Social Enterprises and Benefit Corporations in Colombia

Francisco Reyes Villamizar

Contents

1 Introduction

Colombian corporate law has been at the forefront of Latin American systems for the last decade. In 2008, it introduced the simplified corporation (SC), becoming the first country in the region to adopt a hybrid company form. This business entity, which was inspired by the American closely held corporation and the French *Société par Actions Simplifiée* (SAS), was so successful that in 2017 it led to the adoption of the Model Law on Simplified Corporations by the Organization of American States.[1] Such an auspicious beginning paved the way for the Argentine law on the SC of

[1] Uruguayan law for the promotion of entrepreneurship 19,820, published on September 27, 2019.

F. R. Villamizar (✉)
University of Fribourg, Fribourg, Switzerland
e-mail: freyes@cable.net.co

H. Peter et al. (eds.), *The International Handbook of Social Enterprise Law*,
https://doi.org/10.1007/978-3-031-14216-1_25

2017,[2] the Uruguayan SC of 2019,[3] and the Ecuadorian SC of 2020.[4] These laws are the direct heirs of the Colombian initiative for the SC. The Colombian legal system triggered an incipient harmonization of corporate law in Latin America for the first time in this region. The Colombian legislator has also been a pioneer in the enactment of norms related to benefit corporations (referred to under the law as BIC companies). These types of hybrid business entities were introduced by Law 1901 of June 18, 2018.

As will be explained later, before the legislation on BIC companies, the Colombian legal system had zealously defended the shareholder wealth maximization principle. In fact, the possibilities of investing resources in nonprofit activities were subject to significant legal restrictions, as developed by doctrine and case law.

In the international context, it should be pointed out that the idea of allowing commercial companies to engage in unregulated nonprofit activities is a relatively recent phenomenon. However, until a few decades ago, most countries maintained a strict standard related to the principle of "maximizing the economic interests of shareholders."

The critique concerning the theories that focus exclusively on the principle of profit maximization has given rise to a new way of thinking, in which the concept of the company as a profit-driven organization has given rise to the idea of the business corporation also as a social institution. Thus, companies are expected to act according to principles and rules of procedure that are right for the community.

Similarly, renowned author Michael Porter makes a categorical assertion by stating that "The purpose of the corporation must be redefined as creating shared value, not just profit per se. This will drive the next wave of innovation and productivity growth in the global economy. It will also reshape capitalism and its relationship to society. Perhaps most important of all, learning how to create shared value is our best chance to legitimize business again."[5]

It is precisely in this context that the idea of BIC companies, also known internationally as B Corps, arises. Their activity, as will be seen next, aims not only at obtaining distributable profits among its shareholders or partners but also at creating common interest benefits.

[2] Argentine law to support entrepreneurial capital, number 27,349 of March 29, 2017.

[3] Uruguayan law for the promotion of entrepreneurship 19,820, published on September 27, 2019.

[4] Ecuadorian Entrepreneurship and Innovation Law (Official Registry No. 151- Friday, February 28, 2020).

[5] Porter and Kramer (2011).

2 Content of the Colombian Law of BIC Companies

Colombian legislation on BIC companies adopts simple criteria that are devoid of formalities for the adoption of this type of business. In truth, the laconic nature of Law 1901 of 2018 (only ten articles) makes it relatively easy to apply it. As can be seen below, the obligations that arise for shareholders, officers, and directors do not represent significant transaction costs, so that it can be said that it is a reasonable and, in general, a well-structured regulation. Its main precepts are analyzed next.

2.1 No Need for a Specific Type of Business Entity

It must first be noted that the Colombian legal system did not typify benefit companies as a specific type of business entity. In this sense, BIC companies are not, strictly speaking, a different type of company, if compared with the business entities provided for in the Commercial Code and other complementary regulations. That is why in article 1 of Law 1901, it is cited: "Any existing or future business company of any type established by law, may voluntarily adopt the status of a "Benefit and Collective Interest Company."[6] Thus, in article 9 of the same law, it is clearly stated that "in matters not provided for in this law, BIC companies will be governed by the provisions contained in the bylaws, as well as per the rules applicable to each type of company." Hence, the entire legal system contained in the Second Book of the Commercial Code,[7] Law 222 of 1995,[8] and, if appropriate, Law 1258 of 2008[9] are applicable to BIC companies.

Additionally, as can be seen in the aforementioned rule, there is no restriction as to the type of economic activities in which the company may engage. There is no restriction either regarding its civil or commercial nature or its nature as a publicly held or closely held corporation. Hence, the corporate purpose of a company of this nature can be extended to industrial, commercial, or service activities. It is worth asking, however, whether companies that engage in activities subject to a special legal system can adopt the modality of a collective benefit and interest company. Thus, for example, it is doubtful to consider that a financial entity, trust company, insurance company, or even stock brokerage company can assume the aforementioned nature. Indeed, the restrictive provisions that govern the operation of these

[6]The basic company types in Colombia are the partnership (Sociedad colectiva), the limited partnership (sociedades en comandita simple y por acciones), the limited liability company (Sociedad de responsabilidad limitada), the corporation (Sociedad anónima) and the simplified corporation (Sociedad por acciones simplificada).

