



Universidade do Minho
Escola de Direito

Carlos Arménio da Silva Oliveira **Delaware Public Benefit Corporation Model: analysis and comparison**

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Model: analysis and comparison**

Master thesis

Master in European and Transnational, Business Law

This work was realized under the supervision of:

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STATEMENT OF INTEGRITY

I hereby declare having conducted this academic work with integrity. I confirm that I have not used plagiarism or any form of undue use of information or falsification of results along the process leading to its elaboration.

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Delaware Public Benefit Corporation Model: analysis and comparison

Resumo

O objectivo desta dissertação é de conseguir uma sólida compreensão das complexidades e características fundamentais do modelo de Empresa de Benefício Público de Delaware e compará-lo com a legislação europeia existente e modelos de empresas de países europeus tais como o Reino Unido, Itália e Portugal. O objetivo final será o de discernir o estado geral na Europa em relação a este modelo de empresa, considerando se há necessidade ou não da introdução geral do modelo de Empresa de Benefício Público de Delaware nos países europeus, em particular, em Portugal, e o que poderia ser alcançado com a possível introdução deste novo modelo.

Iremos observar as atuais semelhanças e diferenças entre a Empresa de Benefício Público de Delaware e as características dos Modelos de Empresas Europeias, com foco nas empresas sociais do Reino Unido, a sociedade de benefício Italiana e os modelos de sociedades Portuguesas. Por fim, a Tese tentará descobrir se as Empresas de Benefícios Públicos podem ser um instrumento eficaz para o reforço da Responsabilidade Social das Empresas, remodelando os modelos Europeus de direito das sociedades com o objetivo de desenvolver uma abordagem empresarial mais sustentável para o ambiente da empresa.

Como não há, ainda, considerável debate académico na Europa sobre este novo tipo de empresa e as mudanças que poderia trazer, esta tese está, no momento atual, na vanguarda do Movimento de Benefício Público na Europa.

Palavras-chave: Direito das sociedades; benefício público.

Delaware Public Benefit Corporation Model: analysis and comparison

Abstract

The main objective of this research is to attain a solid understanding of the complexities and core features of the Delaware Public Benefit Corporation Model and compare it with existing European legislation and Company Models from European countries such as the United Kingdom, Italy and Portugal. The final goal will be to discern the overall state in Europe in relation to the PBC Model, considering if there is a need or not for the general introduction of the Delaware Public Benefit Corporation Model in the European countries, particularly in Portugal, and what could be achieved with the possible introduction of this new model.

We shall observe the current similarities and differences between the Delaware Public Benefit Corporation Model and the features of the European company models, with focus on the UK Social Enterprises, the Italian *Società Benefit* and the Portuguese company models. Finally, the Thesis will try to assert if the Public Benefit Corporations can be an effective tool for the reinforcement of the corporate social responsibility, remodeling European company law models in the aim of developing a more sustainable business approach for the company environment.

Since there is not, yet, any considerable academic debate in Europe about this new type of company and the changes it could bring, this thesis is, at the present, at the forefront of the Public Benefit initiative in Europe.

Keywords: Public benefit corporation; company law;

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Abbreviations

CSC- Código das Sociedades Comerciais

CC - Cooperative Code

CSR – Corporate Social Responsibilities

CIC – Community Interest Company

EU – European Union

DGCL - Delaware General Corporation Law

MBCL - Model Benefit Corporation Legislation

PBC – Public Benefit Corporation

SB – Società Benefit

SE – Social Enterprise

UK – United Kingdom

USA – United States of America

SME – Small and Medium-sized Enterprises

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Introduction

First, it should be mentioned that this paper was created in the scope of the LL.M in European and Transglobal Business Law. The LL.M program consists of a diversified program with different fields of study such as competition law, tax law, contract law, European Union law, international economic law, among others. Nevertheless, in the year the author attended the master's program it barely covered the aspects of the Public Benefit Corporation Model, with only a brief mention during a seminary on American Corporations. This was one of the reasons why the author selected this particular field, in order to get acquainted with a company model besides those that are part of the LL.M curricular semester. Other reasons for the choice of such a subject were the great interest and prospect for the promising introduction of the Public Benefit Corporation Model in Europe and the impact on the European company law that it can have, endorsing new developments in this field of law.

During this essay, the author will address the question of the social benefit responsibility in companies. The methodology will focus on the fields of company law, EU company law, state legislation, social benefit considerations as well as economic and theoretical analysis. Since there is not much data or actual research regarding the amount of "benefits" that PBCs have produced so far in comparison with traditional companies, this study will be limited to what PBCs may potentially change in the current corporate environment. The author sustains that in what concerns social benefit efforts in companies, the European legislation, is behind where it should be and the European Company Law should adopt some of the new paradigms.

This essay analysis will be limited to the social benefit initiatives and the benefit corporation movement, with focus on the company law approaches in the USA and in Europe. It will mainly address the features of the Delaware Public Benefit Corporation Model and, for that reason, it will not study in any extensive way the different features of the Public Benefit Corporation Models from the other US states.

When comparing the Model with other European Company Models, it will give emphasis on the United Kingdom Social Enterprise in which the research will focus on the Community Interest Company (CIC) category and the Company Limited by Guarantee. In Italy, it will look over the Italian *Società Benefit* and the AFAM Municipal Pharmaceutical Company (*Farmacie Comunali Firenze*) as the main example of the current situation in Italy. Finally, in Portugal it will study only the main types of companies in Portugal and the Portuguese cooperative model.

Concerning the methodology used in this dissertation, chapter I and II are mainly based in legal descriptive research while chapters III and IV are based in legal description as well as analytic research where the author introduces his own interpretations. In relation to the structure, chapter I explains some of the most recent developments in the social benefit concept and introduces the main areas of interest that the essay will deal with, providing a first description and analysis of the general concepts in study. Chapter II and III are factual chapters that provide core understanding as well as opinions about the topics. Chapter II and III are the main providers of knowledge in what concerns to the specific questions of the dissertation. Chapter IV contributes with possible answers and recommendations.

Lastly, since the Delaware Public Benefit Company Model is, in general, unknown in the European legal framework (with the exception of Italy), this essay will be largely directed on the possible introduction of the Delaware PBC Model or of a similar Model throughout Europe, with a mainly theoretical approach, hoping to encourage further discussion on the subject.

Chapter I

General Considerations about the Topic

1. Changing the focus on Corporations

Nowadays, we face a convergence of crises with environmental, social and economic consequences. Although governments have a responsibility for dealing with crises such as market failures and their negative externalities, they might not be always prepared to deal with the resulting consequences. Indeed, most governments and its institutions regularly fail to address their citizens needs in a competently or timely manner. Governments can also be corrupt, inefficient, their actions (or inaction) can sometimes exacerbate the crises in question, and many end up simply failing to provide the desired public good. As such, one of the potential solutions¹ to solve this issue is to use the immense power and resources that modern corporations have at their disposal for the public benefit².

