company law system[7]. As a result of interstate regulatory competition, Dela-

5. ROCK, Edward. B. (2020): "For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose", *European Corporate Governance Institute - Law Working Paper Nº. 515/2020*, p. 2. DOI: http://dx.doi.org/10.2139/ssrn.3589951.
The term "purpose-driven companies" is used in this paper to identify the companies that pursue a social or environmental purpose, not to label those that do not pursue such purpose as purposeless or value-free companies. The use of this term responds to its common usage in the literature. However, this author is aware that it could be interpreted to mean that by exclusion all companies that are not purpose-driven do not have purpose nor values. In this sense, PAZ-ARES RODRÍGUEZ, Cándido (2023): "Propósito de la empresa y 'causa societatis'", *Revista de Derecho Bancario y Bursátil*, 169.

6. Strine, for example, claims that Delaware follows a shareholder-value model. See, STRINE, Leo (2014): "Making it easier for directors to do the right thing", *Harvard Business Law Review*, 4(2). Other authors such as Stout, challenge that view. See, STOUT, Lynn. (2013): "The Shareholder Value Myth", *European Financial Review*.

7. DORFF, Michael B. (2017): "Why public benefit corporations", *Delaware Journal of Corporate Law*, 42(1), p. 42.

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ware is the state where most US companies choose to incorporate, which makes its PBC statute highly influential[8]. France introduced *sociétés à mission* in 2019. The PACTE Law[9] amended the French Commercial Code to include article L.210-10, which allows companies to adopt a *société à mission status*. Although the French have traditionally influenced Spanish company law –specially in terms of the company contract-, the first do not follow a strict shareholder model. The introduction of article L.210-10 only reinforced the already-existing idea in French company law that the interests of the stakeholders should be taken into consideration when adopting corporate decisions[10]. In this contribution, the analysis of these hybrid purpose company regulations is particularly interesting to assess the Spanish case, not only because the Spanish follow the same shareholder model as Delaware and they share similarities with French company law, but also because of how differently these two jurisdictions have approached the regulation of hybrid purpose companies.

This paper provides an overview of the Delaware and the French hybrid purpose company regulations and then focuses on the introduction of SBIC in Spanish law. First, a brief background to the Delaware and the French regulations is provided. Second, a comparative critical analysis of the PBC and the *société à mission* regulations is conducted by focusing on the main features of both regulations. Third, this contribution delves into Spanish company law and lays out some of the main issues regarding the future SBIC regulation and their possible solutions.

II. A brief history of the Delaware and the French hybrid purpose companies

1. Delaware's public benefit corporation

The notion of "benefit corporation" was introduced in the US by the Model Benefit Corporation Legislation (MBCL) that was formulated on behalf of the non-profit organization B Lab.[11] "B Corporations" were created by the organiza-

8. PLERHOPLES, Alicia E. (2023): "Social enterprises and Benefit Corporations in the United States". In: Peter, H., Vargas Vasserot, C., Alcalde Silva, J. (eds) *The International Handbook of Social Enterprise Law*, p. 905. DOI: http://dx.doi.org/10.1007/978-3-031-14216-1_43.

9. *LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises*.

10. See, article 1833 of the French Civil Code. HIEZ, David (2023): "The suitability of French Law to B Corp". In: Peter, H., Vargas Vasserot, C., Alcalde Silva, J. (eds) *The International Handbook of Social Enterprise Law*, p. 572. DOI: http://dx.doi.org/10.1007/978-3-031-14216-1_27.

11. NOWS, David, & THOMAS, Jeff (2020): "Delaware's public benefit corporation: the traditional vc-backed company's mission-driven twin", *UMKC Law Review*, 88(4), p. 876.

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tion in 2007 to provide a stakeholder-driven framework for those companies that wanted to deviate from the standard shareholder-value approach[12]. Through B Corporations, B Lab's version of "responsible capitalism" started to materialize[13]. B Corporations, however, are not a different legal company form. Companies that want to be certified as B Corporations enter into a private contractual agreement with B Lab[14] to "demonstrate high social and environmental performance", "changing their corporate governance structure to be accountable to all stakeholders", and "exhibit transparency"[15]. Although many states such as Maryland have chosen to follow the MBCL[16], others like Delaware have departed in some crucial areas.

Delaware is the leading state for company law. Over 50% of US publicly traded companies are incorporated in Delaware[17], making Delaware the most attractive choice for incorporations. Therefore, the impact that Delaware's legislation may have is not limited to the state itself, but could have effects that go beyond that. In this context, Delaware's decision to enact PBC legislation is bound to have repercussion outside the state[18]. But why would Delaware be interested in introducing PBCs when it already had a successful enough company law?

Dorff identified two intertwined reasons that Delaware may have had for passing PBC legislation. First, to provide social entrepreneurs with a company form that aligns with their goals, or in other words, to satisfy a market demand. Second, to help society in general by allowing the institutionalization of a social purpose[19]. Both purposes could be inferred from Delaware's government press releases after the bill's signing[20]. Moreover, some of the Council of the Corporation Law Section of the

12. See, https://www.bcorporation.net/en-us/movement/about-b-lab/; last visited on 10 June 2024.

13. NOWS, David, & THOMAS, Jeff (2020): "Delaware's public benefit corporation (…)", op. cit., p. 876.

14. For a detailed explanation of the process of obtaining the B Corporation certification, see MONTIEL VARGAS, Ana (2023): "B Lab and the Process of Certificating B Corps". In: Peter, H., Vargas Vasserot, C., Alcalde Silva, J. (eds) *The International Handbook of Social Enterprise Law*, p. 286-296.

15. See, https://www.bcorporation.net/en-us/certification/; last visited on 10 June 2024.

16. DORFF, Michael B. (2017): "Why public benefit corporations (…)", op. cit., p. 82.

17. BURKE, Rugger & BRAGG, Samuel P. (2014): "Sustainability in the boardroom: reconsidering fiduciary duty under revlon in the wake of public benefit corporation legislation", *Virginia Law and Business Review*, 8(1), p. 62.

18. BURKE, Rugger & BRAGG, Samuel P. (2014): "Sustainability in the boardroom (…)", op. cit., p. 62.

19. BURKE, Rugger & BRAGG, Samuel P. (2014): "Sustainability in the boardroom (…)", op. cit., p. 86-90.

20.See, https://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/; last visited on 10 June 2024.

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Delaware State Bar Association's members believed that the PBC legislation would not jeopardize Delaware's company law success, since the mere provision of another legal company form to those businesses that wanted to adopt it would not translate into significantly high costs for the state[21]. In this context, Delaware's legislature introduced in subchapter VX (sections 361 to 368) of chapter 1 of title 8 of Delaware's Code the provisions applicable to PBCs that differ from the ones imposed to the rest of Delaware's for-profit companies[22].

