

**SUSTAINABILITY IN SPANISH COMPANY LAW: STATE OF THE ART
AND A SPECIAL REFERENCE TO THE NEW SBIC (*SOCIEDAD DE
BENEFICIO E INTERÉS COMÚN*)**

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SUMMARY: A. The evolution of the Spanish corporate governance towards sustainability. B. The progressive “alignment” of the soft law with the sustainability. C. The progressive “alignment” of company law with sustainability. I. The earliest legal initiatives in sustainability under Spanish law. II. Implementing European law: non-financial reporting and promoting long-term shareholder engagement. III. Initiatives of the

Spanish legislator “beyond” European law. **D. Final reflections on the future implementation of the Proposal for a Directive on Corporate Sustainability Due Diligence.**

A. THE EVOLUTION OF THE SPANISH CORPORATE GOVERNANCE TOWARDS SUSTAINABILITY

The corporate governance model has been affected in the debates of recent decades by the demands of Corporate Social Responsibility ("CSR") and, in today's more widespread terminology, by sustainability or sustainable development goals (environmental, social and governance: "ESG"). This has a direct impact on the traditional debate about the concept of corporate interest (s. C.III.1), polarized between the **traditional contractual or monistic positions**¹ (“*shareholder value*”)² and the **institutionalist or pluralistic ones** (“*stakeholder value*”) in which ESG goals fit in because the latter promote a notion of corporate interest that goes beyond the mere satisfaction of the profit-making interest of the shareholders, focusing also on other collective interests such as those of workers, suppliers, customers, the local community³, etc.

This is evidenced by **EU initiatives** on disclosure of non-financial and diversity information (Directive 2014/95), on promoting long-term shareholder engagement (Directive 2017/828), on corporate sustainability reporting (Directive 2022/2464), and the -controversial- Proposal for a Directive on corporate sustainability due diligence. Also relevant are the various initiatives on sustainability promoted from the business world such as the Business Roundtable Declaration (August 2019), the Davos Manifesto on the purpose of companies in the fourth industrial revolution (January 2020) and the countless documents from organizations, scholars and practitioners from the world of business administration and law on the new formulations of the "purpose" of companies aligned with sustainability or ESG.

Both CSR and sustainability are multidimensional areas and it is widely accepted in Spanish literature that, in recent years, there has been an evolution in which CSR policies have been replaced by ESG⁴. This, it has been said, has been guided by the aim of "liberating" the policy

¹ In Spain, the Supreme Court Jurisprudence has maintained in several occasions that the corporate interest is “the common interest of the shareholders” (v. SSTS n. 120/1991, 19 of February; n. 873/2011, 7 of December).

² For all: Sánchez-Calero Guilarte, J., “El interés social y los varios intereses presentes en la sociedad anónima cotizada”, *Revista de Derecho Mercantil*, 246, 2002, p. 1653 et seq.

³ Esteban Velasco, G., “Interés social, buen gobierno y responsabilidad social corporativa (Algunas consideraciones desde una perspectiva jurídico-societaria)”, *Responsabilidad Social Corporativa (Aspectos jurídicos y económicos)*, Castellón de la Plana, Marcial Pons, 2005, p. 13 et seq.; more recently: Megías López, J., “La creación de valor tolerante: un modelo de compatibilidad jurídica entre interés social y responsabilidad social corporativa”, *Estudios sobre órganos de las sociedades de capital. Homenaje a F. Rodríguez Artigas y G. Esteban Velasco* (dirs. Juste/Espín), II, Aranzadi, Cizur Menor, 2017, p. 555 et seq.

⁴ On the evolution, interconnection and even confluence of the two concepts (CSR and sustainability), among the Spanish scholars, see among others: v. Esteban Velasco, G., “Gobierno corporativo, interés social y deberes fiduciarios de los administradores: evolución y tendencias”, *Gobierno corporativo, sostenibilidad y reputación* (dir. Martínez-Echevarría), Aranzadi, Cizur Menor, 2022, p. 65 et seq.; Embid Irujo, J.M., “La

of embracing and protecting the stakeholders' interests from the risk of being tied to the idea of corporate philanthropy (which, traditionally, has been associated with CSR) and of highlighting and ensuring that it is connected with the business strategy and with a transversal approach that involves the entire business organization⁵.

In this context, Spanish law (in line with the United Kingdom, Germany, France and Italy, to mention just a few) has for several years now been integrating this evolution towards "sustainability" in the design of the legal regime for the good governance of our companies (both listed and unlisted). This **evolution** has clearly been projected on two levels: on the one hand, at the **level of soft law** with the adoption (and successive reforms, the latest in 2020) of the *Código de Buen Gobierno de las Sociedades Cotizadas* ("CGC"), an aspect that will be dealt with in section B; on the other hand, at the **level of statutory or hard law**, mainly -but not only- through several amendments to the *Ley de Sociedades de Capital* ("LSC"), which will be explained in section C.