On the other hand, due to the fact that companies are legal entities that have been granted extraordinary privileges by the State, and operate apart from the natural persons who form and run them, we must point out that they are one of the main reasons for this current situation³. Furthermore, this lack of restriction has allowed corporations to organize trillions of dollars of capital and create wealth beyond what most countries possess, ultimately exacerbating economic inequality by accruing incredible wealth for their shareholders while contributing to decades of wage stagnation (Palladino and Karlsson, 2019). Moreover, while many disagree⁴ on the character of the company's main drive, it is clear that profit

¹ Alexandra Pires, in her comparative analysis between American and Italian Public Benefit Models, already warns that, because of its characteristics and objectives, the discussion about for-benefit organizations may involve new conceptions of the roles of the State and the private sector. For more information regarding Pires research, see PIREES, A. (2017), *The fourth sector and the benefit companies: a comparative analysis between the American and the Italian models*, University of Milan, Social Science Research Network. Retrieved from <https://www.cfllegal.com/uploads/outros/publicacoes/2/4e90980560dc6687d75316cf1d3f0839.pdf> (last time consulted: 12-04-2019)

² Despite referring to the role of Corporate Social Responsibility in the private sector and its importance for preserving social welfare through the private provision of public goods, Allen Ferrel, Hao Liang and Luc Renneboog make some very good arguments that can be used to support the Public Benefit Corporation movement. They cast doubt on the belief shared by many researchers that such private provision of public goods can be associated with agency problems that divert shareholder wealth and even undermine the foundations of capitalism. For them " *Corporate governance reforms should take into account such positive externalities*". For more information, see FERREL, A; LIANG, H; RENNEBOOG, L. (2016), *Socially Responsible Firms*, European Corporate Governance Institute (ECGI) - Finance Working Paper No. 432/2014. Retrieved from <https://ssrn.com/abstract=2464561> or <http://dx.doi.org/10.2139/ssrn.2464561>

³ Reinforcing the idea of discontent from the company's operations, Nass states, "(...) *In light of the current period of economic uncertainty, and the awareness of the necessity and desire for sustainability, many Americans are disenchanted with the operating practices and philosophy of major corporations*". For more information on Nass work, see NASS, M. (2014), *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, University of Iowa, The Journal of Corporation Law, 39 Iowa J. Corp. L. 875.

⁴ As an example, Colin Mayer, Peter Moores Professor of Management Studies at Saïd Business School, Oxford University, and an expert on corporate finance, governance and taxation, has the opinion that the purpose of a company is to perform actions that will bring " *benefit to communities, societies, customers and in the process of doing that the owners of a company generate profits but profits are not as such the objective of a corporation*". For more information, see: Purpose. (2017), *Prof. Colin Mayer on corporations and ownership*. Retrieved from <https://purpose-economy.org/en/blog/colin-mayer/> [Accessed on 27-09-2018]. Lipton (2019) further affirmed that the prioritization of the wealth of shareholders at the expense of employee wages and retirement benefits

maximization is the primary foundational principle of modern corporate purpose. This principle is perfectly expressed by the American economist Milton Friedman's famous statement "*the only responsibility of corporations is to make profits*" (New York Times Magazine, 1970, p.122). In fact, USA corporate environment obliges, by law, corporations to maximize shareholder value without regard for anything else, like worker safety requirements, pollution, the public interest, social impact and other actions that are able to benefit society.

Even though, this perspective has been challenged in recent years by the Benefit Corporation movement and the codification of the for-profit mission-driven entity in state corporation statutes, profit maximization continues to be the goal for the majority of the companies in the world. In effect, despite the growing numbers of Public Benefit Corporations, many economists still argue that the idea of creating a new type of company that invests its profits back into the business to grow infrastructure and pay higher wages, providing environmentally friendly housing, education and entertainment, is not the purpose of a corporation, but of a charity or foundation⁵. As wrong or right their thoughts may be, if we want to change this reality and shift over to a sustainable path, we need companies to increase their role, and the Public Benefit Corporation Model has the potential to play an important part in facilitating such a necessary contribution.

In fact, as it becomes patent that there is a necessity to provide new measures to develop European company law, the Public Benefit Corporation Model seems to be an exceptionally valuable tool, both for the development of European company law and for a better implementation of the Corporate Social Responsibility (CSR)⁶ efforts. Regarding CSR in Europe, Sjaafjell and Anker-Sorensen⁷ claim that companies are not to an adequate extent using the room they have to integrate CSR into their core

gave rise to the deepening inequality and populism that today threaten capitalism from both the left and the right. See more in LIPTON, M. (2019), *It's Time to Adopt the New Paradigm*, Harvard Law School Forum on Corporate Governance and Financial Regulation. Retrieved from <https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/> (last time consulted: 28/03/2019)

⁵ Peter Schmitt considers that while they are needed to force a discussion on the issue, "...PBCs are not necessary as an entity type and will likely not stand on their own for long". For more information, see SCHMITT, P. (2016), *Public Benefit Corporations: Pushing the Social Venture Discussion*, The Hubert H. Humphrey School of Public Affairs/Carlson School of Management, University of Minnesota. P.27

⁶ Corporate social responsibility is a very broad concept that addresses many and various topics such as human rights, corporate governance, health and safety, environmental effects, working conditions and contribution to economic development. It is a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders. For more information, see Financial Times. *Definition of corporate social responsibility*, (CSR). Retrieved from [http://lexicon.ft.com/Term?term=corporatesocial-responsibility-\(CSR\)](http://lexicon.ft.com/Term?term=corporatesocial-responsibility-(CSR)) (last time consulted: 28-05-2018)

⁷ For more information, see SJAAFJELL, B.; ANKER-SORENSEN, L. (2013), The Duties of the Board and Corporate Social Responsibility (CSR). Hanne Birkmose, Mette Neville & Karsten Engsig Sørensen (eds.), *Boards of directors in European companies – reshaping and harmonising their organisation and duties*, Kluwer Law International, 2013, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2013-26; Nordic & European Company Law Working Paper No. 10-40. Available on SSRN: <https://ssrn.com/abstract=2322680>.

business, and are failing to comprehend the business potential of contributing to sustainable development. Furthermore, they consider that the board⁹ is the key to unlock companies' potential to integrate CSR into the core business of the companies but the pressing question is how to turn the key. During this thesis, we shall present the Public Benefit Company Model as one of the possible ways to turn the “key”.

Nevertheless, some authors consider that corporate rights should come with societal responsibilities of the firms to advance the public interest. Moreover, if the nations in Europe or the European Union in its fullness officially adopts the Public Benefit Corporation Model or a similar legal model, this accomplishment could have the potential to take the lead in this changing process within the world⁹, and thereby turning away from the current trend of “short-term growth mania” and onto a more sustainable path. For that reason, the main question of this thesis will focus on what is a Delaware Public Benefit Corporation, how it differs from other types of corporations and how the main concept could severely change the European corporate environment. In addition, we need to take into consideration the effective role of the law in the consolidation of the PBC Model, as mainly regulatory laws, which are a prime example of the modern social state, being defined as an *“(...) instrumental law, as a mechanism of regulation or social direction, in order to achieve certain objectives formulated by the political system”*¹⁰.