2. The French *société à mission*

In May 2019, the French legislature enacted the PACTE law[23]. This law redefines the concept of "corporate purpose" in French company law through three elements: i) a general obligation for companies to consider the social and environmental impact of their operations (the "consideration clause")[24]; ii) the option for companies to establish their *raison d'être*[25]; and, iii) the introduction of a new legal status, the *société à mission*, for those companies that pursue social or environmental missions and decide to include it in their articles of association[26/27].

The need to redefine the purpose of French companies can be dated back to 2017, when the consultation for the PACTE law began. At the time, the aim of the

21. DORFF, Michael B. (2017): "Why public benefit corporations (…)", op. cit., p. 89.
The Council of the Corporation Law Section of the Delaware State Bar Association is responsible for suggesting legislative proposals to Delaware's General Assembly. See, article IX of the Bylaws of the Section of Corporation Law of the Delaware State Bar Association. Available at: https://media1.dsba.org/public/Sections/CorpLaw/Bylaws%20of%20DSBA%20Corporation%20Law%20Section%20Amended%20Effective%204-15-2021%20%2805618541xCCC1C%29.pdf; last visited on 10 June 2024.

22. Section 101 of title 1 of Delaware's Code states that the Code "shall be known as the 'Delaware Code'" and "may be cited by the abbreviation 'Del. C.' preceded by the number of the title and followed by the number of the section, chapter or part in the title". This paper will follow this citation rule.

23. *LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises*.

24. Article 169 PACTE law that modifies article 1833 of the French Civil Code.

25. Article 169 PACTE law that modifies article 1835 of the French Civil Code.

26. Article 176 PACTE law that modifies title I of book II of the French Commercial Code.

27. SEGRESTIN, Blanche, HATCHUEL, Armand & LEVILLAIN, Kevin (2021): "When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose", Journal of Bussines Ethics, 171, p. 1. DOI: http://dx.doi.org/10.1007/s10551-020-04439-y.

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law was to rebuild the trust of the citizens in corporations[28]. Therefore, during the consultation process, issues such as the involvement of employees, governance, and the stakeholders, in sustainable value creation were examined[29]. The main focus, however, remained on changing the purpose of French companies from short-term to long-term profit, "thus promoting a vision of capitalism that is more respectful of the general interest and that of future generations"[30].

Before the PACTE law, the French Minister of Economy and Finance argued that the current 1804 Civil Code only considered the enterprise from the angle of the company[31]. This, in turn, created companies that were detached from the environment in which they operated. The introduction of the *société à mission*, which is translated as "company with a mission or purpose", in the PACTE law was thus motivated by this need for clarifying concepts in order to meet the objective of rebuilding the trust of the population in companies.

Article 176 I of the PACTE law (which modifies article L. 210-10 of the French Commercial Code) lays out the requirements that a company regulated under Book II of the French Commercial Code[32] must meet in order to receive the *société à mission* status. These requirements include, the introduction of a *raison d'être*, and of social and environmental objectives in the company's articles of association; the establishment of a mission committee; the report of an independent third-party body; and the registration of the *société à mission* status in the commercial and company registries.

III. Comparative analysis of public benefit corporations in Delaware and *sociétés à mission* in France

1. Company formation and status adoption

PBCs are company forms. This entails that entrepreneurs can decide to, i) organize a company as a PBC from the start by filing a certificate of incorporation in the

28. SEGRESTIN, Blanche, HATCHUEL, Armand & LEVILLAIN, Kevin (2021): "When the Law Distinguishes (…)", op. cit., p. 6.

29. GARCÍA MARTÍN, Lucía (2023): "El impacto de la Loi Pacte francesa (sobre el propósito de las sociedades mercantiles)", *La ley mercantil*, 100, p. 4-5.

30. GARCÍA MARTÍN, Lucía (2023): "El impacto de la Loi Pacte francesa (…)", op. cit., p. 7.

31. GARCÍA MARTÍN, Lucía (2023): "El impacto de la Loi Pacte francesa (…)", op. cit., p. 1.

32. Article L.210-10 of the French Commercial Code states that "companies" can adopt the *société à mission* status. ["Une société peut faire publiquement état de la qualité de société à mission lorsque les conditions suivantes sont respectées"].

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State of Delaware with a public benefit clause[33], or ii) merge a company with a PBC or, iii) opt to modify the articles of association of an already-existing company to convert it to a PBC[34]. *Sociétés à mission*, however, are not company forms but rather a status. Any company regulated under Book II of the French Commercial Code has the option of amending its articles of association to comply with the requirements set in article L. 210-10 and acquire the *société à mission* status. Of course, entrepreneurs may also choose to create a company where its articles of association are already adapted to the French Commercial Code requirements, or merge with a company that has achieved the *société à mission* status.

Indeed, both the conversion to a PBC (which is currently the most common route)[35] and the adoption of the *société à mission* status, require the modification of the company's articles of association[36]. For PBCs, the articles of association must be modified to approve the conversion to the new legal form and to include one or more public benefits[37]. In the case of the *société à mission* status, the amendment of the articles of association must cover the introduction of a *raison d'etre*, the social or environmental objectives, and the set-up of the procedures for monitoring the mission committee[38].

33. See, the certificate of incorporation for a PBC in the state of Delaware, https://corpfiles.delaware.gov/PBC_Inc.pdf; last visited on 10 June 2024. This certificate must be filed in accordance with 8 Del. C. § 102 and 8 Del. C. § 362.

34. SIMMERMAN, Amy L., GREECHER, Ryan J. & CURRIE, Brian (2022): "Converting to a Delaware Public Benefit Corporation: Lessons from Experience", Harvard Law School Forum on Corporate Governance. Available at: https://corpgov.law.harvard.edu/2022/02/18/converting-to-a-delaware-public-benefit-corporation-lessons-from-experience/; last visited on 10 June 2024.

35. SIMMERMAN, Amy L., GREECHER, Ryan J. & CURRIE, Brian (2022): "Converting to a Delaware (…)", op. cit.

36. 8 Del. C. § 262 (a) and article L.210-10 French Commercial Code.
Here, it is relevant to mention that if a company chooses to become a PBC by way of merging with an already-existing PBC (which is less common, see SIMMERMAN, Amy L., GREECHER, Ryan J. & CURRIE, Brian (2022): "Converting to a Delaware (…)", op. cit.), other requirements may be fulfilled. See, 8 Del. C. § 251 to 267. For more information, see Delaware Division of Corporations, available at: https://corp.delaware.gov/mergers09/; last visited on 10 June 2024.

37. "Once the amendment has been approved, the corporation need only file the amendment with the Office of the Secretary of State of the State of Delaware, and the conversion to a PBC is complete"; SIMMERMAN, Amy L., GREECHER, Ryan J. & CURRIE, Brian (2022): "Converting to a Delaware (…), op. cit.

38. Article L.210-10 of the French Commercial Code.

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2. Designation

The company form and status differences may also influence the designation requirements set for the French and the Delaware hybrid purpose companies. In this sense, while one regulation has a designation provision, the other one omits it completely.