Certainly, the integration of sustainability in our statutory law has been in large part due to the necessary implementation of the European Directives (s. C.II). However, what is most remarkable for the purposes of this paper -hence, we will pay more attention to these issues- lies in those aspects that could be described as **the "own/original" regime of Spanish company law**; i.e., those norms that do not respond to a duty to implement European law but rather have been incorporated by our legislator in a sort of "alignment" with the sustainability policies that have prevailed as a legal policy trend over the last few years: (i) On the one hand, long before the above mentioned Directives, the Spanish legislator had adopted pioneering initiatives in the adoption of policies that everybody now consider to be "ESG policies": this occurred, as early as 2011, with Law 2/2011, of 4 March, on Sustainable Economy, and later with the reform of the LSC by means of Law 31/2014, of 3 December, on improving corporate governance, where the "sustainability" criteria was introduced in the directors' remuneration, and in addition, within listed companies, a non-delegable power over the CSR policy was assigned to the board of directors (s. C.1). (ii) On the other hand, the Spanish legislator, when implementing those European Directives, has gone "further" incorporating important amendments into our company law regime. This happened with the -heavily criticized- reform of the directors' duty of diligence/care (art. 225.1 LSC) and its connection to the so-called "interest of the enterprise" (*interés de la empresa*) by means of Law 5/2021, of 12 April; this was also the case with the incorporation, by means of Law 18/2022, of 28 September, of a new sub-type of capital company with a stakeholder purpose in addition to the to the shareholders profit's maximization: the *Sociedad de Beneficio e Interés Común* ("SBIC"), (s. C.3).

B. THE PROGRESSIVE "ALIGNMENT" OF THE SOFT LAW WITH THE SUSTAINABILITY

vertiente no financiera (responsabilidad social corporativa y sostenibilidad) en la reciente evolución del derecho español", *Gobierno corporativo, sostenibilidad y reputación* (dir. Martínez-Echevarría), Aranzadi, Cizur Menor, 2022, p. 33 et seq.; Sequeira Martín, A., "El desarrollo de la responsabilidad social corporativa versus sostenibilidad, y su relación con el gobierno corporativo en las directivas comunitarias y en el derecho español de sociedades cotizadas", *Revista de Derecho de Sociedades*, 2021, 61, p. 33 et seq.

⁵ Esteban Velasco, p. 65.

The gradual incorporation of the ESG criteria into the Spanish corporate governance *soft law* is clearly noticeable when we look at the evolution of the different Corporate Governance Codes ("CGC" or "Code") of our listed companies over the last 20 years. In the first stage, the recommendations of the initial **CGC of 2006** (known as the "*Código Unificado de Buen Gobierno*")⁶ focused exclusively on organizational rules aimed at improving the efficiency of the board of directors and, in general, the transparency and accountability of companies, while maintaining the concept of maximizing the shareholders' value. Thus, despite the European Commission had already published a Green Paper on CSR in 2001, the 2006 CBG expressly excluded any recommendations on CSR, only including a -vague- reference to the CSR in Recommendation 7, when defining the corporate interest to be pursued by the board of directors as: "*the company's best interest and, as such, strive to maximize its value over time (...) and uphold any additional social responsibility principles voluntarily assumed*".

In a very different way, the next **CGC of 2015**⁷ expressly incorporated CSR policies in Spanish listed companies, both in **Principle 24** ("*the company should deploy an appropriate corporate social responsibility policy, as a non-delegable board power, and report transparently and in sufficient detail on its development, application and results*")⁸, as well as in Recommendations 54 and 55. It is worth underlining that this Code introduced for the first time the recognition in the promotion of the corporate interest of other categories of subjects (stakeholders) linked to the company (beyond the shareholders' value), as well as a perspective of the corporate interest linked to "long-termism". This was set out in **Recommendation 12**, which warned that the board of directors should perform their duties with due regard for the principle of equal treatment of shareholders and be always guided by "*by the company's best interest, understood as the creation of a profitable business that promotes its sustainable success over time, while maximizing its economic value. In pursuing the corporate interest, it should not only abide by laws and regulations and conduct itself according to principles of good faith, ethics and respect for commonly accepted customs and good practices, but also strive to reconcile its own interests with the legitimate interests of its employees, suppliers, clients, and other stakeholders, as well as with the impact of its activities on the broader community and the natural environment*". Therefore, the 2015 CGC had already adopted the "**pro-stakeholder**" **orientation** as compatible with the corporate interest.

Though the CGC of 2015 already contained policies aligned with ESG goals, the reform carried out in 2020 has meant -probably at a terminological rather than substantive level- the "definitive transition" of our *soft law* towards sustainability. Throughout the 2020 CGC's new wording, any reference to CSR is significantly reduced in favor of the notion of "**sustainability**", openly promoting the management of listed companies in accordance with ESG objectives¹⁰. The **CBG of 2020**¹¹ contains the same Principle 24 as its predecessor, although the previous reference to CSR is now removed from its heading and replaced by "*Environmental and social sustainability*"¹². The same applies to the content assigned to the notion of corporate interest in Recommendation 12 (which remains unchanged) and continues to

⁶ https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/Codigo_unificado_Ing_04en.pdf.

⁷ https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/Good_Governanceen.pdf

⁸ 2015 CGC, p. 40.

⁹ 2015 CGC, p. 22.

¹⁰ Recalde Castells, A., "La inclusión de objetivos públicos en la gestión de las sociedades de capital", April, 2022, p. 14 et seq. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4072486).