During this paper, we should remember that legal rules, ownership structures, the fiduciary duties of the management and the board of directors, executives' incentives, and the decision-making process are very different outside the Anglo-American world, which significantly influences the debate around PBCs. Therefore, when concerning the quantity of the debate on the role and importance of PBCs, we will see that it often reflects the differences of the levels of capitalism between countries and the limitations they

⁹ Allen Ferrel, Hao Liang and Luc Renneboog found the existence of a positive relation between CSR and value and that CSR attenuates the negative relation between managerial entrenchment and value.

⁹ I share Leo E. Strine, Chief Justice of the Delaware Supreme Court, opinion, in which *“(...) The United States and Europe must lead by example. Our societies obviously went through periods when we callously disregarded the rights of labor and the integrity of the environment. We therefore must help the developing world make the same progress we did but with fewer externalities”*. For more information, see STRINE, L. (2005), *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, Delaware Journal of Corporate Law, Vol. 30, No. 3, pp. 673-696. Available at SSRN: <https://ssrn.com/abstract=893940>

¹⁰ TEUBNER, Gunther. *Jurisdição – Noções, características, limites, soluções*. Revista de Direito e Economia, Coimbra, ano XIV, 1988, p.46. Regarding Regulatory Law, it deals with procedures established by federal, state, and local administrative agencies, as opposed to laws created by the legislature (statutory laws) or by court decisions (case law). Regulations can relate to a large array of executive branch activities, such as applications for licenses, oversight of environmental laws, and administration of social services like welfare. For more information, see HG.org Legal Resources. Regulatory Law. Retrieved from <https://www.hg.org/regulatory-law.html> (last time consulted: 22-02-2019)

place on their companies. This will be clearly seen when comparing the differences between the American Public Benefit Corporation Model and the Italian *Società Benefit* approach.

1.1. The notion of Public Benefit in Companies

Since the creation of companies, the legal rules binding and defining them has changed considerably, to the point where the company's notion has been severely altered, from being a public creation to a typically market creation in which privileges to the large companies are granted and retained without the obligation of following a determined public purpose. In effect, according to Professor Colin Mayer¹¹, the "(...) *a notion of servicing their customers*" that has changed during the 20th century when companies "(...) *shifted to the importance of the shareholders, to maximize in terms of shareholders*". Indeed, despite the fact that the fiduciary duty of the directors is to the company, in practice that means little since the control rights belong to the shareholders¹². This change consequently altered the main direction of corporate governance practices for the maximization of the profits and interests of the shareholders, resulting in the general detriment of the society who ultimately bears the social costs of the corporation's decisions¹³. On the opinion of Palladino and Karlsson, this misguided focus, driven by the neoliberal conception of shareholders as the only actor within the firm who is critical to corporate success, is the result of decades of flawed theory in corporate law and policy. Moreover, according to Holly J. Gregory and Sidley Austin, the corporation's purpose is also subject to an ever-changing public sentiment and

¹¹ For more information on Professor Colin Mayer opinion, see: Purpose. (2017), *Prof. Colin Mayer on corporations and ownership*. Retrieved from <https://purpose-economy.org/en/blog/colin-mayer/> (last time consulted: 27-09-2018)

¹² A corporation's board owes its "fiduciary duties" exclusively to shareholders, meaning that the board, as it makes decisions, is solely accountable to shareholders. Crucially, if corporate leaders' decisions are driven by other priorities, they can be challenged either by "activist" investors threatening to take over boards, or by legal action; these threats work to disincentive any deviation from the shareholder primacy norm (eBay v. Craigslist 2010). For more information, see PALLADINO, L. and KARLSSON, K. (2019), *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, Roosevelt Institute. Retrieved from <https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance/> (last time consulted: 21/03/2019)

¹³ Increasing economic evidence suggests that shareholder primacy is not benefiting other corporate stakeholders, including workers, suppliers, consumers, or communities. Lenore Palladino has a very interesting opinion on the influence of the shareholders in corporate decisions, writing, "*At its core, the logic necessitates that all corporate decisions are made according to the effect that they will have on the share price*". Consequently, corporate boards "*understand themselves as ultimately accountable only to shareholders, because all other corporate stakeholders—employees, customers, taxpayers—are covered by 'contracts'*". For Palladino, "*prioritizing shareholders means keeping costs—among them, employee wages—as low as possible, even if that will have a negative effect on the corporation's long-run ability to grow and prosper*". For more information, see PALLADINO, L. (2018), *Public Benefit, Incorporated*, Boston Review. Retrieved from <http://bostonreview.net/class-inequality/lenore-palladino-public-benefit-incorporated> [(last time consulted: 06-01-2019). A commended 2017 article in the Harvard Business Review, "*The Error at the Heart of Corporate Leadership*," by Harvard Business School Professors Joseph Bower and Lynn Paine, reject shareholder primacy while making a compelling case for director-centric stakeholder governance: "*We are capitalists to the core. We believe that widespread participation in the economy through the ownership of stock in publicly traded companies is important to the social fabric, and that strong protections for shareholders are essential. But the health of the economic system depends on getting the role of shareholders right. The agency model's extreme version of shareholder centrality is flawed in its assumptions, confused as a matter of law, and damaging in practice. A better model would recognize the critical role of shareholders but also take seriously the idea that corporations are independent entities serving multiple purposes and endowed by law with the potential to endure over time. And it would acknowledge accepted legal principles holding that directors and managers have duties to the corporation as well as to shareholders. In other words, a better model would be more company centered*".

cultural norms, being regarded differently in distinct parts of the world. Continental Europe (particularly Germany, France and the Netherlands) and countries in Asia have inclined toward satisfying the needs of employees and other “stakeholders”, variously defined to include suppliers, creditors and the communities in which corporations operate. On the contrary, the USA, Canada and the United Kingdom have leaned towards shareholder primacy as a standard that is easily measured and observed, avoiding a diffusion of accountability and the risk of differing interpretations about what constitutes good performance¹⁴. However, regarding the company’s economic approach, most countries’ legal and economic systems allow either for-profit or nonprofit activity, but not a mix of the two. This generates negatives outcomes, plainly evidenced when more socially minded entrepreneurs end up having to restrict their vision into one structure or the other and end up being hindered in their activities by the rules of the company type they chose¹⁵.