In Delaware, PBCs may include the words "public benefit corporation" or the "PBC" letters in their company name[39]. Opting to include such designation may certainly help with "branding", or in other words, it may increase the chances of third parties identifying the company as a sustainable and stakeholder-friendly company[40]. In turn, this can not only fulfill the entrepreneurs' moral objectives, but it can definitely serve their pecuniary interests. Indeed, not only potential customers, but also potential investors are more likely to identify the company to invest in it. On the other hand, the French legislature opted for not including a designation requirement in the *société à mission* provisions. Companies that adopt the status will thus conserve their company name, and if applicable, their company form's respective mandatory designation[41]. The mandatory publication of the *société à mission* status in the company and commercial registries, however, may arguably provide a similar effect to the PBC designation requirement, as third parties may also identify companies with the status more easily.

3. Not-for-profit value creation: specific public benefit, *raison d'être*, and social and environmental objectives

One of the key elements surrounding these purpose-driven companies is the combination of a for-profit purpose with non-profit value creation, which may have a social or environmental character depending on the regulation. In this regard, the Delaware PBC legislation and the *société à mission* provisions in the French Commercial Code differ on how the non-profit objective will be pursued.

Delaware's PBCs are required to promote "one or more specific public benefits", which must be introduced in their articles of association[42]. PBCs' public benefits

39. 8 Del. C. § 362 (c).

40. DORFF, Michael B. (2017): "Why public benefit corporations (…)", op. cit., 102.

41. For example, in the case of *sociétés à responsabilité limitée*, article L.233-1 of the French Commercial Code states that the company name must be proceeded by the words "société à responsabilité limitée" or the initials "SARL".

42. 8 Del. C. § 362 (a).

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must have a positive impact or reduce the negative effect in the areas that the company chooses. Indeed, section 262 (b) of the Delaware Code suggests some areas where PBCs may concentrate their action[43], but it does not constrain the impact that these companies may have to certain areas. In fact, practice shows that PBCs often choose to include a specified public benefit that is rather broad. One example of this can be found in *Veeva systems*'[44] public benefit: "To provide products and services that are intended to help make the industries we serve more productive and to create high-quality employment opportunities in the communities in which we operate"[45].

In contrast, the *société à mission*'s non-profit goals can be classified into two groups, namely, a *raison d'être*, and social and environmental objectives[46]. First, the companies must establish a *raison d'être*[47] in their articles of association. The *raison d'être* is the non-profit long-term mission that companies that want to achieve the *société à mission* status must include in their articles of association[48]. There is dissent

43. 8 Del. C. § 362 (b) states the following: "Public benefit means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature".

44. *Veeva systems* amended its articles of association in 2020 to convert to the PBC form. See, *Veeva systems's* proxy statement for the special meeting to become a PBC https://www.sec.gov/Archives/edgar/data/1393052/000162828020017032/def14a2021specialmeetingpr.htm#i67d03521f64c428baacf21d3eec03404_13; last visited on 10 June 2024.

45. In *Veeva systems*' amended articles of association
https://www.sec.gov/Archives/edgar/data/1393052/000162828021013044/veevex31jun2021.htm; last visited on 10 June 2024.
Lemonade's specific public benefit also showcases this tendency towards broad objectives: "To harness novel business models, technologies and private-nonprofit partnerships to deliver insurance products where charitable giving is a core feature, for the benefit of communities and their common causes". See, Lemonade's amended articles of association https://www.sec.gov/Archives/edgar/data/1691421/000110465920082779/tm2024563d1_ex3-1.htm; last visited on 10 June 2024.

46. Article L. 210-10 1º and 2º of the French Commercial Code.

47. Although the French legislature has yet to define what the *raison d'être* entails, organizations such as *L'Observatoire de la Responsabilité Sociétale des Enterprises* (ORSE) have attempted to define it as "an expression of the company's societal purpose, which will be both a guide and a safeguard for the decisions of the board of directors"; Guide ORSE - C3D (2020): "Loi Pacte & Raison d'être: et si on passait à la pratique?", Chapitre 2, p. 19. Available at: https://www.orse.org/nos-travaux/guide-orse-c3d-loi-pacte-raison-detre-et-si-on-passait-a-la-pratique; last visited on 10 June 2024.

48. FLEISCHER, Holger (2021): "Corporate Purpose: A Management Concept and its Implications for Company Law", *European Company and Financial Law Review*, 18 (2), p. 11.DOI: http://dx.doi.org/10.1515/ecfr-2021-0008 .
SEGRESTIN, Blanche, HATCHUEL, Armand & LEVILLAIN, Kevin (2021): "When the Law Distinguishes (…)", op. cit., p. 11.

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among scholars, however, on whether the *raison d'être* is the purpose of the company or only a guideline for directors when adopting the most important decisions[49].

Similarly to its PBC counterpart, companies usually approach their *raison d'être* as being broad and vague. Examples include *Danone*'s[50] *raison d'être*, "bringing health through food to as many people as possible"[51], and *Sigma Informatique*'s[52] mission to "contribute to a digital, ethical and responsible world that takes care of women and men in the exercise of their profession, and with respect for the planet"[53]. One reason for this may be that the French legislature decided to additionally require companies to establish "one or more social and environmental objectives"[54] to which they must commit to in their operations. These goals are meant to be integrated in the company's usual business activities, for instance, by way of adopting a social mission that will have an impact on the employees' working conditions[55]. By setting up the social and environmental objectives, the company makes the voluntary commitment to fulfil them in its operations. This, in turn, entails that *société à mission* directors are now contractually required to not constantly meet the profit maximization demands of shareholders when that may hinder the company's social and environmental goals[56]. Unlike the *raison d'être,* these objectives are expected to be more specific since they are restricted to either having a social or environmental character. Nevertheless, these areas are still quite extensive, so companies are likely to set objectives that are rather broad. *Danone*'s social and environmental objectives, for example, in-

49. FLEISCHER, Holger (2021): "Corporate Purpose (…)", op. cit., p. 10-11.

50. *Danone* adopted the *société à mission* status in July 2020. See, https://www.danone.com/about-danone/sustainable-value-creation/danone-societe-a-mission.html; last visited on 10 June 2024.

51. 2022 *Danone*'s Mission Committee report, April 5th 2023, p. 4. Available at: https://www.danone.com/content/dam/corp/global/danonecom/investors/en-all-publications/2023/shareholdersmeetings/danonecommitteereport2022eng.pdf; last visited on 10 June 2024.

52. *Sigma Informatique* adopted the *société à mission* status in June 2023. See, https://www.sigma.fr/groupe/valeurs-vision/#:~:text=SIGMA%20traduit%20son%20engagement%20au,le%20respect%20de%20la%20planète%20»; last visited on 10 June 2024.

53. "Contribuer à un monde numérique, éthique et responsable qui prend soin des femmes et des hommes dans l'exercice de leur métier & dans le respect de la planète".