[7]General Governance of companies.

[8]Ley de reforma al régimen de sociedades y concursus (Reform law of the companies and insolvency).

[9]Law on Limited Partnerships.

entities, the protection of resources from private savings, and other considerations of public order could be incompatible with the *semi-lucrative* purpose of BIC companies. In this matter, it will be necessary to await the pronouncement from the regulatory authorities, as well as the regulations that may be issued by the government.

However, as mentioned before, it seems clear in light of article 1 of the quoted law that a listed company can adopt the nature of a BIC company. Certainly, if the by-laws of a company listed in the securities and intermediaries register are amended, its nature could be altered so that it could assume the nature of a BIC company.[10] For this purpose, the company obviously must adopt the status of a publicly held corporation and must comply with all the requirements and regulations of listed companies.

2.2 Legal Nature of BIC Companies

The second article of the regulation establishes the legal nature of BIC companies. For this purpose, the law defines what a commercial benefit and collective interest company is. In this sense, the regulation refers to "those companies that are registered in accordance with the current legislation, which, in addition to the benefit and interest of their shareholders, will act in the interest of the community and the environment." This provision highlights the hybrid nature of these entities. This precise aspect reveals the importance of these entities. In commercial or civil companies, charitable activities are only viable to the extent that there is a determinable relationship with the corporate purpose or economic operations that the company is engaged in. However, in BIC companies, there is considerable leeway to carry out such acts for the common benefit.

The starting point for this analysis is based on the basic concept of a—civil or commercial—company, understood as a for-profit institution. The very definition of a company in article 98 of the Colombian Commercial Code is sufficiently clear on this matter. As provided in this article, by virtue of a company contract, "two or more persons are obliged to make a contribution in money, in work or in kind, *in order to distribute among themselves the profits obtained in the company's business activity*."

A share of the company's profits constitutes the main compensation received by shareholders in return for their capital contributions to the business entity. Therefore, it must be emphasized that the very purpose of a contract, according to the terms of the aforementioned article 98, consists in the distribution of profits derived from the undertaking of business activities, as laid out in the company's purpose clause. The

[10] In accordance with the Colombian current regulations, any company that intends to make a public offering of securities to undetermined persons or to more than 100 persons must be registered in the National Registry of Securities and Intermediaries (Cf. Statute of the Securities Market).

legal right vested in each shareholder to receive corporate profits represents the necessary quid pro quo for whatever contributions they make to the corporation. This economic benefit is usually referred to as a *subjective lucrative motive*, which is the ultimate trade-off for the shareholders. Such economic benefit is based on the effective distribution that is made among the shareholders, in accordance with the balance sheets at the end of the year, as they are approved by the relevant corporate body (shareholders' meeting). This feature, aside from characterizing civil and commercial companies, distinguishes this business model from other business organizations in which the economic benefits obtained are not intended to be effectively distributed among their members. Good examples of this type of entities are the private law associations regulated in the Civil Code, such as certain associations, foundations, and other legal entities characterized by the nonprofit involvement of the revenues obtained resulting from their economic operations.[11] In this case, the possibility that the business activity may yield positive results does not conflict with profit since such economic benefits cannot be legally distributed.[12] The benefits that are obtained in the organization of cooperatives, represented in discounts and other advantages of an economic content, can be considered a manifestation of *mutuality* in which there is no legal room for profit distribution.[13] Therefore, it must be emphasized that the simple reduction in the amount of certain obligations of the associate, or some benefits obtained from the cooperative, cannot be understood as profits.

Obviously, the difference between for profit and non for profit entities is at the core of the legal structure of civil and commercial companies, as it is expressed in the Commercial Code and in additional regulations. In particular, reference should be made to the capacity system that the law grants to companies, traditionally delimited by the so-called *law of speciality*. On this matter, the existing regulations in Colombia are contained in the Commercial Code. For example, article 99 provides:

> The capacity of the company will be limited to the development of the company or activity foreseen in the company's purpose clause. Acts directly related to the business purpose and those whose objective is to exercise rights or fulfill obligations, legally or conventionally derived from the existence and activity of the company, shall be understood to be included in the company's purpose.

[11] Therefore, the activities that a company carries out in the exercise of its corporate purpose must also be aimed at obtaining income that can generate distributable profits. The Superintendency of Companies has been explicit on this aspect, stating the following: "In the partnership contract all associates have a common vocation towards obtaining profits, since it is profit that constitutes the motive that induces the partners to celebrate it (art. 98, inc. 1 of the C. de Co.). This being the case, all the activities or operations of the company must be aimed at obtaining profits [. . .] not being possible for them to carry out free acts regularly or permanently" (Official Letter SL-25275, of December 12, 1989).

[12] On this matter, Vincent Chuliá's opinion is illustrative, as he believes that "the cooperative would not ultimately have to obtain a distributable social benefit, nor would its economic operation give rise to its existence; while this type of benefit does exist and the corporation has that lucrative purpose in the strict sense ... " (cited by Paniagua Zurera (1997, p. 304).