¹⁴ For more information on the corporation’s purpose, see Austin, S. and Gregory, H. (2019), *Everything Old is New Again—Reconsidering the Social Purpose of the Corporation*, Harvard Law School Forum on Corporate Governance and Financial Regulation. Retrieved from <https://corpgov.law.harvard.edu/2019/03/12/everything-old-is-new-again-reconsidering-the-social-purpose-of-the-corporation/#2> (last time consulted: 28/03/2019)

¹⁵ Heerad Sabeti approaches this issue with a solution, the creation of a For-Benefit Enterprise, in which the Public Benefit Corporation Model is one of its many types, with a commitment to social purpose and a reliance on earned income. Once recognized and adopted by governments, markets, and entrepreneurs, the model would pave the way for the “emergence of a fourth sector, which, according to Sabeti, “ (...) has been there all along, though cloaked by conventional adherence to old categories”. For more information, see SABETI, H. (2011), *The For-Benefit Enterprise*, Harvard Business Review. Retrieved from <https://hbr.org/2011/11/the-for-benefit-enterprise> (last time consulted: 12-04-2019)

1.2. The tendency to change company's traditional purpose

Conversely, as the 21st century pushes on, there has been an increased emphasis on other stakeholder values, with particular attention being directed to social and environmental concerns. In fact, a recent survey of 500 institutional investors, known as the Edelman Trust Barometer¹⁶, found that investors are increasingly taking into account as investment factors longer-term social and environmental considerations and the corporation's cultural health. They are also expecting companies to take a stand on relevant social issues. In fact, 64 percent of the investors surveyed assumed that "(...) *CEOs should take the lead on change rather than waiting for government to impose it*" and a full ninety-eight per cent thought, "(...) *public companies are urgently obligated to address one or more societal issues to ensure the global business environment remains healthy and robust*"¹⁷.

Authors such as Kent Greenfield¹⁸ have discussed the issue in question and proposed modifications to corporate law that, if applied, would challenge corporate power. To better present his ideas, Greenfield went to the point of formulating five principles for those developing public policies in the area of corporate governance. Firstly, he stated that the ultimate purpose of corporations should be to serve the interests of society as a whole, and relates with his second principle, that corporations are distinctively able to contribute to the societal good by creating financial prosperity. Greenfield third principle asserted that corporate law should further principles 1 and 2, reminding us "(...) *there is no such thing as a limited liability society*". His fourth point insisted on the idea that a corporation's wealth should be fairly shared among those who contribute to the creation of that wealth. Finally, the fifth one emphasized on the importance of Democratic corporate governance as the best way to ensure the sustainable creation and equitable distribution of corporate wealth. Fortunately, Greenfield is not the only one trying to provoke

¹⁶ The Edelman Trust Barometer Special Report: Institutional Investors reveals new criteria for evaluating investments as well as insights on what drives institutional investor trust in companies. The second annual special report finds that investment criteria are evolving to target areas beyond financial metrics, with a strong focus on corporate culture, Environmental, Social and Governance (ESG) investing, and companies' roles within broader society. The research surveyed more than 500 chief investment officers, portfolio managers, and buy-side analysts in five countries (U.S., Canada, UK, Germany and Japan), representing firms that collectively manage over \$4.5 trillion in assets. For more information, see Edelman. (2018), *Trust Barometer Special Report: Institutional Investors*. Retrieved from <https://www.edelman.com/research/trust-barometer-institutional-investors> (last time consulted: 28/03/2019)

¹⁷ For more information, see Edelman Trust Barometer. (2018), *Special Report: Institutional Investors US Results*. P-14. Retrieved from https://www.edelman.com/sites/g/files/aatuss191/files/2018-11/Edelman_Trust_Barometer_Institutional_Investor_US_Results_0.pdf (last time consulted: 28/03/2019)

¹⁸ Kent Greenfield's *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* posits that corporation law shouldn't be thought of as "private" law, which governs the relationships of individuals, but as a branch of "public" law, such as constitutional, tax, or environmental law. In his assertions, the author adds that the American nation could and should choose "*to require that democratic values govern corporations, rather than having corporate values govern democracy.*" For more information, see GREENFIELD, K. (2010), *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*, University of Chicago Press.

changes in how corporate law is designed. In effect, with the growth of the nonprofit sector in the last decades and the increase of its scope of influence regarding public goods and services, the common view about company's for-profit sole purpose has been increasingly challenged¹⁹.

At the present, the newest evolutionary corporate form²⁰, the Public Benefit Corporation Model is a debated model, and has been particularly discussed in the North-American Academia, as Lidstone²¹ questions, “(...) *why a Public Benefit Corporation Rather Than A Non-PBC?*”. Besides PBCs, other movements, such as the also recent Environmental, Social and Governance (ESG) Criteria²², social entrepreneurship and impact investing²³ are assisting individuals to clearly distinguish between traditional companies and those that are committed to a broader set of stakeholder values. They represent part of a global shift in consciousness, which thrives to recognize that humanity needs to take better care of its

¹⁹ As an example, in his January 2018 letter to CEOs, BlackRock CEO Larry Fink discussed the need for portfolio companies to have a “*sense of purpose*” and shared his view that to “*prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers and the communities in which they operate*”. Fink adds, “*Without a sense of purpose, no company, either public or private, can achieve its full potential*”. For more information, see BlackRock. (2018), *Larry Fink's Annual Letter to CEOs: Purpose & Profit*. Retrieved from <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (last time consulted: 28/03/2019)

²⁰ Montgomery, J. *Mastering the Benefit Corporation*, Business Law TODAY. For more information, see: https://www.americanbar.org/publications/blt/2016/07/02_montgomery.html (last time consulted: 02-06-2018)

²¹ Henrick K. Lidstone discusses the role of Public Benefit Corporations in Colorado but also in general. For more information, see *The Long and Winding Road to Public Benefit Corporations in Colorado*. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266654

²² Environmental, Social and Governance – ESG Criteria are a set of standards for a company's operations that socially conscious investors use to screen potential investments. Environmental criteria consider how a company performs as a steward of nature. Social criteria examine how the company's manages relationships with employees, suppliers, customers and the communities where it operates. Governance deals with a company's leadership, executive pay, audits, internal controls and shareholder rights. The introduction of ESG factors in the decisions of companies and investors, along with the economic and financial factors, seeks to reduce financial risks (for example, those associated with polluting industries), and preserve the market, increasing financial returns and the development of businesses and markets. For more information on this criteria, see CHEN, J. (2019), *Environmental, Social and Governance – ESG Criteria*, Investopedia. Retrieved from <https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp> (last time consulted: 28-04-2019) and CMVM. *O que são fatores “ESG”?*, Perguntas e Respostas sobre Finanças Sustentáveis, Área do Investidor, Comissão do Mercado de Valores Mobiliários. Retrieved from <https://www.cmvm.pt/pt/AreadoInvestidor/Faq/Pages/faq-financas-sustentaveis.aspx> (last time consulted: 28-04-2019)