54. Article L. 210-10 2º of the French Commercial Code.

55. ROHFRITSCH, Pierre (2019): "L'entreprise a mission dans le Projet de Loi Pacte. L'entreprise à mission: réflexions sur le projet de loi PACTE. Actes de la conférence de recherche du 2 mai 2019", France Stratégie, p. 14.

56. SEGRESTIN, Blanche, HATCHUEL, Armand & LEVILLAIN, Kevin (2021): "When the Law Distinguishes (…)", op. cit.,, p. 9.

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clude i) "impact people's health locally; ii) preserve and renew the planet's resources; iii) entrust *Danone*'s people to create new futures; and iv) foster inclusive growth"[57].

Therefore, while Delaware opted for imposing the introduction of one or more specific public benefits in the PBCs' articles of association, the French legislature combined a general mission (the *raison d'être)* with one or more specific social and environmental objectives. Having at least one mandatory *specific* objective allows for less vagueness and thus more guidance for *société à mission* and PBC directors, since courts can more easily distinguish when a conduct is beyond the agreed purpose[58]. Moreover, companies that include such objectives are required to only consider the relevant stakeholder groups affected by those specific missions, which is less likely to result in an excessive increase of the costs for adopting a corporate decision[59]. On the other hand, opting for also introducing a mandatory general purpose may come with several perks. Indeed, making the inclusion of a *raison d'être* mandatory for *sociétés à mission* is said to require companies "to create benefit for society *generally*"[60], and it may serve as a reminder on how they should be aware of the impact that their operations have on third parties[61]. However, one could argue that general purposes are unrealistic. They are too broad to actually have an effect in the company's day-to-day operations, so it seems pointless to include it in the company's articles of association. Finally, it is important to note that the mere discussion and establishment of these non-profit missions is arguably going to promote sustainability or social dialogues within the company, which may result in the long-term implementation of other CSR corporate governance policies.

As stated above, although unlike PBCs, *société à mission* companies have both a specific and a general mission, in practice there is a generalized tendency towards the introduction of rather broad objectives. The use of diffuse goals may allow companies -and their directors- to have enough flexibility to perhaps make a bigger positive impact in several areas depending on the interest of the company at the time. These types of missions, however, are likely to contribute to directors' lack of accountability, not only because of the increased directors' leeway in adopting decisions, but

57. 2022 *Danone*'s Mission Committee report, April 5th 2023, p. 4. https://www.danone.com/content/dam/corp/global/danonecom/investors/en-all-publications/2023/shareholdersmeetings/danonecommitteereport2022eng.pdf ; last visited on 10 June 2024.

58. MURRAY, John (2014): "Social enterprise innovation: delaware's public benefit corporation law", *Harvard Business Law Review*, 4(2), p. 353.

59. MURRAY, John (2014): "Social enterprise innovation (…)", op. cit., p. 353-354.

60. MURRAY, John (2014): "Social enterprise innovation (…)", op. cit., p. 353.

61. MURRAY, John (2014): "Social enterprise innovation (…)", op. cit., p. 353.

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also because of the absence of a concrete metric that could measure some of these goals[62]. Indeed, director accountability is one of the main challenges in stakeholder governance, and neither the French nor the Delaware regulations has addressed it, thus increasing the uncertainty surrounding the adoption of the PBC form or the *société à mission* status.

4. Directors: duties, accountability, and liability

4.1. Directors' duties: the "balancing obligation" and the "consideration clause"

PBCs must be managed "in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation"[63]. The statute replaces the fiduciary duties applicable to the boards of traditional for-profit Delaware companies with these three new duties. The board still owes a duty of loyalty and care to the company's shareholders[64], but it must also consider the interests of the persons materially affected by the company's operations as well as the company's public benefit(s)[65]. These provisions drift away from the shareholder-wealth maximization model by imposing directors the duty to equally balance these three groups of interests in the management of the company[66].

62. BELINFANTI, Tamara & STOUT, Lynn (2017): "Contested Visions: The Value of Systems Theory for Corporate Law", *University of Pennsylvania Law Review*, Cornell Legal Studies Research Paper Nº. 17-17, pp. 14-15.
Despite this, there is now research on corporate purpose that claims to measure it by collecting "the aggregated beliefs of employees". This metric is based on the idea that if employees have reason to believe that their work has a meaning beyond profits, the company is doing something to promote a non-profit purpose. See, GARTENBERG, Claudine (2023): "Understanding the relationship between corporate purpose and profits", The ECGI blog. Available at: https://www.ecgi.global/blog/understanding-relationship-between-corporate-purpose-and-profits?mc_cid=b1602012fd&mc_eid=5e19f8545c; last visited on 10 June 2024.

63. 8 Del. C. § 362 (a) and 365 (a).

64. In Delaware, there is no specific provision imposing directors a duty of loyalty nor care towards the company's shareholders, but case law has generally accepted its existence. One example of this can be found in LOFT, INC., v. GUTH et al, where the Court of Chancery of Delaware established that a director must act "in the good faith belief that her actions are in the corporation's best interest".

65. NOWS, David & THOMAS, Jeff (2020): "Delaware's public benefit corporation (…)", op. cit., p. 879.

66. ALEXANDER, Frederick (2016): "Delaware Public Benefit Corporations: Widening the Fiduciary Aperture to Broaden the Corporate Mission", *Journal of Applied Corporate Finance*, 28: p. 70.
DOI: http://dx.doi.org/10.1111/jacf.12177.

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Under Delaware law, directors may consider interests beyond the shareholders under the business judgment rule[67]. In this sense, the current academic debate is polarized between those who claim that directors are required to ultimately pursue shareholder value creation[68], and those who seek to prove that the first statement is now outdated and thus should be replaced by director pursuit of other objectives besides the maximization of shareholder profit[69]. Practice shows, however, that some major US-incorporated companies opt to follow the first approach, namely, shareholder-value creation. *Starbucks*[70] is an example of a for-profit "traditional" company that has pursued social objectives and has not been met with challenges under the business judgment rule because of the recognized financial value that may come with pursuing social missions[71]. On the other hand, the business judgment rule on PBC boards will only apply to disinterested and informed balancing decisions[72]. Indeed, PBC directors *must* consider the public benefit and the interests of the groups of stakeholders concerned in every corporate decision they make, regardless of whether the result of such decision may or may not benefit shareholder profit or any other type of objective.

In France, however, the duties of *société à mission* directors have not been specifically codified. Despite this, *société à mission* directors must comply with the "consideration clause", which states that companies must be managed in the "corporate interest, taking into account the social and environmental issues related to -their- activity"[73]. Indeed, since all French directors must meet this clause, unlike in Delaware, the legislator did not impose a unique duty for *société à mission* directors.

Although the "balancing obligation" and the "consideration clause" are not identical in terms of wording, they may produce similar effects in practice. Both impose directors the duty to take into account the interests of the company's stakeholders, yet the "balancing obligation" is more concrete and is bound to cover more groups

67. Delaware General Corporation Law does not impose any constraints to directors in this regard. See, 8 Del. C. c. 1 subchapter IV.