¹¹ https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CBG_2020_ENen.PDF

¹² 2020 CGC, p. 44.

point out to "long-termism" as well as to the alignment with the ESG objectives¹³. Recommendations 53 to 55 of the CGC of 2020 contain most changes compared to the previous one of 2015. Now, they have a different systematic approach and replace and/or add the term "sustainability" to the previous CSR. Thus, in **Recommendation 53**, it is suggested that the "*task of supervising compliance with the policies and rules of the company in the environmental, social and corporate governance areas, and internal rules of conduct should be assigned to one board committee or split between several*", mentioning -among others, as the audit and the nomination committees- the possibility of creating "*a committee specialized in sustainability or corporate social responsibility*"¹⁴. Likewise, whatever committee is created for these purposes, it shall be composed "*solely of non-executive directors, the majority being independent*", to whom a minimum number of duties are attributed, as set out in **Recommendation 54**. These duties include ensuring that the "*corporate culture is aligned with its purposes and values*", as well as supervising, evaluating, and reviewing the "*effectiveness of the company's corporate governance system and environmental and social policy, to confirm that it is fulfilling its mission to promote the corporate interest and catering, as appropriate, to the legitimate interests of remaining stakeholders*"¹⁵. **Recommendation 55** then lists the elements that will be part of the "*environmental and social sustainability policies*", and identifies in a non-exhaustive list, the principles, commitments, objectives and strategies "*regarding shareholders, employees, clients, suppliers, social welfare issues, the environment, diversity, fiscal responsibility, respect for human rights and the prevention of corruption and other illegal conducts*", the methods for "*supervising non-financial risk, including that related to ethical aspects and business conduct*" as well as the tools for their elaboration, implementation and publicity¹⁶.

As for the new wording of Recommendations 53 to 55, it seems clear that they follow the policy trend already set by the previous CGC of 2015, but -as mentioned above- replacing the term "CSR" with "sustainability" and developing the content of those sustainability policies. It is noteworthy, however, that the previous reference (in Recommendation 53, letter d) of CGC of 2015), assigning to the board committee the duty to review "*the company's corporate responsibility policy, ensuring that it is oriented towards the **creation of value***", has been eliminated in the CGC of 2020. This **elimination is reprehensible** -at least, incoherent- if the aim of the Code is to maintain -as numerous studies and doctrinal positions defend- that sustainability is not incompatible with the creation of shareholder value¹⁷.

C. THE PROGRESSIVE "ALIGNMENT" OF COMPANY LAW WITH SUSTAINABILITY

As mentioned above, in the context of Spain's evolution towards the alignment or integration of ESG objectives in our corporate governance system, the evolution of our statutory law - in particular, the LSC- points out that in recent years several norms have been adopted to contemplate the possibility of **corporate decision-making based on ESG objectives**. However, not all of them result, as noted above, from European law and its necessary

¹³ 2020 CGC, p. 25.

¹⁴ 2020 CGC, p. 44.

¹⁵ CGC 2020, p. 44.

¹⁶ CGC 2020, p. 45.

¹⁷ See in detail with many references: Noval Pato, J., "La sostenibilidad en un contexto de primacía del accionista", *Revista de Derecho de Sociedades*, 64, 2022, p. 149 et seq., specially, p. 167 et seq.; Megías López, (2017), p. 570 et seq. However, before the recent legal changes, expressing doubts about the compatibility between CSR and maximizing shareholder value in a loss-making or low-profitability corporate context: Sánchez-Calero, J./Fuentes, M./Fernández, I., "La primacía de los accionistas y la RSC: ¿una compatibilidad posible?", September 2010, p. 16 et seq, available at: https://eprints.ucm.es/id/eprint/11962/1/Primac%3%ADa_accionistas_y_RSC.pdf.

implementation, but rather some are "original" (i.e., of the Spanish legislator's own initiative) and, in many cases, pioneering within Europe.

I. The earliest legal initiatives in sustainability under Spanish law

Before the Directives mentioned above were approved, the Spanish legislator had adopted pioneering initiatives in the integration of policies that are now considered ESG. This occurred in 2011, firstly, with **Law 2/2011**, of 4 March, of **sustainable economy** (*Ley de Economía Sostenible*)¹⁸ and, secondly, with the reform of the LSC by means of **Law 31/2014**, of 3 December, on the improvement of corporate governance.

Law 2/2011 of sustainable economy introduced in our legislation (art. 2) **the first definition of sustainable economy**: "*a pattern of growth that reconciles economic, social and environmental development in a productive and competitive economy, that favors employment of quality, equal opportunities and social cohesion, and that guarantees respect for the environment and the rational use of natural resources, so as to meet the needs of present generations without compromising the ability of future generations to meet their own needs*". At a corporate governance level, the most relevant changes introduced affected **transparency in the remuneration** of directors of listed companies and credit institutions, required to draw up an annual report on the remuneration policy of their directors and chief executives (although this had already been established as a recommendation in the CUBG of 2006). Therefore, by means of Law 2/2022 of sustainable economy, what had previously been a mere recommendation in our *soft law* became a mandatory rule (cf. art. 27 et seq.)¹⁹.