[13] Law 454 of 1998 and Decree 1401 of 1999, relative to the legal system applicable to cooperatives.

Likewise, article 110, section 4, of the same Code states:

> The commercial company will be constituted by public deed in which it will be stated: [. . .] The corporate purpose, that is, the company or business of the company, making a clear and complete statement of the main activities. The stipulation by virtue of which the corporate purpose extends to activities stated in an indeterminate way or that do not have a direct relationship with it will be ineffective.

And article 5, section 5, of Law 1258 of 2008 provides:

> The simplified corporation will be created by means of a contract or unilateral act that is recorded in a private document, registered in the Mercantile Registry of the Chamber of Commerce of the place where the company establishes its main domicile, in which at least the following shall be stated: [. . .] A clear and complete statement of the main activities, unless it is stated that the company may carry out any legal commercial or civil activity. If nothing is expressed in the articles of incorporation, it will be understood that the company may carry out any lawful activity.

It is well known that according to traditional company law, the *ultra vires* doctrine is applicable to all companies. In accordance with this doctrine, a company lacks the legal capacity to carry out acts or contracts that are beyond its corporate purpose.[14] In accordance with general company law rules, any legal act carried out under such circumstances (*ultra vires*) suffers from nullity due to the lack of capacity of the subject performing the act.[15] This limitation on the company's capacity is aimed at protecting the partners or shareholders because—at least in theory—it allows controlling the destination of the contributions made to the company's capital.[16] Under this concept, the company can request to nullify those *ultra vires* acts carried out by its administrators (officers and directors) through a declaration that the company lacked sufficient capacity to perform them. Thus, it is possible to

[14] Insofar as companies are only bound by operations that correspond to their corporate purpose and in accordance with the *ultra vires* doctrine, administrators will be liable for acts not provided for in the corporate purpose and that cause damage to third parties. These matters are not the responsibility of the Superintendency, given its nature as an administrative body, but will be heard by the ordinary courts (Superintendency of Companies, Official Letter OA-19021 of November 27, 1979). However, the Superintendency can sanction administrators when they perform *ultra vires* acts (in this sense, see, Judgment of September 10, 1998 delivered by the Administrative Court of Cundinamarca).

[15] According to the detailed explanation of Gervasio Colombres (1972, p. 105) "The expression *ultra vires* designates a legal system of scope variable in doctrine and positive law. It can, however, be characterized in its broadest application by saying that the activity indicated in the constitutive act represents a limit, not only to the power of the administrators, but also to the capacity of the corporation itself, determining as a consequence that acts foreign to the corporate purpose are irredeemably null, even when compliance with them has been decided by the unanimous agreement of the partners."

[16] In the words of the Superintendency of Companies, "it is stated that the limit imposed on administrators in the corporate purpose is precisely due to a concern that human and capital resources are invested, used or allocated in those activities agreed within the corporate purpose, in such a way that the contributions of the associates are not diverted or distracted in activities foreign to the intention expressed in the partnership agreement" (Resolution 320-2279, of September 22, 1995).

challenge the *ultra vires* acts carried out by a company's administrators by demonstrating its lack of capacity to carry them out. This situation takes place even in those instances in which the same shareholders have authorized the execution of the corresponding legal business. The laws under which the simplified corporation is governed, contained in Law 1258 of 2008, authorize the undetermined corporate purpose, so that no authorization is required to engage the company in any kind of legal economic activity (number 5 of article 5, ibid.). This system of unlimited purpose clause constitutes an efficient mechanism to exclude annoying litigation derived from lack of capacity (*ultra vires*), with which a guarantee is also set up for third parties that contract with the company. Third parties can be assured that any transaction entered into by the company is valid and binding. This unlimited purpose clause also gives rise to a high level of certainty and predictability regarding the validity of the legal businesses which the company engages in.

However, even in the case of simplified corporations, since the company maintains its civil or commercial nature the object is restricted to for-profit activities (as opposed to nonprofit entities, such as foundations or associations). Hence, both in traditional companies (such as regular corporations and limited liability companies) as well as in simplified corporations, participation in nonprofit activities continues to be severely restricted, due to the capacity limitation defined by the principle of specificity. Even in the case of simplified corporations with an undetermined purpose, it is evident that the activities must tend to create profit for their shareholders. Such conclusion is derived, unequivocally, from the notion of *economic activity*, referred to in article 5 of Law 1258, cited above.

Based on legal provisions contained in the Commercial Code, the doctrine of the Superintendency of Companies of Colombia has always limited and restricted the scope of charitable activities, such as donations, based on criteria such as their proportionality and relationship with the corporate purpose. In a relatively recent pronouncement, the entity pointed out, for example, that "the shareholders' assembly can order donations. But it should be noted that except in the case of a unanimous decision in this regard by all the shares corresponding to the subscribed capital, such determination does not by any means exclude the possibility of a challenge procedure by dissenting and absent partners, by tax auditors and even by the administrators themselves, if they find that a gratuitous act of this nature exceeds the limits of the corporate contract and, to that extent, does not comply with the legal and statutory prescriptions" (C.Co. articles 190 and 191).