68. ALEXANDER, Frederick (2016): "Delaware Public Benefit Corporations (…)", op. cit., p. 70.

69. STOUT, Lynn (2012): "The shareholder value myth (…)", op. cit., p. 6-7.

70. See, *Starbucks* current social missions, available at: https://www.starbucks.com/responsibility/people/; last visited on 10 June 2024.

71. EL KHATIB, Kennan (2015): "The harms of benefit corporation", *American University Law Review*, 65(1), p. 175.

72. 8 Del. C. § 365 (b).

73. Article 1833 II of the French Civil Code.

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of stakeholder interests than the "consideration clause", which is limited to social and environmental matters. However, neither the French nor the Delaware regulations identify the stakeholders, determine how they should be identified, or how their interests should be weighted. This is bound to hinder the management function that directors must perform, and in turn make the regulations less efficient and less attractive for those interested in adopting it.

4.2. Director's liability

Under general French company law, shareholders of a company are allowed to bring a derivative action against the directors of the company[74]. Generally, these derivative suits allow -minority- shareholders to bring a claim on behalf of the company against, for example, the directors or the majority shareholders[75]. S*ociété à mission* shareholders may launch such action, not only when they believe that the "consideration clause" is not being met by the board, but also when some of the corporate decisions are against the company's *raison d'être,* or its social and environmental objectives, which are in the company's articles of association and thus bind directors. Similarly, PBC shareholders are allowed to bring a derivative suit against directors when they fail to meet the "balancing obligation"[76]. Unlike the French Commercial Code, the Delaware Code does include a specific provision that deals with derivative actions in these hybrid companies.

The main disadvantage to these derivative actions may be their standing scope. Only shareholders can bring derivative actions against *société à mission* and PBC directors, and thus keep them accountable. The rest of stakeholders, which are meant to be considered by both Delaware and French hybrid companies in their operations, are left out. In this sense, if directors can only be held accountable by a group of stakeholders, they are likely to prioritize their interests.

74. Article 1843-5 of the French Civil Code.

75. DORRESTEIJN, Adriaan. F. M. & OLAERTS, Mieke (2022): *European corporate law* (Fourth, Ser. European company law series, volume 5), Kluwer Law International B.V, p. 181.

76. 8 Del. C. § 367: "Any action to enforce the balancing requirement of § 365(a) of this title, including any individual, derivative or any other type of action, may not be brought unless the plaintiffs in such action own individually or collectively, as of the date of instituting such action, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of the corporation with a market value of at least $2,000,000 as of the date the action is instituted".

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The breach of the "balancing obligation" by Delaware PBC directors triggers their liability[77]. This "balancing obligation", however, has been deemed by some as a negative feature of the statute. These authors argue that under the "balancing obligation", it is easy for directors to justify their decisions: almost anything could be justified as being in the interest of the stakeholders and could therefore be protected by the business judgment rule[78]. In turn, this would create a high threshold for directors' liability. The opposite can also be argued. Some authors claim that by introducing this duty to weigh several sets of interests, the statute has expanded director's liability[79]. According to this view, PBC directors are not only liable for making corporate decisions that go against the interests of shareholders, but also when those are not in the best interest of the employees or the environment, for example. This potential issue is, nevertheless, addressed by the Delaware Code in section 365 (c), which allows PBCs to introduce a section 102 (b) (7) provision in the company's articles of association that eliminates the liability of directors for disinterestedly failing to make balancing decisions under section 362 (a)[80].

Directors of companies with the *société à mission* status must consider its *raison d'être,* and its social and environmental objectives[81]. If one decision is against the company's missions, the director's liability is at risk. Such violation could give rise to civil liability[82], and could even result in the dismissal of the director concerned[83]. Unlike Delaware's codified "balancing obligation", the *raison d'être* and the social and environmental objectives must be set by the companies, which –as stated above- may bring even more uncertainty in terms of director liability when adopting decisions related to the non-profit missions, especially considering the generalized use of vague missions.

77. 8 Del. C. § 365 (a).

78. DULAC, Matthew J. (2015): "Sustaining the sustainable corporation: benefit corporations and the viability of going public", *Georgetown Law Journal*, 104(1), p. 184.

79. DORFF, Michael B. (2017): "Why public benefit corporations (…)", op. cit., p. 97-98.

80. ALEXANDER, Frederick (2016): "Delaware Public Benefit Corporations (…)", op. cit., p. 71-72. DORFF, Michael B. (2017): "Why public benefit corporations (…)", op. cit., p. 98.

81. Article L. 210-10 1º and 2º of French Commercial Code.

82. Article 1850 II of the French Civil Code and article L. 225-251 I of the French Commercial Code.

83. FLEISCHER, Holger (2021): "Corporate Purpose (…)", op. cit., p. 11.

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5. Accountability: reporting requirements, the mission committee, and third-party assessment

In regard to holding PBCs and companies with the *société à mission* status accountable to their non-profit missions, the Delaware and French regulations make use of different mechanisms. Delaware's legislature opted for introducing reporting requirements. As such, PBCs are required to biennially report to shareholders on the "promotion of the public benefit (…) and of the best interests of those materially affected by the corporation's conduct"[84]. This report can be made by the company itself or by a third-party.

In France, the legislature opted for a dual approach to accountability. Companies with the *société à mission* status are required report on their progress on their social and environmental objectives, i) by means of an intra-company assessment through a "mission committee", and ii) a third-party assessment[85]. The "mission committee" will be formed by at least one employee, and it will be dedicated to monitoring the company's progress on fulfilling the social and environmental goals, which will be reflected on its annual report[86]. This committee is meant to be able to act as a counterpower to the board, and not as a mere "compliance" or "box-ticking" organ[87]. As such, the committee may ask for information within the company, or even reach for outside investigations to fulfill its monitoring objective[88]. The company's progress towards its social and environmental goals is not only monitored by the mission committee, but it must also be verified by an independent third-party body accredited

84. 8 Del. C. § 366 (b).

85. Article L. 210-10 3º and 4º of the French Commercial Code.
The third-party body must be accredited by the French Accreditation Committee (*Comité français d'accréditation*), and unless stipulated otherwise in the company's articles of association, it will be appointed by the board for a maximum of six years (article R.210-21 I and II of the French Commercial Code). For example, in the case of *Danone*, two firms that perform audit services have been chosen to perform the role of the "independent third party", namely, *PriceWaterhouseCooper*s (PwC) and *Mazars*, the latter having replaced the first in 2022. See, 2022 *Danone*'s Mission Committee Report, 7. Available at: https://www.danone.com/content/dam/corp/global/danonecom/investors/en-all-publications/2023/shareholdersmeetings/danonecommitteereport2022eng.pdf; last visited on 10 June 2024).

86. Article L.210-10 3º of the French Commercial Code.
Companies that have over fifty employees can choose to replace the mission committee with a mission coordinator ("référent de mission").