²³ Impact investing, as defined by the Global Impact Investors Network, are “*investments made with the intention to generate positive, measurable social and environmental impact alongside a financial return*”. While Impact investors actively seek to place capital in businesses, non-profits organizations, and funds in industries such as renewable energy, basic services including housing, healthcare, education, micro-finance, and sustainable agriculture. Impact investing has gained traction among a wide range of investors, including the largest financial institutions, pension funds, family offices, private wealth managers, foundations, individuals, commercial banks, and development finance institutions. The US SIF Foundation's 2018 biennial Report on US Sustainable, Responsible and Impact Investing Trends, found that sustainable, responsible and impact investing (SRI) assets accounted for \$12.0 trillion of the \$46.6 trillion in total assets under professional management in the United States. For more information, see US SIF. Research. (2018), *US SIF Foundation Releases 2018 Biennial Report On US Sustainable, Responsible And Impact Investing Trends*. Retrieved from https://www.ussif.org/blog_home.asp?Display=118 (last time consulted: 20/03/2019). See also Dallmann, JP. (2018), *Impact Investing, Just A Trend Or The Best Strategy To Help Save Our World?* Retrieved from <https://www.forbes.com/sites/jpdallmann/2018/12/31/impact-investing-just-a-trend-or-the-best-strategy-to-help-save-our-world/#3f60612b75d1> (last time consulted: 20/03/2019)

resources. Confirming this tendency, Schmitt²⁴ writes that, "...*The need for sustainable environments, economies, and societies is becoming a mainstream topic and receiving significant attention*". As so, representing the opinion of many entrepreneurs that businesses should be more than money, today's business world has been shifting into a more public good awareness. Following this perspective drift, thriving firms like Ben & Jerry's²⁵ or Patagonia²⁶, who are both Benefit Corporations, keep prioritizing societal and environmental agendas. Additionally, companies like Google and Farfetch are praised by the public on how they take care of their employee's welfare²⁷ and the broader impact their actions have on society²⁸. Lastly, the avant-garde 4-day workweek experimentation made by the Perpetual Guardian²⁹,

²⁴ For more information about the importance of pushing social venture discussion, see SCHMITT, P. (2016), *Public Benefit Corporations: Pushing the Social Venture Discussion*, The Hubert H. Humphrey School of Public Affairs/Carlson School of Management, University of Minnesota. (p.3)

²⁵ Ben & Jerry's has been a certified B Corporation since September 2012, however, the company's was already know for pioneering socially responsible business movement for many years before the B corporation movement, being one of the first in the world to value its social mission as highly as its economic mission. As an example, Ben & Jerry's Foundation gives 7.5% of the company's pre-tax profits to charity since 1985. For more information, see LINDE, D. (2016), *Before the B-Corp, there was Ben & Jerry's*. *Medium*. Retrieved from <https://innovationsjournal.net/before-the-b-corp-there-was-ben-jerrys-1300fc1551eb> (last time consulted: 26/03/2019). See also Certified B Corporation. (2018), *B Impact Report: Ben and Jerry's*. Retrieved from <https://bcorporation.net/directory/ben-and-jerrys> (last time consulted: 26/03/2019)

²⁶ In 2011, Patagonia, Inc incorporated as a benefit corporation in the state of California. According to Kristin A. Neubauer, "*Patagonia's corporate purpose has always been rooted in an environmental focus-donating time, services and at least 1% of sales to environmental groups throughout the world*". For more information, see NEUBAUER, K. (2016), *NOTE & COMMENT: Benefit Corporations: Providing A New Shield for Corporations With Ideals Beyond Profits*. University of Maryland Francis King Carey School of Law, *Journal of Business & Technology Law*, 11 J. Bus. & Tech. L. 109.

²⁷ Google has been ranked as one of the best companies to work for, with the tech giant employees consistently reporting high levels of job satisfaction and praising the excellent benefits and compensations the company provides. Some of those perks that Google's employees have range from having every meal at work for free, taking free cooking classes to learn how to make new dishes, attending and help organizing Talks at Google, having on-site gyms and free workout classes, education subsidies and generous tuition reimbursements, etc. For more information, see YANG, Lucy. (2017). *13 incredible perks of working at Google, according to employees*. *Insider*. Retrieved from <https://www.thisisinsider.com/coolest-perks-of-working-at-google-in-2017-2017-7> [Accessed on 16/03/2019]. See also JANG, E. (2018), *Are Google Employees More Productive Because Of Company Perks?* *Forbes*. Retrieved from <https://www.forbes.com/sites/quora/2018/07/09/are-google-employees-more-productive-because-of-company-perks/#736b78e54b4d> (last time consulted: 16/03/2019)

²⁸ Indeed, a 2015 Warwick study noticed that Companies like Google have invested more in employee perks and, as a result, employee satisfaction has risen 37 percent. The study also provided evidence of a link between human happiness and human productivity, with the somewhat obvious conclusion that happier workers achieve higher productivity, suggesting the need to pay more attention to emotional well-being as a causal force. Lastly, the study remarks that if well-being boosts people's performance at work, it raises the possibility, at the microeconomic level and perhaps even the macroeconomic level, of self-sustaining spirals between human productivity and human well-being. For more information, see OSWALD, A.; PROTO, E. and SGRÖI, D. (2015), *Happiness and productivity*, University of Chicago Press, *Journal of Labor Economics*, 33 (4). pp. 789-822. Retrieved from <https://www.journals.uchicago.edu/doi/abs/10.1086/681096> (last time consulted: 02/04/2019)

²⁹ The 4-day workweek was an experiment made by the New Zealand's financial services Company Perpetual Guardian with assistance from researchers at the University of Auckland and Auckland University of Technology. The experiment results reported an increase in workers productivity and focus with the employees acknowledging having lower stress levels, higher levels of job satisfaction and being able to better manage work-life balance. For more information regarding this experiment, see DEOBUSH, G. (2019), *This Company Swears By a 4-Day Work Week. Now It Has Advice on How Your Employer Can Make the Switch*. *Fortune*. Retrieved from <http://fortune.com/2019/02/20/four-day-work-week-research-benefits/> (last time consulted 12-04-2019). See also, ROY, E. (2018), *'No downside': New Zealand firm adopts four-day week after successful trial*, *The Guardian*. Retrieved from <https://www.theguardian.com/world/2018/oct/02/no-downside-new-zealand-firm-adopts-four-day-week-after-successful-trial> (last time consulted: 12-04-2019)

between March and April of 2018, in which the company's 240 employees experimented a four day workweek with remarkable outcomes that brought to the community the discussion of making a switch to a more condensed workweek. The company reported an overall increase in workers productivity and focus and decided to make the changes permanent in the end of the same year.

Connected to this increasing change in public consciousness, there is a renewed importance of the Corporate Social Responsibility (CSR) in Europe with the Enterprise 2020³⁰, CSR Europe's flagship initiative to address European and global challenges to achieve smart, sustainable and inclusive growth. Enterprise 2020 current goals are to increase the integration of sustainability into business models and management of companies while also being a platform for collaboration with stakeholders and a catalyst for innovation to build a sustainable and inclusive society in Europe and beyond. Moreover, this movement works in order to engage with the European institutions about strategies to drive the global sustainability agenda, and has the ultimate goal of becoming a recognized global leader business network. There is also the current effort for the introduction of the American Public Benefit Corporation (PBC) Model in the European company environment, which the Italian *Società Benefit* Model serving as an admirable example of that determination.