The relationship between the type of activities that can be undertaken by a company and the wording in the purpose clause entails a question of fact, which must be determined in each specific case and is not limited to the tax advantages that may ensue for any given company. Indeed, for the "development" of the company or the operations—such as those that are legally included, those that are directly involved in the corporate purpose, or those whose purpose is to exercise rights or fulfill obligations derived from the existence and company's operations—there may be many instances that explain and justify engaging in nonprofit endeavors. It must also be added that companies, especially although not only corporations, have a social visibility and importance that explains their participation in community

programs and activities that are not directly related to the main activities planned in their respective objects (social, educational, artistic, research programs, etc.). A genuine and disinterested altruistic or solidary purpose can be added to the pragmatic goodness derived from the concern of their controllers to be perceived by the community in a favorable way.

A determination as to whether generosity or calculation constitute the sole or determining reason is ineffective, since it is enough to verify whether the act of liberality is directly related to the development of the company's purpose. It is obviously understood that these are lawful acts regarding their objective or cause in agreement with the rules of commercial competition. In this vein, it cannot be ruled out that there are free acts, such as donations, in which a direct relationship of such nature can be established. For example, when donations are made to those affected by a tragedy that affects workers in the company or the area in which its activity is carried out in a distinguishable way, as in the regions where supplies are acquired or labor is intensively employed.

After the issuance of the rules on benefit and collective interest companies, the circumstances just mentioned are no longer an obstacle for the company to carry out nonprofit activities, without major obstacles. In particular, it should be noted that the degree of affinity that it shares with the corporate purpose is completely resolved with the simple company name. Thus, it will not be necessary to demonstrate a connection with the economic operations that the company is engaged in so it can carry out activities that are not aimed at creating profit for its shareholders. Nor is it essential that there be a criterion of proportionality between what is spent on activities of collective interest and the economic benefits that the company obtains for carrying out such activities. For example, a BIC company could validly allocate 80% of its resources to investments that have a beneficial impact on the environment but only 20% to commercial acts, from which the company derives economic benefits for its shareholders. In this example, the charitable activities could not be considered ultra vires, and therefore, their invalidity would not be actionable due to the company's lack of capacity to carry them out.

Based on the foregoing analysis, it can be argued that the concept of the company achieves a wider scope,[17] by facilitating the allocation of its resources, at least partially, to activities that may have social repercussions. It is, without a doubt, a development of what has come to be called conscious capitalism (or environmental, social, and governance responsible companies). This concept makes it possible to overcome the narrow space delimited by the principle of maximizing the interests of shareholders, to achieve a wider scope. That is why the by-laws of BIC companies allow for decisions that cover the interests of third parties (stakeholders) to be included in the company's plans, in addition to those that are inherent to the partners or shareholders. Thus, for example, corporate decisions can be adopted that grant benefits to workers, pensioners, consumers, suppliers, and, in general, members of the communities where the company operates.

[17] For some, this type of action has come to be called shared value. See Porter and Kramer (2011).

In light of the foregoing explanation, the evident benefit that arises from BIC companies consists of the possibility of acting legitimately both in lucrative and non-profit purposes. Before the advent of this legislation, the activities of benefit and collective interest companies were not legally viable, due to the restrictions derived from the essential element of profit sharing, the principle of specificity and the doctrine of the *ultra vires*. Certainly, the principle that governs the Commercial Code and other complementary regulations is the maximization of the economic benefits enjoyed by shareholders.

2.3 Tax System

The provisions in the second paragraph of article 2 of the Colombian law on BIC companies state that "companies that adopt the BIC designation still will have to comply with the obligations of the regular rates on income tax and its supplemental taxes, the common rates on sales and other national, departmental and municipal tax obligations." This provision reflects concerns about the possible use of BICs as an instrument to avoid tax duties. The problem lies in the possibility of the company allocating a substantial part of its economic resources to activities that are exempt from income tax or subject to tax deductions. Hence, it is essential that the sums invested in these types of *exempt* activities are fully justified in accordance with the current tax laws.

In all other aspects, it can be pointed out that there is no difference in the tax treatment given to BIC companies. Thus, unlike other legal systems in which there are tax incentives for the creation and operation of these companies, the Colombian legal system adopts, for now, a criterion of tax neutrality for these entities. That is to say, they have the same tax burden as companies that are exclusively for profit.

2.4 Additional Features of BICs

The choice of this type of company presupposes not only the obligation to include those activities in the corporate purpose from which it is intended to create benefits for the community or related to the collective interest. Also, the formality of incorporating the words "Benefit and Collective Interest" or the abbreviation BIC into the company reason or name must be observed.