Shortly afterwards, the term "sustainability" was introduced into the LSC with the reform introduced by Law 31/2014, again in relation to the **directors' remuneration systems**, this time, for all companies (listed or not), requiring such systems to be oriented towards the promotion of the company's long-term profitability and sustainability (art. 217.4 LSC: "*Directors' remuneration must in any case be in reasonable proportion to the importance of the company, its economic situation at any given time and the market standards of comparable companies. The remuneration system established must be oriented to promote the company's long-term profitability and sustainability and incorporate the necessary safeguards to avoid excessive risk-taking and the rewarding of unfavorable results*"). The inclusion of the proportionality principle links remuneration to the size of the company and its economic significance (turnover, growth expectations, etc.)²⁰, whilst the introduction

¹⁸ As the beginning of this tendency is also often mentioned the Law 3/2007 on gender equality (especially Title VII "Equality in corporate social responsibility"), which is still in force and promotes the gender balance (see art. 75) on the boards of directors of large companies: Fuentes Naharro, M., "La igualdad en la responsabilidad social de las empresas", en *Igualdad de mujeres y hombres. Comentario a la Ley orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*, (dir. Montoya), Thomson-Civitas, Cizur Menor, 2007, p. 495 y ss; more recently: "Gender equality on boards. Spain", *L'equilibrio di genere dieci anni dopo la Legge Golfo-Mosca: a long and winding road* (dirs. E. Desana/G. Presti), Giuffrè, Milano, 2022, p. 155 et seq.

¹⁹ Sánchez-Calero, J., "Economía sostenible y gobierno corporativo: ¿una relación o una exclusiva?", *El Cronista del Estado Social y Democrático de Derecho*, núm. 12, 2010 p. 42 et seq., analyzing those topics (as for the draft Law).

²⁰ Valpuesta Gastaminza, E., "Arts. 217 a 220", *Comentarios a la Ley de Sociedades de Capital*, 3ª ed., Bosch, Barcelona, 2018, p. 569.

of the sustainability criteria requires that the remuneration is linked to the long-term success of the company²¹.

In addition, the reform of LSC by means of Law 31/2014, also included among the **non-delegable powers** of the board of directors of a listed company **the approval of the CSR policy** [art. 529 ter. 1.a) LSC], which endorsed a recommendation made in the CUBG 2006 (Recommendation 8). Therefore, the reform places the CSR policy alongside the major decisions on business management which cannot be delegated: strategic, investment, financing, and dividend policies. Indirectly, the prohibition to delegate this power is also recognizing its assignment to the board of directors, which means that in the assessment of the compatibility of those decisions with the corporate interest, directors will be protected by the business judgment rule recognized in Spanish law under article 226 LSC.

II. Implementing European law: non-financial reporting and promoting long-term shareholder engagement

As mentioned above, our legal system (like the rest of the Member States) has implemented in the last few years several reforms in our LSC and the Commercial Code ("C. de com.") to implement Directive 2014/95 on non-financial information first, and Directive 2017/828 on shareholder engagement afterwards. The recently adopted Directive 2022/2464 on sustainability reporting by companies remains to be implemented.

Directive 2014/95 has been implemented by Law 11/2018 on non-financial information and diversity²². By means of this reform, **article 49.6 of the C. de com.** has been amended on the content of the consolidated management report, which after this reform should include environmental and social issues, respect for human rights, the fight against corruption and bribery, and employee issues, including the steps taken, if any, to promote the equality of treatment and opportunities between women and men, non-discrimination and the inclusion of people with disabilities²³.

²¹ It has been said that this does not mean that the company should not pay attention to the medium and short term when setting remuneration, but that the long term should also be considered for these purposes: v. Ruiz Muñoz, M., "La retribución de los administradores y altos ejecutivos de las sociedades de capital: libertad, transparencia y control", *Estudios sobre el futuro Código Mercantil. Libro homenaje al profesor Rafael Illescas Ortiz* (dir. Morillas, Perales, Porfirio), Universidad Carlos III de Madrid, 2015, p. 885. Others have remarked that the sustainability criteria introduced for the directors' remuneration system are more linked to the maximization of long-term profitability whilst ESG goals are broader than that: Perales Viscasillas, P., "La integración de la sostenibilidad y el largo plazo en la Ley 5/2021", *Implicación a largo plazo de los accionistas en Sociedades Cotizadas. Comentarios a la Ley 5/2021* (dirs. Tejada, Izaguirre, Perales, López), Tirant, Valencia, 2022, p. 259 et seq.

²² See, among others: García Mandaloniz, M., "Hacia un gobierno corporativo sostenible con implicación efectiva y sostenible de los accionistas para la mejora del rendimiento financiero y no financiero a largo plazo y con divulgación de la información no financiera", *Revista de Derecho de Sociedades*, 54, 2018, p. 18 et seq.; Val Talens, P., "Responsabilidad Social Corporativa e información no financiera", *Responsabilidad social corporativa: Nuevos retos, nuevas soluciones*, (dir. Boldó), UJI, Castellón, 2020, p. 103 et seq.; Enciso Alonso-Muñumer, M., "Transparencia y sostenibilidad: nuevos retos de la información no financiera", *Revista de Derecho del Mercado de Valores*, 27, 2020, p. 242 et seq.