87. LEVILLAIN, Kevin, HATCHUEL, Armand, LÉVÊQUE, Jérémy & SEGRESTIN, Blanche (2022): "The emergence of multipolar corporate governance: the case of Danone and the French Société à Mission", In: *EURAM 2022-Leading the digital transformation*, p. 26.

88. LEVILLAIN, Kevin, HATCHUEL, Armand, LÉVÊQUE, Jérémy, & SEGRESTIN, Blanche (2022): "The emergence (…)", op. cit., p. 26.

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by a public organ[89]. At least every two years[90], the third-party body will analyze the company's fulfillment of the objectives set in its articles of association, by conducting its own investigations and consulting the mission committee's annual report[91]. Therefore, while Delaware leaves to PBCs whether they would like to produce the report themselves or ask a third-party to do it, France imposes both a private and independent-made report. *Sociétés à mission* are, in addition, required to go through the reporting process annually, yet PBCs must inform biannually on their progress.

Delaware's PBC reporting requirements are meant to be less onerous for companies, provide them with more flexibility, and favor long-term over short-term corporate goals. However, this may make companies less accountable to their non-profit missions since they are not being checked on their progress as frequently. This problem is not likely to arise in *sociétés à mission*, which are required to stick to a more onerous double-monitoring mechanism that makes them more transparent towards their stakeholders. Delaware's reporting simplicity is thus at the expense of stakeholder transparency.

Where the independent organ determines that the company with the *société à mission* status is not fulfilling the social and environmental goals set in its articles of association, the company may be sanctioned to remove the status[92]. The decision to impose such sanction will depend on what the third-party assessment determines, which will be not only based on its private investigations, but also on the mission committee's report. In this sense, the mission committee can exert influence over the company itself. Delaware's reporting requirements, on the other hand, do appear to be similar to a compliance mechanism, since the company merely checks on the progress of its non-profit missions and reflects it on the report.

89. LEVILLAIN, Kevin, HATCHUEL, Armand, LÉVÊQUE, Jérémy & SEGRESTIN, Blanche (2022): "The emergence (…)", op. cit., p. 19.

90. Article R.210-21 II of the French Commercial Code.

91. LEVILLAIN, Kevin, HATCHUEL, Armand, LÉVÊQUE, Jérémy & SEGRESTIN, Blanche (2022): "The emergence (…)", op. cit., p. 11; article R.210-21 III of the French Commercial Code.

92. Article L.210-11 French Commercial Code.
LEVILLAIN, Kevin, HATCHUEL, Armand, LÉVÊQUE, Jérémy & SEGRESTIN, Blanche (2022): "The emergence (…)", op. cit., p. 12.

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IV. The Spanish case: The introduction of hybrid purpose companies by Law 18/2022, of the 28th of September, on the creation and growth of companies

Most legal scholars agree on the fact that Spanish company law follows a shareholder value maximization model[93]. Spanish limited liability companies must be managed in the interest of the shareholders, which is argued to be a consequence of the traditional for-profit *causa societatis*[94]. As a result of the influence exerted by French law, the *causa societatis* is deemed as one of the three essential elements of a contract under Spanish Contract law[95]. In the company contract, the *causa societatis* is considered the common aim or goal of the shareholders, which is usually to create profit and distribute it among themselves[96]. From this it follows that if the *causa societatis* is to create value for the company shareholders, the company must be managed in the way that best fulfills said cause, that is, by putting the shareholders' interests first when adopting corporate decisions[97].

Despite following a shareholder value model, Spain is not alien to the CSR debate. The idea that companies should take responsibility for the negative impact that their activities have has reached the Spanish legislature, which recently introduced hybrid companies or SBIC in the CCE law[98]. According to the tenth additional

93. See, MEGÍAS LÓPEZ, Javier (2017): "La creación de valor tolerante: un modelo de compatibilidad jurídica entre interés social y responsabilidad social corporativa". In: Rodríguez Artigas, F., Esteban Velasco, G. (eds) *Estudios sobre órganos de las sociedades de capital*, p. 579-585.

94. PAZ-ARES RODRÍGUEZ, Cándido (2023): "Propósito de la empresa (…)", op. cit.
See, RDGSJFP, 17 December 2020 [JUR\2021\5839].

95. Article 1261.3 of the Spanish Civil Code.

96. Article 116 I of the Spanish Commercial Code and article 1665 of the Spanish Civil Code.

97. PAZ-ARES RODRÍGUEZ, Cándido (2023): "Propósito de la empresa (…)", op. cit.

98. "Se reconoce la figura de las Sociedades de Beneficio e Interés Común, como aquellas sociedades de capital que, voluntariamente, decidan recoger en sus estatutos: – Su compromiso con la generación explícita de impacto positivo a nivel social y medioambiental a través de su actividad; – Su sometimiento a mayores niveles de transparencia y rendición de cuentas en el desempeño de los mencionados objetivos sociales y medioambientales, y la toma en consideración de los grupos de interés relevantes en sus decisiones; – Mediante desarrollo reglamentario se contemplarán los criterios y la metodología de validación de esta nueva figura empresarial, que incluirá una verificación del desempeño de la sociedad, quedando sujetos tanto los criterios como la metodología a estándares de máxima exigencia" [The figure of Benefit and Common Interest Companies is recognized as those limited liability companies that, voluntarily, decide to include in their articles of association: –Their commitment to the explicit generation of positive social and environmental impact through their activity;– Their submission to higher levels of transparency and accountability in the pursuit of the aforementioned social and environmental objectives, and the consideration of the relevant

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provision of the CCE law, all limited liability companies[99] are eligible to amend[100] or include[101] in their articles of association the requirements to achieve the SBIC "status"[102]. Such requirements will be laid out in another legal instrument that is yet to be enacted[103]. SBIC, similarly to *sociétés à mission*, pursue for-profit value creation as well as other non-profit social or environmental objectives[104]. These companies will thus drift away from the liberal governance model that Spanish limited liability companies usually opt for, to adopt a governance model that balances both environmental or societal interests and shareholder value maximization.

The introduction of SBIC in the Spanish shareholder model, however, may lead to at least one preliminary question: is the social governance model that SBIC follow compatible with Spanish company law? The answer to this question might be apparent after the analysis of Delaware's PBCs above, especially for those familiar with the adoption of constituency statutes by some US states that have been traditionally considered as having a shareholder-centric company law[105]. Nevertheless, for the purpose of this contribution, I will elaborate briefly on the compatibility of the future SBIC regulation with the current Spanish company law system. In Spanish company law, the *causa societatis* is usually to create profit, but nothing prevents shareholders

stakeholders in their decisions; – The criteria and methodology for the validation of this new business figure, which will include a verification of the company's performance, will be contemplated by means of regulatory development, and both the criteria and the methodology will be subject to the most demanding standards] (Tenth additional provision of the CCE law).

99. Pursuant to article 1 (1) of the Spanish Companies Act, these are the "sociedad de responsabilidad limitada", the "sociedad anónima" and the "sociedad comanditaria por acciones".