As for the role of the Millennial generation, recent surveys show that they consider that businesses do not prioritize issues that matter to them and, despite realizing that profits are both a priority and a necessity, they also believe that business success should be more than just financial performance³¹. What

³⁰ Since its launch in 2010, Enterprise 2020 has become the European movement for companies committed to developing innovative business practices and working together with their stakeholders to provide solutions to existing and emerging societal needs. In response to the European Union's Europe 2020 strategy, the Enterprise 2020 initiative addresses sustainability issues, which are increasingly bringing into question our current patterns of living, working, learning, communicating, consuming and sharing resources. In 2015, in response to the urgent need to address unemployment, climate change and demographic changes in Europe, this Movement launched the Enterprise 2020 Manifesto. The Manifesto called on businesses and governments to work together and take action on three strategic priorities during the five years leading up to 2020: Make employability and inclusion a priority across boards, management and value chains; Stimulate companies to engage as committed partners with communities, cities and regions to develop and implement new sustainable production methods, consumption and livelihoods; Put transparency and respect for human rights at the heart of business conduct. This movement, brought together by CSR Europe, already includes more than 40 National Partner Organisations and over 10,000 companies across Europe. For more information, see CSR Europe. *Our strategy, The European Business Network for Corporate Social Responsibility*. Retrieved from <https://www.csreurope.org/about-us/our-strategy> (last time consulted: 22/02/2019)

³¹ A recent international survey by Deloitte also found that millennials believe that corporations should set out to achieve a broad balance of objectives that include: Making a positive impact on society and the environment; Creating innovative ideas, products and services; job creation, career development and improving people's lives; An emphasis on inclusion and diversity in the workplace. For more information, see Deloitte. (2018), *The Deloitte Millennial Survey 2018: Millennials disappointed in business, unprepared for Industry 4.0*. Retrieved from <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html> (last time consulted: 28-11-2018). A Deloitte's 2015 Millennial Survey had already concluded that 7,800 future leaders from 29 different countries considered that the business world was getting it wrong, with around 75% of them saying that they felt businesses were focused on their own agendas rather than improving society. For more information on Millennial's opinions, see also Poswolsky, A. (2015), *What Millennial Employees*

makes millennial voices stand out so much is the fact that they will make up an estimated seventy-five percent of the workforce in 2025. This growing wave of workers with more social and environmental priorities will bring an expected positive change to the business world, and companies that are ready to incorporate new ideas related to the public benefit could see greater success.

Really Want. Fast Company. Retrieved from <https://www.fastcompany.com/3046989/what-millennial-employees-really-want> (last time consulted: 15/03/2019)

2. Public Benefit Corporation - The Concept

Benefit Corporations were created and launched by the non-profit organization B Lab³² and, according to Bart Houlahan³³, aim to prove that socially responsible brands can succeed in all types of markets while using a variety of strategies. In order to achieve its objectives, B Lab commits itself through three primary initiatives where they award a “B” accreditation to businesses that show that they are meeting set standards for social and environmental performance, lobby states to change laws to benefit corporations and work to drive money to these benefit companies.

The American States that have adopted this new model in their legislation have modelled their statutes on the Model Benefit Corporation Legislation³⁴ (MBCL), a model statute drafted by Bill Clark, a Drinker, Biddle & Reath LLP attorney, who worked in conjunction with B Lab on the project. The concept began to establish itself in 2010, when Maryland and Vermont became the first USA States to embrace the for-profit, mission-driven entity effort. Since then, PBCs have been conducting business, growing in number, and, for the first time, in 2017, Laureate Education³⁵, a benefit corporation went public, closing its initial public offering in February and having raised \$490 million from investors. Although, in 2018 both Kansas and Mississippi³⁶ states failed to introduce benefit corporation legislation, at the moment,

³² B Lab is a non-profit organization that certifies for-profit companies with the vision that “(...) one day all companies will compete to be not just best in the world but also best for the world, and as a result society will enjoy a more shared and durable prosperity”. B Lab pursues its objective “(...) by verifying credible leaders in the business community, creating supportive infrastructure and incentives for others to follow their lead, and engaging the major institutions with the power to transform our economy”. B Lab has also created the Global Impact Investment Rating System (GIIRS), which rates companies in various categories, from environmental sensitivity to social responsibility. According to Bart Houlahan, an independent board of experts, scholars, investors and regulators oversees the system and since 2012, at least 8,000 companies have requested ratings, and more than 600 companies in 60 different industries have earned “B” certification. For more information see: B Lab, *Redefining the Role of Business in Society*. Retrieved from <https://bcorporation.net/about-b-lab> (last time consulted: 20-11-2018) and Knowledge@Wharton. (2012), *B Lab’s Bart Houlahan: Building More Socially Responsible Corporations*. Retrieved from <http://knowledge.wharton.upenn.edu/article/b-labs-bart-houlahan-building-more-socially-responsible-corporations/> (last time consulted: 20-01-2019)

³³ Bart Houlahan is co-founder of B Lab and currently helps in overseeing the organisation.

³⁴ For more information on the Model Benefit Corporation Legislation (MBCL), see B Lab. (2016), *Model Benefit Corporation Legislation*. Benefit Corporation. Retrieved from http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_9_16.pdf (last time consulted: 14-04-2019)

³⁵ Incorporated in the State of Delaware, Laureate Education is the world’s largest higher education company serving one million students across 25 countries. While being the first benefit corporation to go public, Laureate Education was also the largest Certified B Corporation to enter the public markets. According to Frederick Alexander, Head of Legal Policy at B Lab, “*Laureate, and its shareholders, have rejected the market paradigm of ‘shareholder primacy’ by going public as a new type of corporate entity specifically designed to treat customers, employees and communities as the shareholders’ partners, rather than as interests to be managed for maximum financial gain*”. For more information on Laureate Education going public, see CSRWire. (2017), *First Benefit Corporation Goes Public – Laureate Education*. Retrieved from http://www.csrwire.com/press_releases/39700-First-Benefit-Corporation-Goes-Public-Laureate-Education (last time consulted: 04/03/2019)

³⁶ In Kansas, an act concerning Public Benefit Corporations H.B. 2125 was introduced on January 23, 2017. The bill passed the House on February 21, 2017, by a vote of 124-1 and was received in the Senate, where it was referred to the Committee on Judiciary on February 23, 2017. It died in the Senate Committee on May 4, 2018. Previous versions of this bill were introduced in 2016 (H.B. 2697) and 2014 (H.B. 2650), but died in the House Committee on Judiciary and House Committee on Commerce, Labor and Economic Development, respectively.

most US States have created policies that ensure legal statuses for for-benefit businesses and 33 USA States and the District of Columbia have already authorized Benefit Corporations.

In general, a Public Benefit Corporation is a for-profit corporation intended to produce a public benefit and operate “*in a responsible and sustainable manner*”³⁷. Unlike traditional corporations, a PBC is obliged to consider its public benefit purpose and interests of those affected by the corporation’s conduct in addition to stockholder value³⁸. In addition to their mandatory general benefit, the articles of incorporation of a Public Benefit Corporation may identify one or more specific public benefits, including: (i) providing beneficial products or services to low income or underserved individuals or communities; (ii) promoting economic opportunity beyond job creation; (iii) preserving the environment; (iv) improving human health; (v) promoting the arts, sciences or knowledge; (vi) increasing capital flow to public benefit entities; and (vii) accomplishing other particular benefits for society or the environment. At the moment, for companies to become a benefit corporation, they have to incorporate as one in a State who has approved PBC legislation, or be the result of a business deal (e.g., merger) “*(...) approved by the statutorily defined quorum in the applicable state of incorporation*”³⁹.