²³ The final text of which, however, obeys the latest wording given by Law 5/2021, which amends, once again, article 49.6 C. de com. in relation to non-financial information to include the "mechanisms and procedures

Afterwards, Law 5/2021 has implemented Directive 2017/828 on long-term shareholder engagement. This Law, among other issues (see III), implements the regime contained in the Directive which, as known, establishes a direct relationship between long-term objectives, corporate governance, and directors' remuneration, both in terms of detail (art. 9 bis 6), transparency (art. 9 bis 7 and art. 9 ter) and control of this policy by the shareholders. All these aspects have been included in the new wording of articles **529 *sexdecies* to 529 *novodecies* LSC**, applicable to listed companies. This reform introduces the term "sustainability" in article 529 *novodecies* (3, a) and 6), stating that the remuneration policy will contribute to the corporate strategy, the long-term corporate interest and the sustainability of the company, and will explain how this is achieved. A reference to CSR is also included (3,d) in relation to the flexible remuneration policy²⁴.

III. Initiatives of the Spanish legislator “beyond” European law

As noted at the beginning of this paper, the reform of the LSC by means of Law 5/2021 has introduced another institution in our company law that is related to sustainability -as linked to the achievement of a long-term investment- and goes beyond the implementation of Directive 2017/828 on shareholder's engagement. We are talking about the introduction of the so-called "**loyalty shares**" with additional voting (new articles 527 *ter* to *undecies* LSC) as an option (by means of **articles of association**) for listed companies. This new institution is related to the long-term vision of the company and, therefore, indirectly with the objectives of sustainability by rewarding shares that have been held continuously for a minimum period of two years²⁵.

However, the amendment introduced by Law 5/2021 that has caused the greatest impact – and controversy– among our scholars is the reform of **article 225.1 LSC**, which introduces into the directors' duty of care content a duty to pursue the "**interest of the enterprise**" (*interés de la empresa*). This term -"interest of the enterprise"- is not synonymous with the term "corporate interest" or “best interest of the corporation” (“*interés social*”), as the latter has traditionally been used by Spanish doctrine and courts.

Spanish corporate law does not expressly pronounce on the content that should be given to the notion of corporate interest, nor has it done so in the past. The reception of the

available to the company to promote the involvement of workers in the management of the company, in terms of information, consultation and participation”.

²⁴ The connection between long-term, sustainability and remuneration has been considered by most of the Spanish doctrine, both before and after the 2017/828 Directive on shareholder engagement: Quijano González, J. “La nueva Directiva de 2017 sobre implicación de los accionistas”, en *Derecho de Sociedades y de los Mercados Financieros. Libro Homenaje a Carmen Alonso Ledesma* (coord. Fernández, Arias, Martínez), Iustel, Madrid, 2018, p. 724 et seq. However, this is not an unanimous view: González Vázquez, J.C., “Retribución de administradores: algunas consideraciones sobre “say on pay” y “pay ratio rule” a la luz de la Directiva (UE) 2017/828”, *Nuevas tendencias de Derecho europeo y del Derecho español de sociedades* (dirs. Sánchez-Calero, Martínez, coord.. Fuentes), Publicaciones de la UCM, Madrid, 2019, p. 187 et seq.

²⁵ As stated in the Explanatory Memorandum of Law 5/2021, “*This is a mechanism that can be used to encourage shareholders to maintain their investment in the company in the long term and reduce short-term pressures on company management*”. On loyalty shares, among others: Fernández Torres, I., “El voto adicional por lealtad: una aproximación crítica a la propuesta de reforma de la ley de sociedades de capital”, 161, *Revista de Derecho Bancario y Bursátil*, 2021, p. 11 et seq.; Fernández del Pozo, L., “Fidelización del socio mediante la concesión de ventajas corporativas. Dinámica de juegos y cortoplacismo”, *La Ley mercantil*, 54, 2019, p. 1 et seq.

comparative doctrine –mainly German and Italian– led Spanish scholars to similar discussions, as in other countries, about **institutional** or (i.e. *versus*) **contractual conceptions of corporate interest**, as a guide or orientation for directors’ performance. In very brief terms we can say that those scholars’ supporters of the “institutional notion” of corporate interest identify it with an abstract and open notion of stability, preservation and profitability of the company as a whole, not only associated to the interest of the shareholders, but with a tendency towards de-personalization of the company and to give relevance to the corporation itself as the holder of the interest. Synthetically, the ultimate consequence of this position leads to perform the business activity promoting the material expectations of the shareholders *and* of the other stakeholders affected by the existence of the company²⁶. On the contrary, those scholars advocating for a contractual notion of corporate interest avoid the de-personalization perspective from the understanding that corporate interest is solely the interest of the shareholders in maximizing the economic value of the company²⁷. The “contractual theory” of corporate interest has been prevailing among both the Spanish doctrine and jurisprudence²⁸. Undoubtedly, this has been supported by the wording of the LSC, which traditionally has not incorporated the elements of a “stakeholder model”.