Law 1901 of 2018 includes a detailed list of some of the general facets that characterize BIC companies, in relation to employees, the community, creditors, suppliers, and the environment, among others. Indeed, in paragraph of article 2 of the aforementioned law, it is stated that benefit and collective interest companies (BICs) have the following characteristics, "without prejudice to the fact that within their mission they develop other inherent attributes to its essence of corporate social responsibility":

1. They establish a reasonable salary for their workers and analyze the salary differences between their most and least paid employees to establish fairness standards.
2. They establish subsidies to train and develop their workers professionally and offer professional reorientation programs to employees whose employment contract has been terminated.
3. They create options for workers to participate in the company, through the acquisition of shares. Additionally, they expand the health plans and wellness benefits of their employees and design strategies for mental and physical health nutrition, aiming for the balance between work and private life of their workers.
4. They create a manual for their employees, to explain the values and expectations of the company.
5. They provide employment options that give workers flexibility in the working day and create telework options, without affecting the remuneration of their workers.
6. They create job options for the structurally unemployed population, such as youth at risk, homeless individuals, reintegrated or people who have been released from prison.
7. They expand the diversity in the composition of the boards of directors, management, executive and supply teams, in order to include in them people belonging to different cultures, ethnic minorities, religions, and those with different sexual orientations, heterogeneous physical capacities and diversity of genre.
8. They encourage volunteer activities and create alliances with foundations that support social works in the interest of the community.
9. They acquire goods or contract services from companies of local origin or that belong to women and minorities. In addition, they give preference in the execution of contracts to suppliers of goods and services that implement equitable and environmentally based standards.
10. Annually, they carry out environmental audits on efficiency in the use of energy, water and waste and disseminate the results to the general public and train their employees in the social and environmental mission of the company.
11. They monitor greenhouse gas emissions generated by business activity. They implement waste recycling or reuse programs. They progressively increase the renewable energy sources used by the company and motivate their suppliers to carry out their own environmental assessments and audits in relation to the use of electricity and water, waste generation, greenhouse gas emissions and the use of renewable energies.
12. They use energy efficient lighting systems and provide incentives to workers to use environmentally sustainable means of transport on their way to work.
13. They disclose the financial statements of the company to their workers.
14. They express the mission of the company in the various documents of the company.
15. They implement fair trade practices and promote programs for suppliers to become collective owners in the company, in order to help them to get out of poverty.

It is clear that this rule is not inclusive. Thus, it is possible that any other charitable activity that the shareholders consider useful or necessary can be included in the BIC by-laws. This norm alludes to the imperative nature in the writing of this paragraph. Indeed, the provision states that "Commercial Benefit and Collective Interest Companies ("BIC") **will have**, among others, the following characteristics. . .". An exegetical interpretation of this provision could lead to a conclusion that all BIC companies are required to incorporate into their by-laws all the charitable activities that have been described above.

It seems, however, that such a strict reading of the aforementioned rule could discourage the creation of this class of entities. Certainly, the obligation to commit to the 15 activities referred to above would make many entrepreneurs think twice about

adopting this business modality. A systematic interpretation is appropriate in order to reconcile the requirement imposed on the company to carry out some benefit and collective interest activities, with the State interest of encouraging the creation of this type of companies. As is evident, the practical performance of all the aforementioned activities would be so onerous that it would surely leave the company without any opportunity to create profit for its associates. In light of the above, it seems clear that the rule discussed could not be interpreted exegetically. In our opinion, therefore, the inclusion of any of these activities in the by-laws would suffice to make a company assume the form of a BIC company. The Colombian government has reasonably interpreted these provisions. So only one activity out of each of the five ESG "dimensions" provided in Law 1901 of 2018 needs to be mandatorily undertaken.

2.5 Acquisition and Loss of the Status of a BIC Company

As indicated at the beginning of the chapter, BIC companies can be created *ex novo* if the associates adopt this system at the time of the incorporation of the company or *ex post* through a statutory reform in which the BIC structure is adopted. Law 1901 of 2018 is sufficiently clear on this point. Article 3 states, in effect, that "to adopt the status of BIC company or to terminate it, a statutory amendment adopted by the majority provided for in the law or in the statutes for the amendments of the social contract will be required." Using this standard, the essentially voluntary nature of this business modality is emphasized. It is clear that the adoption of the BIC company does not imply the transformation of the company. Based on the aforementioned, the choice of a Benefit and Collective Interest Company does not imply a change in the type of business association adopted *ab initio*. For this reason, the mandatory provisions set forth in the Commercial Code for *conversions*, which include a special type of shareholders' meeting (article 13 of Law 222 of 1995) are not applied. The obligation to fulfill legal conditions for the amendment of the company's by-laws (or charter) include an inspection right granted to shareholders during the 15 business days that precede the shareholders' meeting (ibid.). Since the adoption of a BIC does not entail a *conversion* those requirements are not applied either, nor the special balance sheet for the reform to the company's by-laws (article 170 of the Commercial Code), nor the right of withdrawal for absentees and dissidents (article 12 of Law 222, cited). Thus, the shareholders' decision to move to the BIC framework implies only a by-law reform not subject to specific individual rights or guarantees.