One difference from other types of corporations is that Benefit Corporation statutes affirmatively require directors to consider the impact a corporate action might have on employees, customers, communities, and the environment, among other aspects that could potentially influence their actions. As a result, Public Benefit Corporations have a distinctive ability of being for-profit companies that not only have to work towards maximizing shareholder benefit, but also pursue a stated social mission, which provides them with a significant degree of freedom in investment activities and cost structures that common investor-backed, for-profit business do not have. Since they can choose to follow a public purpose and remain a for-profit company, PBCs are often called hybrid entities⁴⁰. On the other hand,

Regarding the Mississippi State, the Mississippi Benefit Corporation Act H.B. 544 was introduced on January 8, 2018 and was referred to the House Judiciary Committee. The bill died in committee on January 30, 2018. A previous version of the bill, H.B. 673, was introduced on January 13, 2017 but died in committee on January 31, 2017. For more information, see Social Enterprise Law Tracker. *Benefit Corps*. Retrieved from <https://socentlawtracker.org/#/bcorps> (last time consulted: 03/04/2019)

³⁷ Delaware Code ANN. Tit. 8 362(a) (2013)

³⁸ For more information on Delaware Public Benefit Corporations, see: Cooleygo. *Delaware Public Benefit Corporation – Now what?* Retrieved from <https://www.cooleygo.com/delaware-public-benefit-corporation-now-what/> (last time consulted: 27-05-2018)

³⁹ The author writes “*(...) A corporation can become a benefit one either because it is incorporated as so or by result of a transaction (e.g., merger) approved by the statutorily-defined quorum in the relevant state of incorporation*”. See PIREs, A. (2017), *The fourth sector and the benefit companies: a comparative analysis between the American and the Italian models*, University of Milan, Social Science Research Network. p.3. Retrieved from <https://www.clflegal.com/uploads/outros/publicacoes/2/4e90980560dc6687d75316cf1d3f0839.pdf> (last time consulted: 12-04-2019)

⁴⁰ On this subject, Plerhoples writes, “*(...) Public benefit corporations, benefit corporations, flexible purpose corporations, and social purpose corporations are often called hybrid entities because they can choose to pursue profits and a public purpose*”. See PLERHOPLES, A. (2014), “*Delaware Public Benefit*

despite the obligation of PBC directors to provide justifications for their actions and the corporate publication of the annual or biennial report, it does not need to be audited nor do third-party standard setters have any authority to revoke its benefit corporation status, which, according to Pires, “(...) is one of the main critics to this model”.

As we already know, the Public Benefit Corporation has a legal obligation to promote a public benefit while operating in a responsible and sustainable manner. However, we may ask, what type of benefits can PBCs promote? Those benefits include, but are not limited to, “*effects of artistic, charitable, cultural, economic, education, environmental, literary, medical, religious, or scientific or technological nature*” (DGCL, 362 b). The most important aspect and purpose of this legal form is the protection of directors and officers, providing a new level of freedom in decision making that allows management to make decisions not only based on maximizing shareholder value, but also to align company activities in their pursuit of a social mission. Different from nonprofit companies, PBCs do not receive special tax treatment and are distinct from B Corporations⁴¹, which require certification from B Lab.

2.1. Public Benefit and Certified B Corporations

Due to the similarities between Public Benefit Corporations and Certified B Corporations, these two forms are often misunderstood and perceived as the same company model (see table 1). While the B Corp Certification is a third-party certification administered by the non-profit B Lab, based in part on a company's verified performance on the B Impact Assessment. Benefit Corporations are official corporate

Corporations 90 Days Out: Who's Opting In?, The Regents of the University of California Business Law Journal, University of California, Davis, School of Law, Business Law Journal. P.7.

⁴¹ Certified B Corporations are social enterprises certified by B Lab. They are businesses that meet the highest standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose, and centred on how they create value for non-shareholding stakeholders, such as their employees, the local community, and the environment. B Corp Certification assesses the overall positive impact of the company that stands behind it. To get that certification, companies have to achieve a minimum verified score on the B Impact Assessment, a rigorous assessment of a company's impact on its workers, customers, community, and environment, and make their B Impact Report transparent on bcorporation.net. Once a firm crosses a certain performance threshold on these dimensions, it makes amendments to its corporate charter to incorporate the interests of all stakeholders into the fiduciary duties of directors and officers, amending their legal governing documents to require their board of directors to balance profit and purpose. For more information, see Certified B Corporation. *About B Corps*. Retrieved from <https://bcorporation.eu/about-b-corps> (last time consulted: 22/11/2018)

models for businesses, who are legally empowered to pursue positive stakeholder impact alongside profit. Some companies⁴² are both Certified B Corporations and benefit corporations, and the benefit corporation structure fulfills the legal accountability requirement of a B Corp Certification⁴³. Lastly, there is one difference that if not fully understood may also generate some misunderstandings, the entity's designation. While B Lab (and most USA states) uses the term "Benefit Corporation", Delaware employs the term "Public Benefit Corporation". Both names are correct, however Public Benefit Corporation will be the mostly used term during this thesis.

For a better understanding of the core differences between these two models, see Table 1, by B Lab, set forth below, comparing Public Benefit Corporations and Certified B Corporations in the USA.

⁴² Kickstarter, Method, Plum Organics, Farmigo, King Arthur Flour, Klean Kanteen, Greyston Bakery, and Sun Light & Power are examples of Certified B Corporations that have met their legal requirement for certification by using the benefit corporation structure.

⁴³ Patagonia, AltSchool, Turnstile Tours, American Prison Data Systems, Gilded Rogue Enterprises, Evox Television, and Urbane & Gallant are examples of benefit corporations that subsequently became Certified B Corporations because they felt the certification had additional value.

Table 1: Public Benefit Corporations and Certified B Corporations in the USA⁴⁴

Subject	Benefit Corporations	Certified B Corporations
Accountability	Directors required to consider impact on all stakeholders	Directors required to consider impact on all stakeholders
Transparency	Must publish public report of overall social and environmental performance assessed against a third party standard*	Must publish public report of overall social and environmental performance assessed against a third party standard
Performance	Self-reported	Must achieve a minimum verified score on B Impact Assessment. Recertification required every three years against evolving standard
Availability	Available for corporations only in 33 U.S. states and the District of Columbia	Available to every business regardless of corporate structure, state, or country of incorporation
Cost	State filing fees from \$70-\$200	B Lab certification fees from \$500 to \$50,000/year, based on revenues

⁴⁴ For more information, see Benefit Corporation. *Benefit Corporations and Certified B Corps*. Retrieved from <https://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps> (last time consulted: 24/11/2018)

B Lab Role

Developed Model Legislation, Certifying body and supporting works for its passage and use, 501c3, offering access to offers free reporting tool to meet Certified B Corporation logo, transparency requirements; No portfolio of services, and vibrant role in oversight, however, when community of practice among B choosing a third party standard, Corps; many companies choose B Lab.