But, as mentioned, in recent years there have been soft and hard law movements towards a greater recognition of “institutional theories” of the corporate interest, albeit still weak. One of the most significant changes in this direction was introduced by the aforementioned Law 5/2021, of April 12, amending **article 225.1 LSC**, which is the provision that refers to the “general duty of care” of the corporate directors, adding a final sentence that leads to the following wording: “Directors shall perform their duties and carry out the duties imposed by law and the bylaws with the diligence of an orderly businessman, taking into account the nature of the office and the functions attributed to each of them; *and in any case, subordinate their personal interests to the interests of the enterprise*” (new wording in italics)²⁹. The clear intention of the law was to **incorporate a stakeholder model**³⁰, as the reference to the interest of the company as the guiding principle of management aiming to cover a wider range of interests

²⁶ Alonso Ledesma, p. 28 (41-42, 44-45); Alonso Ureba, p. 95 (105-106); Embid Irujo, 2004, 11 (25-28); Esteban Velasco, 2005, p. 13 (*passim*, especially pp. 47 et seq.).

²⁷ Classical and essential references are to Girón Tena, p. 199; Garrigues, p. 249 (266); Duque, p. 68 et seq.; more recently Alfaro Águila-Real, 1995, p. 53; Juste Mencia, 1995, p. 51-52; Paz-Ares Rodríguez, p. 1805 (1808); Sánchez Calero, p. 191; Sánchez-Calero Guilarte, 2006, p. 851 (866 et seq., and 904-906).

²⁸ See the Supreme Court Jurisprudence lead by STS no. 120/1991 (Civil Division), of 19th February; and its progeny, made up among many others by SSTS (Civil Division) no. 825/1998, of 18th September; no. 193/2000, of 4th March; no. 1131/2002, of 29 November; No. 186/2006, of 7 March; No. 400/2007, of 12 April; No. 1229/2007, of 29 November; No. 873/2011, of 7 December; and No. 991/2011, of 17 January 2012.

²⁹ The quote was added during the parliamentary processing, which comes from amendment no. 16 to the Draft Bill, and whose wording was more extensive: “(...) and subordinate, in any case, their particular interest to the interest of the company and, ultimately, to the general interest, in accordance with article 128.1 of the Constitution”. The justification for the amendment by the proposing parliamentary group was as follows: “The aim is to give greater specificity to the old ‘duty of diligence of an orderly businessman’, specifying the link between this duty and the objectives pursued by this law, which are none other than good corporate governance and the promotion of a long-term vision of the company. And finally, it is a question of integrating all this into the constitutional framework of the social and democratic rule of law and into the role that the Spanish Constitution attributes to the company as a generator of individual and social wealth”.

³⁰ Embid Irujo, 2022, sec. IV.3 (digital version).

affected by business activity and not only those of the shareholders³¹. However, its construction is significantly deficient in many ways, and certainly in relation to the comparative doctrinal and normative advances on the issue.

The Spanish doctrine has **criticized the formula used by the legislator**, even by those scholars most supportive to the introduction of the stakeholder model. In this regard, at least two deficiencies have been pointed out. Firstly, the use of an outdated expression that recalls too much to the Germanic origins of the debate and to the institutional theories linked to the economic doctrine of the “*Unternehmen an sich*”, whilst the current trend in other countries as well as from the European Union refer to sustainability or social responsibility³². And above all, as historically evidenced, the use of the notion “interest of the enterprise” has been criticized because it is a very broad/open term that generates a basic problem in determining the interests included in the notion and the relationships between those interests³³.

Secondly, it has also been heavily criticized the introduction of an expression in the duty of care that relates the consideration of stakeholders' interests with an opportunistic or selfish conflict of interest of the directors by referring the subordination of “*their personal interest to the interest of the company*”³⁴. The treatment of conflicts of interest is a characteristic element of the duty of loyalty, which is already extensively regulated in Spain (arts. 227 et seq. LSC). This is even more clear when reading article 227 LSC -that the reform has not changed- which defines **director's duty of loyalty** based on the “corporate interest”, without any mention to the “interest of the enterprise”; the same can be inferred when reading article 228.e) LSC, which also refers to the “corporate interest” when listing the elements of the conflict of interest's prevention system. Therefore, the inclusion of the term “interest of the enterprise” and its coexistence with the “corporate interest” generates interpretative doubts about the relationship and respective scope of each one. If the distinction included by the legislator was made on purpose, that could lead to the conclusion that the inspiration for the duty of care and the duty of loyalty is different, due to the distinction between the concepts of the interest of the enterprise and corporate interest³⁵. In any case, it is an incorrect technical construction which should not prevent to confirm the purpose intended by the legislator: a more complex interest than that of the shareholders to be taken in consideration³⁶.

It remains to be seen whether this flawed provision will actually have an impact on the corporate governance of Spanish capital companies, and how it will affect the relationship with the notion of corporate interest through a teleological interpretation. In other words, time will tell whether the interpreter understands the rule not as “subordinating, in any case,

³¹ On the meaning of the “interest of the enterprise” and the “corporate interest”, see Esteban Velasco, 2014, p. 271 (282-286).

³² Alfaro Águila-Real, 2021, criticizes the use of the expression “interest of the company” (“*interés de la empresa*”) as being out of date. Also Megías López, 2021, 11 (49).

³³ Juste Mencía, 2021, p. 3093 (3101-3102); Esteban Velasco, 2022, p. 417 (428); Recalde Castells, SSRN 2022, p. 26.