It is obvious that in the case of the creation of BIC companies *ex novo*, the unanimous consent of the company's shareholders (original investors) is required. As there are no dissidents and there is a commonality of purpose between the partners or shareholders, the risks of internal conflict arising from the hybrid nature of the company are mitigated. The situation is quite different when the character of a BIC company is adopted after the establishment of the company, though this

happens less frequently. The decision rendered by the shareholders' meeting to abide by the legal framework of a benefit and collective interest company raises certain concerns regarding the minority shareholders or partners. In accordance with the law, such decision is subject to a majority equal to that provided for the amendment of the company's by-laws. And, obviously, such a decision is not always approved by unanimous consent. Instead it can be adopted frequently by the vote of an absolute majority. Therefore, it is likely that absent or dissenting shareholders could attempt to challenge the adoption of a BIC.

Obviously, such resolutions of the assembly or shareholders are subject to a majority voting rule. In accordance with the provisions of article 188 of the Commercial Code, all valid resolutions adopted by the highest corporate body, in observance of the rules on the calling of meetings, quorums, and majorities, are binding on all shareholders. It is normally assumed that the majority expresses what has come *to be called the corporate interest*. Hence, both those who vote in favor and those who oppose the determination or do not attend the meeting are equally bound by the decision adopted by the corporate body.

Naturally, as with all the resolutions adopted by the highest corporate body, those who are absent or dissenting have the right to challenge the resolutions that have been adopted. The action to challenge the resolution of the assembly or shareholders may be brought on the grounds provided for under article 190 of the Commercial Code:

> Decisions taken during a meeting held in contravention of the provisions of Article 186 [lack of convocation or quorum or performance outside the registered office without the presence of a universal quorum] will be ineffective; Those that are adopted without the number of votes provided by the statutes or laws, or exceeding the limits of the social contract, will be absolutely null; and those that are not of a general nature, in accordance with the provisions of article 188, will be unenforceable to absent or dissident members.

Additionally, resolutions adopted by the highest corporate body may be questioned when they imply an abuse by the majority. In general, there is reprehensible abuse "when a subjective right is exercised with the intention of causing damage or for a purpose other than that for which the objective right has provided for its use." This point is explained by the great French scholar Louis Josserand (1999, p. 5):

> Modern law and especially contemporary law have developed a much more comprehensive idea of the abuse of right. It is abusive any act that, for its motives and for its purpose, goes against destiny, against the function of the Law that is exercised; the purely intentional criterion tends to be replaced by a functional criterion, derived from the spirit of Law, and from the function entrusted to it.

Article 43 of Law 1258 of 2008 states:

> Shareholders must exercise the right to vote in the interest of the company. A vote exercised for the purpose of causing harm to the company or other shareholders or to obtain for oneself or for a third unjustified advantage, as well as a vote from which it may be detrimental to the company or to the other shareholders, will be considered abusive. Whoever abuses their shareholder rights in the determinations adopted at the meeting will be liable for the damages

> caused, notwithstanding that the Superintendency of Companies may declare the absolute nullity of the determination adopted, due to the illegality of the object.

The Colombian Superintendency of Companies has stated that the abuse of right constitutes an exceptional mechanism whose actions must be duly accredited during the process. In this regard, the entity, in the exercise of jurisdictional functions, has highlighted what is transcribed below:

> This Office has also made reference to the high burden of proof that must be met by those who propose a legal action for abuse of majority. In these circumstances, it is not enough to allege that the decisions approved in a meeting of the assembly were contrary to the subjective interests of a minority shareholder. To prove that an abuse occurred, it must be shown that the actions of the majority were motivated by an illegitimate purpose. This would occur, for example, if the right to vote was exercised with the deliberate intent to cause harm to the minority shareholder. [. . .] The Firm does not have evidence to verify that the majority shareholders of Jannas Business Group (Simplified Corporation, SC) acted abusively when approving the capitalization aimed by this procedure. First, the plaintiff did not provide sufficient evidence to dispute the economic justification used by the defendants to approve the capitalization under study [. . .]. Second, the primary issue [. . .] was carried out subject to the right of first refusal [. . .] the Office found no indications that the majority had decided to issue shares knowing that Mr. Rodríguez lacked sufficient resources to exercise their right of first refusal"(Order issued in the case of Alexander Rodríguez against Jannas Grupo Empresarial SSC and others).

2.6 Governance of BIC

Law 222 of 1995 contains the basic rules concerning the liability of directors and officers of a company (also referred to as administrators). This statute establishes the definition of those officials who are considered administrators for the purpose of the application of fiduciary duties of conduct (good faith, loyalty, and care). Based on this definition, the aforementioned duties of conduct are developed in detail, the responsibility system that corresponds to them is indicated, and the individual or derivative suit that proceed in case of violation of the legal framework are indicated thereby.