100. In case of an already-formed limited liability company, more than half of the shares with the right to vote must vote in favor of the adoption of the requirements to achieve the SBIC "status". See, articles 199 (a) of the Spanish Companies Act (for "sociedades de responsabilidad limitada") and 201 (1) (for "sociedades anónimas").

101. That is, when a newly-formed company has its articles of association adapted to the requirements to become an SBIC.

102. Because of the clear similarities between the French *société à mission* regulation and the SBIC in this regard, for the purpose of this paper SBIC will be referred to as a "status" that Spanish limited liability companies may decide to adopt.

103. Some legal scholars, however, argue that it would be more suitable to amend the Spanish Companies Act to introduce SBIC instead of regulating them in another legal instrument. See, GONZÁLEZ SÁNCHEZ, Sara (2022): "La sociedad de beneficio e interés común en la Ley 18/2022 y su regulación en el Derecho comparado", *Revista de Derecho de Sociedades*, nº 66, p. 237.

104. See, the tenth additional provision of the CCE law.

105. As stated above, the idea that the US follows a shareholder primacy model is contested by some commentators. See, STOUT, Lynn (2012): "The shareholder value myth (…)", op. cit.

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from adopting and pursuing a non-profit goal[106]. The "Dirección General de Seguridad Jurídica y Fé Pública" (DGSJFP)[107] has consistently claimed that limited liability companies are allowed to pursue non-profit objectives[108], and even courts have argued that profit goals *shall prevail* over other *causa societatis*[109]. This idea is further confirmed by the lack of a mandatory provision that imposes the creation of shareholder profit to limited liability companies. Therefore, the *causa societatis* of hybrid companies does not go against any existing rule or judicial precedent[110]: not only do SBIC pursue profit goals, but even if they only pursued social or environmental goals, it would be in line with Spanish company law. If the *causa societatis* changes, however, so must change the interests that are considered when managing the company to fulfill that cause. The interests of the shareholders alone no longer serve the *causa societatis* of the SBIC and thus the interests of other stakeholders need to be considered[111]. This does not mean that the interests of the shareholders will be ignored, but rather that other interests will be at the same level. From this it follows that the inclusion of the interests of stakeholders in the governance of the company is necessary in order to fulfill the non-profit common goal that the SBIC shareholders agreed to, and therefore there is no reason for hybrid companies to be incompatible with Spanish company law[112].

The tenth additional provision of the CCE law lays out two features that the SBIC regulation will likely touch on: transparency and accountability. SBIC will be subject to strict requirements to ensure that the social and environmental objectives set in its articles of association are fulfilled and thus "greenwashing" is avoided. Given the similarities between the French and the Spanish company law systems and the focus on transparency and accountability in the CCE law –which are two of the most relevant features in the *société à mission* regulation-, Spanish legal scholars foresee that the legislature will opt to introduce some of the mechanisms that the French includ-

106. DEL VAL TALENS, Paula (2023): "Social Enterprises (…)", op. cit., p. 817.

107. The "Dirección General de Seguridad Jurídica y Fé Pública" (DGSJFP) is an organ dependent on the Spanish Ministry of Justice that oversees certain notarial issues as well as those related to the Spanish commercial and civil registries.

108. RDGSJFP 17 December 2020, IV; 11 April 2016, IV; 20 January 2015, III.

109. See, STS 29 November 2007 (RJ: 1229\2007).

110. DEL VAL TALENS, Paula (2023): "Social Enterprises (…)", op. cit., p. 818.

111. See, the tenth additional provision of the CCE law.

112. PAZ-ARES RODRÍGUEZ, Cándido (2023): "Propósito de la empresa (…)", op. cit.

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ed in the PACTE law[113]. A mission committee in a SBIC would control the progress on its social and environmental objectives. The board of directors, however, is already in charge of managing the company in the way that best fulfills the *causa societatis*, which in a SBIC would cover both the for-profit and the non-profit goals[114]. Adding another corporate organ to control the *causa societatis* would thus be redundant and it would raise costs for companies that decide to adopt the SBIC "status"[115]. But the mission committee is not the only accountability mechanism that may be attractive to SBIC. The progress towards the *société à mission* social and environmental objectives is also verified by an independent third-party body, which imposes an even higher threshold for company accountability. This has been praised by some Spanish legal scholars, which also claim that the loss of the status if the *sociétés à mission* do not comply with the requirements set in the French Commercial Code, could be an interesting addition to the future SBIC regulation[116]. Indeed, the French accountability requirements impose a high level of stakeholder transparency and the double-monitoring mechanism avoids the use of the status for greenwashing purposes, which are two features that could make the SBIC regulation more efficient.

The third requirement that the tenth additional provision of the CCE law lays out is the consideration of the interests of the relevant stakeholders when adopting corporate decisions in a SBIC[117]. This raises questions on, for example, directors' duties and their enforcement. As in the PBC and *société à mission* cases above, the Spanish SBIC will pursue social and environmental objectives that are likely to remain vague. This vagueness may thus allow for too much director discretion, which could jeopardize their accountability. SBIC directors are expected to consider the interests of multiple groups of stakeholders instead of focusing on maximizing shareholder value, which is not only how companies have been traditionally managed in Spain[118] but they are the only group of interests that offers a particularly transparent metric to measure their fulfillment (for example, share price)[119]. Here, the legislator is more than likely to mimic the Delaware PBC regulation and thus opt to restrict the duty

113. GONZÁLEZ SÁNCHEZ, Sara (2022): "La sociedad de beneficio (…)", op. cit., p. 254.

114. See, article 209 of the Spanish Companies Act.

115. GONZÁLEZ SÁNCHEZ, Sara (2022): "La sociedad de beneficio (…)", op. cit., p. 255.

116. GONZÁLEZ SÁNCHEZ, Sara (2022): "La sociedad de beneficio (…)", op. cit., p. 255.

117. See, the tenth additional provision of the CCE law.

118. PAZ-ARES RODRÍGUEZ, Cándido (2023): "Propósito de la empresa (…)", op. cit.

119. FISCH, Jill E. & SOLOMON, Steven D. (2020): "Should Corporations Have a Purpose?", *Tex. L. Rev.*, 99, p. 1320. DOI: http://dx.doi.org/10.2139/ssrn.3561164

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to consider the stakeholders' interests to SBIC directors rather than to include all limited liability company directors. But stakeholder governance comes with other problems such as the identification of some of the stakeholders or how to weigh their interests. A prominent example of this is "the environment": what will be considered "the environment"? Will it be the places where the company operates, or will it cover more than that? Who will determine what the interests of the environment are? Will those interests have representation in the company? And what metric will be used to measure whether the environment's interests have been considered? The Spanish legislator will be confronted by these issues and will have to decide whether to address them in the SBIC regulation or whether to –like the Delaware and the French legislators- leave it to the companies to resolve.