³⁴ On the incorrect systematic: Juste Mencía, 2021, p. 3093 (3100 et seq.); Sánchez-Calero Guilarte, 2021, sec. IV (digital version); Megías López, 2021, 11 (51-52); Esteban Velasco, 2022, p. 417 (421 et seq.); Guerrero Trevijano, sec. 3.2.b) (digital version); Alfaro Águila-Real, 2021; Recalde Castells, SSRN 2022, p. 26.

³⁵ This is suggested by Embid Irujo, 2021, who admits that “the issue would need further analysis”.

³⁶ Sánchez-Calero Guilarte, 2021, sec. III and final reflection in sec. VI (digital version).

their [directors'] personal interest to the interest of the enterprise," but as "considering, in any case, the interest of the enterprise", "the success of the company", "the sustainability of the company," etc., i.e. that directors should prioritize this (plural) interest (of the "enterprise") over the narrower scope of the corporate interest. Should this be the case, this consequently would open up a discussion about whether the new rule allows for a path to claim extra-contractual liability against directors by third parties who suffer direct harm resulting from a breach of this complex duty, through the corresponding action for liability (according to art. 241 LSC)³⁷. However, it is very unlikely that this new reference to the "interest of the enterprise" will make a real change; at most, **it will result in a less aggressive integration between the corporate interest and the interest of the enterprise**, i.e., it will consolidate the long-term value creation as a guideline for directors' performance with the subsequent implications in their discretionary business decisions making³⁸.

It seems to us that a greater impact in ordinary management situations would require more relevant modifications or, at least, that they would affect other elements of the corporate governance system³⁹. However, it cannot be ruled out that this new wording of article 225.1 LSC may also be useful, for example, to favor conservative solutions for a company in a **pre-bankruptcy crisis**; this is a specific context in which directors' duties face clear tensions as for the interests their performance should be oriented, based on incentives from a regulation different than corporate law⁴⁰.

It is also essential to highlight the latest step taken, within the context of the alignment of our company law with sustainability, by means of Law 18/2022, of 28 September, on the creation and growth of companies, whose Tenth Additional Provision recognizes the so-called **Benefit and Common Interest Company** (*Sociedad de Beneficio e Interés Común*, "SBIC"). This Law proposes the regulation of a model of companies with a purpose other than profit in the style of the American *benefit corporation*, or the Italian *società benefit*, or the French *société a mission*. The Law is quite sparse, and simply encourages the Spanish government to develop the proposal by means of a Regulation in accordance with certain minimum principles; hence, it does not really establish a complete regime. We will try to point out those minimum principles:

³⁷ Sánchez-Calero Guilarte, 2021, sec. V (digital version); Megías López, 2021, 11 (53); and Recalde Castells, SSRN 2022, p. 27.

³⁸ Esteban Velasco, 2022, p. 417 (426-428). Viera González, p. 3, points out that when the mandate is within the duty of care, the directors are protected by the *business judgment rule* (art. 226 LSC).

³⁹ Megías López, 2021, 11 (52).

⁴⁰ Article 19 of Directive 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, states: "Member States shall ensure that, in the event of impending insolvency, directors take due account of at least Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following: (a) the interests of creditors, equity holders and other stakeholders; (b) the need to take steps to avoid insolvency; and (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business". The Spanish legislator has not considered it necessary to transpose this provision of the Directive into Spanish law through Law 16/2022, of 5 September, on the reform of the Insolvency Act, justifying this absence by considering it "implicit in the current legislation", according to the Report on the analysis of the regulatory impact of the General Technical Secretariat of the Ministry of Justice (August 4, 2021).

Firstly, it is not a new type of company, but rather a special condition available to capital companies that **voluntarily** meet the requirements. The future Regulation will determine the criteria and methodology for validating this new figure, that is, the system to become or to obtain the status of SBIC.

Secondly, the SBIC is required to incorporate in its articles of incorporation the **commitment to generate a positive social and environmental impact** through its activity. Unlike the compared models based on the aforementioned benefit corporation, this legal norm does not directly require the articles of incorporation to include a specific purpose (or statement of business) in addition to the profit motive of the shareholders that the company must promote⁴¹.

Thirdly, the need for the SBIC to be **transparent** in its performance of social and environmental objectives and in considering the relevant stakeholders in its decisions. Presumably, this requirement will lead to the need to issue a periodical report on the social and environmental impact and on how the articles of association's purpose is being achieved, beyond the generally enforceable obligations and regardless of the size of the company. Additionally, the Law requires the impact of the SBIC's activity to be verified or audited by independent experts.

The new SBIC's legal regime is quite limited and **does not allow to change the general rules established in the LSC**; thus, it cannot neither change the rules affecting directors, nor enhance majorities required for certain resolutions of the shareholders' general meeting, nor shareholder withdrawal rights, etc. It is foreseeable that the forthcoming Regulation developing the SBIC will focus on the necessary requirements to be established in the articles of association to acquire and maintain such status.

D. FINAL REFLECTIONS ON THE FUTURE IMPLEMENTATION OF THE PROPOSAL FOR A DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE

Further legal changes in Spain, as in the rest of Europe, will be focused on the transposition of the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (hereinafter, "CSDDD")⁴². Awaiting a final text, the few **Spanish scholars** who have so far pronounced themselves on the several aspects that this Directive will introduce in the domestic corporate law have been **critical**.