Colombian law does not explicitly provide that fiduciary duties are applicable to the relationship between administrators and shareholders (as it occurs in other legal systems). However,[18] there are provisions in the current legislation that allow for a

[18]Thus, for example, Portuguese legislation goes beyond the precept adopted in Colombia. When referring to the duty of care, art. 64 of the Code of Commercial Companies (decree-law 262 of 1986) provides that "managers, administrators or directors of a company must act with the diligence of a reasonable and orderly manager, in the interests of the company, taking into account the interests of shareholders and workers" (See Neto, 1988, p. 460). Against this trend, Rodríguez Azuero (1998, p. 58) has manifested itself in Colombia, noting that it is striking that art. 22 of Law 222 of 1995 "note that the actions of the representative will be carried out in the interests of the company, but taking into account the interests of the associates, since the administrators must fundamentally watch over the interests of the legal person that is, for legal mandate, essentially

broad interpretation of such duties. For instance, according to article 23 of Law 222 of 1995, the actions of the administrators "shall be carried out in the interests of the company, **taking into account the interests of its associates**." That article denotes the legislative intent to apply the rule to situations involving disloyalty to shareholders. This requirement does not in any way detract from the premise that the main interest that administrators must defend is that of the company (in the traditional framework of exclusively profit-making companies). However, there is no negative connotation in the fact that the administrator has the duty to consider the situation of all or some of the shareholders at the time of making decisions, the adoption of which may cause them harm.[19]

One of the great legal innovations introduced by Law 1901 on BIC companies lies precisely in the possibility that the company's managers can consider interests different from those of the company and the shareholders. Thus, in effect, according to the literal wording of article 4 of the Law, "In addition to the rules provided for liability in Law 222 of 1995, the administrators of BIC companies must take into account the interest of the company, that of its partners or shareholders and the benefit and collective interest that has been defined in its bylaws." This rule allows the resolutions adopted by the company's administrative bodies (board of directors) to contemplate nonprofit activities, such as those indicated in the aforementioned provision of article 2 of Law 1901.

In light of the above-quoted article it is clear that there was a change in the legal system governing the liability of directors and officers. In truth, the managers of the social enterprise will not be subject to liability for the fact of carrying out acts that are not oriented to favor, exclusively, the interests of the shareholders or partners. Thus, to the extent that administrators act within the scope provided for in the by-laws (both in lucrative activities and in those that are not), they will be protected from possible liability vis-à-vis the company, its shareholders, and third parties.

2.7 Special Report

In addition to obligations imposed on administrators by virtue of the provisions of Law 222 of 1995 and, in particular, the duty of legal representatives to prepare a management report pursuant to the terms of article 47, ibid., the law on BIC

different from that of the partners ". The aforementioned UK company regime establishes the principle called "enlightened shareholders value", which allows the interests of the associates to be taken into account in the determinations of the Board of Directors.

[19] In accordance with the case law established by the Superintendency of Companies of Colombia, "the norms that govern the actions of the administrators seek to promote a delicate balance between the autonomy that such subjects must have to conduct social business and the responsibility that must be attributed to them by inadequate compliance with this management" (Superintendency of Companies. Judgment No. 800-52 of September 1, 2014).

companies establishes the need for a special report to be prepared regarding the beneficial activities the company developed during the year. According to the text of article 5 of Law 1901:

> The legal representative of the BIC company will prepare and present to the highest corporate body a report on the impact of the management of the respective company, in which they will report on the activities of benefit and collective interest developed by the company. This information must be included in the year-end report, which is presented to the highest corporate body.

The usefulness of this report is clear. Primarily, it is useful for associates, who will be able to evaluate the nonprofit activity of the company during the accounting period reviewed. In effect, while the management report referred to in Law 222 allows them to examine the conduct of the administrators in relation to the lucrative businesses of the company, the report prepared pursuant to Law 1901 provides them with information on the benefit and collective interest acts performed by the company within the same accounting cycle. The report will include, among other things, the percentages of investment made in various activities and the profitability of the company itself.

Also, the special report referred to in article 5, cited above, has significant use to government control authorities, such as the Superintendency of Companies and, especially, tax authorities. As already explained above, the risk of charitable activities becoming fictitious sources of tax exemptions and deductions justifies the need for management reports concerning the scope and extent of the company's activities.

In order for the report to enjoy sufficient publicity, the second paragraph of article 5 of the BIC Law requires that it "must be published on the company's website for consultation by the public." In the event that the company does not have a website, the aforementioned report "must be available at the registered office and will be sent to whoever so requests in writing by means of a communication addressed to the legal representative of the BIC company" (ibid).

2.8 Stand-Alone Standard

BIC companies must be understood in the framework of an international movement in which several countries have issued legislation on them, and various private organizations have developed independent standards for the reporting of information related to the activities engaged in by these companies. The existence of these standards greatly facilitates the homogenization and reliability of the data provided to shareholders and third parties.

Due to the above, it is implied, in Law 1901, that the management report should be subject to independent standards. Article 6 of the BIC Law establishes, in effect, that the independent standard adopted by BIC companies must adhere to the following principles:

(a) Recognition. This principle refers to the fact that the standard must be recognized for being used to define, report and evaluate the activity of companies in relation to the community and the environment;
(b) Comprehensive character. The concept refers to the fact that, in the evaluation and reporting methodology, the effects of the activity of the BIC company in relation to the activities of benefit and collective interest must be analyzed;
(c) Independence. The concept refers to the evaluation and reporting methodology that must be developed by a public, private or mixed, national or foreign entity which is not controlled by the BIC Company, nor by its parent companies or subsidiaries;
(d) Reliability. This refers to the fact that the standard must be prepared by an entity that has experience in evaluating the impact of the companies' activity on the community and the environment and that it must be based on methodologies that include an examination from different perspectives;
(e) Transparency. It means that the information used with the independent standards, as well as that relative to the entities that elaborate them, must be published for the knowledge of the public.