Directors' duties are only one of the concerns for the SBIC regulation. Indeed, similarly to Delaware and France, in Spain the shareholders –and in some circumstances, the creditors-[120] are the only stakeholders that have standing to bring a derivative action against the directors when their corporate decisions negatively impact the company[121]. As a result, if SBIC directors fail to pursue the company's social and environmental objectives, most stakeholders will not have standing to bring a ag against the directors and thus their interests are bound to not be considered equally when managing the company. In this sense, certain authors claim to have identified a new principal-agent relationship between the stakeholders and the company and its shareholders, where the first are the principals and the second are the agents[122]. The principal-agent theory is based on the principal delegating control over decision-making to the agent while still monitoring the agent's performance himself[123]. The problem lies in trying to prevent the agent from acting in its own interest by avoiding information asymmetries and reducing monitoring costs[124]. In this new principal-agent relationship, there also are information asymmetries and monitoring

120. Article 240 of the Spanish Companies Act.

121. Articles 238 (1) and 239 (1) of the Spanish Companies Act state that only if the shareholder's meeting to decide whether an action against the directors should be brought by the company is not convened, are the shareholders allowed to bring a derivative action against them on their own.

122. KEMP, Bastiaan (2023): "The future role of the general meeting". In: Birkmose, H.S., Neville, M., Engsig Sørensen, K. (eds) *Instruments of EU corporate governance*, p. 229.

123. ARMOUR, John, HANSMANN, Henry & KRAAKMAN, Reinier (2017): "Agency problems and legal strategies". In: *The anatomy of corporate law: a comparative and functional approach*, 3, p. 29. DOI: http://dx.doi.org/10.1093/acprof:oso/9780198739630.003.0002

124. ARMOUR, John, HANSMANN, Henry & KRAAKMAN, Reinier (2017): "Agency problems (…)", op. cit., p. 29.

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costs, but they are particularly high[125]. The fact that the stakeholders are very diverse and that most of them are not easily identifiable makes monitoring the agents challenging, which will therefore lead to more control being granted to the agents[126]. To reduce these costs, these authors suggest improving information disclosure to the company stakeholders by setting up meetings between both parties or informing on the effects that corporate decisions have on the stakeholders[127]. However, one could argue that this solution is bound to lead to the starting point, that is, stakeholder identification: who or whom is the company supposed to inform? Would it be beneficial to name a representative for each stakeholder group? If so, who should be in charge of such task?

The analysis above shows that the future SBIC regulation will be compatible with Spanish company law though its text will have to overcome some hurdles, namely, directors duties, but also –to name a few- stakeholders' rights or the duty of good faith of the shareholders. Despite this, the SBIC regulation might still challenge some of the views that have traditionally prevailed among company law scholars. As such, SBIC are the first indication of stakeholder governance in Spanish company law, and thus it would not be unusual to find that debates that seemed to be settled in literature, are rekindled. It could be argued that the introduction of SBIC should lead to a shift in Spanish company law towards a stakeholder model, but that is not the point that this paper is trying to make. The point is that the incorporation of responsible capitalism in company law is now a reality, yet how each jurisdiction will achieve that reality has to be aligned to *their* understanding of companies[128]. Indeed, perhaps the focus should not be on shareholder or stakeholder value but rather on the promotion of CSR principles through the existing model that each jurisdiction follows. The introduction of hybrid companies is an example of this, but that is not the only way in which this can be achieved. If shareholders are the main force behind Spanish companies, maybe efforts should be made to promote institutional investors or shareholder activism, instead of making a huge change to a stakeholder model that is definitely not a "one size fits all" solution.

125. KEMP, Bastiaan (2023): "The future role (…)", op. cit., p. 230.

126. KEMP, Bastiaan (2023): "The future role (…)", op. cit., p. 230.

127. KEMP, Bastiaan (2023): "The future role (…)", op. cit., p. 230.

128. See, PUCHNIAK, Dan W. (2022): "No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose", *RED*, 4(1), p. 14.

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V. Conclusion

At the start of this paper, the question was raised how the future SBIC regulation will approach certain stakeholder governance issues that usually come with hybrid purpose companies: directors' duties, stakeholder transparency, accountability, etc. To tackle these questions, two jurisdictions that have successfully introduced hybrid purpose companies were analyzed: Delaware and France. In Delaware, hybrid purpose companies were introduced as a *legal form* under the name "public benefit corporation", whereas in France, they were introduced as a company *status* under the name "société à mission". After the comparative analysis of the two regulations, several ideas about the answer can be outlined.

First, although PBCs and *sociétés à mission* regulations dissent in some crucial aspects such as the legal form and status differences and their accountability requirements, they share potential weaknesses. Indeed, both regulations decided not to address –and thus leave to the hybrid purpose companies to resolve- two key stakeholder governance issues related to directors' duties and their enforcement. The French and the Delaware regulations impose directors the duty to consider the interests of the stakeholders, yet they fail to come up with a solution to the problems of stakeholder identification, how to weigh their interests, or how to measure their fulfilment. As a result, director discretion increases and therefore it is more difficult to keep them accountable. The problem of director accountability, however, is only further aggravated by the lack of a mechanism that allows *all* relevant stakeholders –and not only shareholders- to keep them accountable (for example, by means of a derivative action). Given that hybrid purpose company directors must consider the interests of the stakeholders when adopting corporate decisions, I would argue that allowing shareholders alone to enforce directors' duties is clearly inconsistent with the stakeholderism-adjacent model that these companies follow.

The Spanish SBIC regulation has the opportunity to address these issues. It is still questionable, however, whether some of these problems can be resolved, or even if they *should* be resolved. For example, establishing a system to identify all stakeholders and their interests would not only be time consuming for the company at first, but it would also require a strong commitment to periodically check on these stakeholders and where their interests stand, and even identify new potential stakeholder groups. And even if such commitment is fulfilled, it is arguable whether the high costs that the company would have to incur in would be worth it.

Nevertheless, the comparative analysis of the Delaware and French hybrid purpose company regulations also revealed some features that could be included in the SBIC regulation. The Spanish legislator placed emphasis on the fact that SBIC will

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have to comply with transparency and accountability requirements, and this contribution revealed that a mere compliance mechanism is perhaps not the most efficient to fulfill that function. Indeed, the French regulation imposes upon *sociétés à mission* a double monitoring mechanism that combines an annually intra-company assessment with a biannually independent-made report to measure the company's progress on its social and environmental objectives, which will determine whether the company maintains its status. This double monitoring mechanism seems to be a suitable safeguard to ensure the commitment to the SBIC social and environmental objectives and thus prevent the dreaded "greenwashing".

Despite the poor legal framework usually associated with hybrid purpose companies, the French case proves that it is possible to come up with mechanisms to solve some of the potential problems –or at least to reduce their negative effect. As such, SBIC are the first step towards the introduction of CSR principles in Spanish company law and thus their recognition should further encourage the study of the levels of power within the company that respond to social and environmental issues. Ultimately, SBIC has potential to achieve positive results in terms of CSR but they ought to be combined with other corporate measures.

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