In broad terms, as it is well known, the CSDDD Proposal initially imposes obligations on larger companies to establish an **internal control system** to detect the negative effects that their own business activity, that of their subsidiaries, and that of their entire value chain may

⁴¹ As is well known, the common denominator of this model is mainly based on two stakeholder-oriented elements, one general and the other more specific. The general element refers to the need to conduct business in a responsible and sustainable manner, while the specific element requires the identification in the bylaws of a singular non-profit purpose accompanying the profit motive. See, in the United States, Sec. 362(a)(1) DGCL, Sec. 14601(e) Cal. Corp. Code, or Sec. 1702.(e) N.Y. Bus Corp. Law. In Italy, see Sec. 376 of Legge n. 208 Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato, 28 December 2015 (known as Legge di Stabilità of 2016). And in France, see art. L.210-10 of the French Commercial Code.

⁴² 23 February 2022, COM(2022) 71 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

have on the environment, human rights, and climate change (arts. 4-11), requiring Member States to regulate a system of sanctions for non-compliance (art. 20), and a system of civil liability for damages (art. 22). It should be noted that the translation of the title of the CSDDD into Spanish has not been appropriate ("*Propuesta de Directiva de diligencia debida de las empresas en materia de sostenibilidad*") and it has generated some confusion with the duty of care ("*deber de diligencia*") as a fiduciary duty of corporate directors.

A Spanish author has highlighted how, despite the proportionality principle that the Directive defends and the fact that its immediate target is the large company, its scope will indirectly be extended to **SMEs**. Whenever the large companies concerned have commercial relationships with not concerned companies, the due diligence requirements will have an impact on them; or, in other words, whenever those not concerned companies are part of the value chain of those large companies, the due diligence requirements will be applicable to them. The preventive measures taken to ensure that SMEs do not suffer negatively from the obligations of large companies -i.e., to avoid that their viability may be jeopardized- seem to be heading in the right direction (arts. 7, 8, and 14 of the CSDDD Proposal). However, despite this, there are still concerns because the consequences that SMEs may suffer are very serious, especially the risk of suspension or termination of commercial relationships with the large companies affected by the Directive. The consequence will be that these smaller companies will also have to assume the change, and the cost is not proportional for them⁴³.

On the other hand, the CSDDD Proposal could generate great legal uncertainty for companies as regards the standards of human rights and environmental protection that are applicable to them. The list of international treaties included in the Annex is not a suitable technique as these treaties apply to those States that have signed/ratified them, not to their companies. Additionally, these norms include provisions that are too broad to be enforced; besides, this broadness hinders the identification of the applicable liability standards⁴⁴.

The Directive's imposition on companies to actively contribute to mitigating climate change and to avoid contributing to global temperature increases has been criticized. Those obligations include identifying how business activities contribute to climate change and taking appropriate measures to reduce emissions, with the aim of limiting global warming to 1.5°C in accordance with the Paris Treaty (art. 15 CSDDD Proposal). The way these obligations are conceived leads to a result-based model or system as opposed to the more generally accepted means-based one. It will be challenging for most affected companies to determine how their activities contribute to climate change. Certainly, the goal set by the Paris Treaty is outside the scope of companies' control and the duties imposed go beyond what the Treaty requires⁴⁵.

From a corporate law perspective, the CSDDD Proposal interferes with internal corporate law rules, particularly in terms of business decision making's discretion. When the Proposal imposes on companies duties in the course of their business to respect human rights, the environment, the climate change, and when it facilitates liability actions to claim damages in this regard, it is creating an obligation on corporate directors to manage their company taking

⁴³ Chamorro Domínguez, *passim*.

⁴⁴ Recalde Castells, 2022 RDM, sec. II.4.3 (digital versión).

⁴⁵ Recalde Castells, 2022 RDM, sec. II.5 (digital versión).

into account all those elements. In fact, directors are required by the Proposal to establish and monitor an internal control system -sustainability due diligence process- that the company must implement (art. 26)⁴⁶.

Notwithstanding, undoubtedly, the most discussed provision of the CSDDD Proposal is the explicit introduction of a duty of care for directors to take into account the consequences of their decisions on sustainability, including human rights, climate change and environmental consequences, in the short, medium and long term (art. 25), due to the direct implications it has on the corporate governance⁴⁷. Indeed, this is a duty that did not need to be explicitly stated by the Proposal since the company's duties in this regard directly affect the director's duty of care, i.e., the duties imposed on companies by the Directive would have been enough to that end⁴⁸.

⁴⁶ Recalde Castells, 2022 RDM, sec. II.4 (digital versión).

⁴⁷ Guerrero Trevijano, section 3.2.a) (digital version), also highlights the potential undesirable consequences, as it may favor behaviors of managers that benefit their private interests by increasing their discretion, increasing agency costs, and decreasing productivity. Tapia Hermida also emphasizes that this duty will be added to the enormous catalog of duties that directors already have in the Capital Companies Act, sectoral laws and regulations, and those that also indirectly come from codes of corporate governance.

⁴⁸ Viera González, p. 1; and Recalde Castells, 2022 RDM, sec. II.8 (digital versión).