It is evident that the standards for reporting information regarding BIC companies are dynamic in nature since they are periodically modified. Certainly, the international entities in charge of preparing them must continually modify such guidelines to keep them up to date.

There should be quality control regarding the standards that BIC companies can use to prepare their management reports. Precisely for this reason, in Law 1901, it is stated that the Superintendency of Companies has the power to create a list of independent criteria, according to which compliance with the five principles indicated above can be determined. The Superintendency of Companies, through Resolution 200-004394 of October 18, 2018 defines the independent standards to be used by BIC companies, because they comply with the principles set forth in article 5 of the Law. In accordance with the aforementioned administrative act, the standards accepted in Colombia for the aforementioned purposes are the following:

1. The B Corporation Type B Company Certification.
2. The GRI Standards of the Global Reporting Initiative.
3. The ISO 26000 standard for Corporate Social Responsibility of the International Organization for Standardization.
4. The United Nations Guide to the Sustainable Development Goals (SDG Compass), the World Business Council for Sustainable Development and the GR.15.

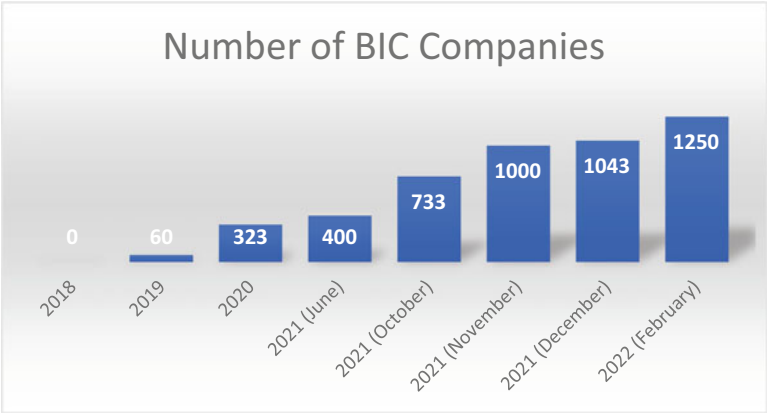

Fig. 1 Number of BIC companies. Source: Colombian Superintendence of Companies (2022)

3 Conclusion

As of March 2021, there were 62 companies in Colombia certified by System B. [20] Among them are restaurant chain Crepes & Waffles and Finaktiva, a financial entity specializing in granting loans to new ventures. However, the certifications held by these companies do not necessarily mean that they have adopted the model of the benefit and collective interest companies. To the extent that these companies act as profit-making companies, a problem could arise regarding their ability to carry out activities of benefit and collective interest. As indicated at the beginning, there are criteria in connection with the corporate purpose, proportionality, and capacity of the society to prevent, in general, a civil or commercial society allocating a substantial part of its resources to non-profit activities. Thus, any shareholder or, even, creditor could request the nullity of such activities based on the ultra vires theory.

Hence, it is reasonable to demand that such companies (certified as B companies) adopt the modality of benefit and collective interest companies in accordance with the provisions of Law 1901 of 2018. If shareholders have an interest in the development of these activities, they could not do so without complying with the rules set forth in the aforementioned law on BIC Companies. It is the Superintendency of Companies that has the power to intervene and prevent the illegal acts of B companies that have not adopted the BIC company model. It remains to be seen if there will be a convergence between Colombian BIC companies and the few corporations that have been certified by System B in this country.

[20] See "Empresas B, comunidad que va más allá de las finanzas", Bogotá, Portafolio, March 19, 2021: (https://www.portafolio.co/negocios/empresas/empresas-b-comunidad-que-va-mas-alla-de-las-finanzas-550242).

In any event, it is clear that Colombian legislation has adopted a highly flexible model for benefit and collective interest companies, which does not imply high transaction costs for entrepreneurs who wish to adopt it. The adoption of all the advantages of a BIC is facilitated by the fact that it is not a specific type of company (requiring conversion to take advantage of its features).

That is probably the reason why the model of BIC companies has been so successful in Colombia. As can be seen from the statistical data provided in Fig. 1, the growth of this business model has been exponential within the last few years.

One of the main advantages of BIC companies consists of the possibility of acting legitimately in lucrative and non-profit spheres. Before the advent of this legislation, the activities of benefit and collective interest were not legally viable, due to the restrictions derived from the essential element of profit sharing, the specialty theory and the *ultra vires* concept. Certainly, the principle that governs the Commercial Code and other complementary regulations is the maximization of the economic benefits received by shareholders.

Reference

Porter ME, Kramer MR (2011) Creating shared value, how to reinvent capitalism—and unleash a wave of innovation and growth. Harv Bus Rev 89:62–77