* Delaware Public Benefit Corporations are not required to report publicly or against a third party standard.

2.2 How many Benefit Corporations are there in the USA?

According to James Woulfe⁴⁵, Benefit corporations are creatures of state law, and since it is not certain that each state will expertly record the number of benefit corporations operating in the state, it is difficult to exactly determine how many of them are active. While some states, like Oregon and Connecticut, allow the public to track the number of active benefit corporations in the state in real time, other states are less transparent and the data concerning the number of active benefit corporation's may only be available by special request.

Nevertheless, the best data we can have on the number of benefit corporations in the U.S. comes from B Lab who periodically reaches out to Secretaries of the State around the country, inquiring about the number of active benefit corporations in each state, and listing them on its website. Therefore, as of 6th July of 2018, B Lab unofficial count was approximately 5400 total Public Benefit Corporations in the U.S.⁴⁶.

⁴⁵ James Woulfe is the Director of Government Affairs at the Connecticut Group, LLC, a full-service government affairs and public relations firm. For more information on his articles, see Woulfe, J. (2018), *How Many Benefit Corporations Are There in the U.S?* SocEntPolicy. Retrieved from <http://www.socentpolicy.com/how-many-benefit-corporations-are-there-in-the-u-s> (last time consulted: 02/04/2019)

⁴⁶ Related with the PBCs topic, in April 2019, B Lab announced that it had more than 2800 Certified B Corporations all over the world. For more information on B Lab Total Certified Corporations, see B Lab Europe and Luis Amado Twitter on B Corps. Retrieved from <https://bcorporation.eu/about-b-lab/country-partner/portugal> (last time consulted: 15-04-2019)

Chapter II

The Public Benefit Corporation Model in Delaware

1. Delaware Corporate Environment

One feature of the U.S. corporate law environment that always generates curiosity between outside observers and newcomers is the predominance, on the legal landscape, of the Delaware law. This peculiarity generally concerns a main question, as to why companies are drawn to Delaware in the first place⁴⁷, as more than one million⁴⁸ business entities have made Delaware their legal home. There is a clear perception that there is an advantage to incorporating there, but what are those perceived advantages?

As if answering this particular question, Lewis S. Black wrote⁴⁹, “(...) *Of the corporations that make up the Fortune 500, more than one-half are incorporated in Delaware*”. The author continued to explain that there are various reasons for companies to select Delaware to incorporate. Ranging from all the history and tradition surrounding Delaware Corporation Law to the fact that it is “one of the most advanced and flexible corporation statutes in the USA”⁵⁰. Lastly, the action of its Courts, in particular, the Court of Chancery⁵¹, and the state legislature, which includes the Secretary of State’s Office helps to strengthen the fact that “*Delaware law is the gold standard*”⁵². The Delaware General Corporation Law (Title 8, Chapter 1 of the Delaware Code) is the statute governing corporate law in the U.S. state of Delaware and is considered the most important jurisdiction in the United States corporate law since the early 20th century. Delaware corporate law decisions often have applications for both private and public company clients, especially nowadays as fewer companies go public and as large, sophisticated private companies become increasingly prevalent. As stated by Leo E. Strine⁵³, in Delaware, the aspects of company law such as competition law, labor law, trade, and requirements for the filing of regular

⁴⁷ In 2015, Delaware had approximately 60% of publicly traded companies in the United States incorporated there, including 63% of the Fortune 500 companies and over 90% of companies that incorporate outside of their principal state of operations making Delaware their state of incorporation. For more information, see ANDERSON, R.; MANN, J. (2015), *The Delaware Delusion*, Columbia Law School’s Blog on Corporations and the Capital Markets. Retrieved from <http://clsbluesky.law.columbia.edu/2015/08/03/the-delaware-delusion/> (last time consulted: 23-02-2019)

⁴⁸ Delaware Division of Corporations. Retrieved from <https://corp.delaware.gov/aboutagency/> (last time consulted: 22/03/2019)

⁴⁹ For more information on why corporations chose Delaware, see BLACK, L. (2007), *Why Corporations Choose Delaware*, Delaware Department of State, Division of Corporations. P.3

⁵⁰ As Black writes, “(...) *It includes the Delaware General Corporation Law which is one of the most advanced and flexible corporation statutes in the nation*”. P.3

⁵¹ The Delaware Court of Chancery is a unique 220-year-old business court that has written most of the modern U.S. corporation case law.

⁵² For more information, see DORFF, M. (2017), *Why Public Benefit Corporations?* Delaware Journal of Corporate Law (DJCL), Vol. 42, Forthcoming; Southwestern Law School Research Paper No. 2016-10. Available at SSRN: <https://ssrn.com/abstract=2848617>. P. 4

⁵³ For more information regarding Leo E. Strine views on Delaware Corporate Law and its challenges, see STRINE, L. (2005), *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, Delaware Journal of Corporate Law, Vol. 30, No. 3, pp. 673-696. Available at SSRN: <https://ssrn.com/abstract=893940>

disclosures to public investors, are not part of Delaware's corporation law. Instead, Delaware corporation law governs is only focused on the internal affairs of the corporation specializing on the form of contract law that governs the relationship between corporate managers (the directors and officers) of corporations, and the stockholders.

1.1. Challenges to Delaware Position

Nevertheless, there are several challenges to the Delaware current dominance role regarding corporate law, and in the most recent years, many scholars and economic analysts have put forward that Delaware's competitive position is eroding.

For instance, in 2013, an article from *The Economist*, one of the most important and influential economic journals in the world, praised Delaware for its well-developed body of company law and the expertise of its judges but warned about existing threats to its dominance. Such threats were identified as the losing of attractiveness regarding company litigation, corporate scandals that tend to prompt bouts of rulemaking by the Securities and Exchange Commission (SEC) and lawmaking by the U.S Congress, and the fall in the number of big public firms, because of excessive litigation and red tape⁵⁴.

One criticizing example of the Delaware dominance is "The Delaware Delusion"⁵⁵, a paper by Pepperdine University Law Professor Robert Anderson IV and George Washington University Law Professor Jeffrey Manns. In their paper, the two authors disagree with the exceptional importance of Delaware and argue about Delaware's dominance of the incorporate market⁵⁶. The results presented in their proposition seem to suggest that lawyers engage "*(...) in default decision-making based on Delaware's past preeminence, rather than actively weighing the value-added Delaware and other states offer to their clients*". In addition, the authors propose that this default decision making does not

⁵⁴ For more information, see *The Economist*. (2013), *Delaware's corporate courts: A new judicial boss*. Retrieved from <https://www.economist.com/business/2013/11/23/a-new-judicial-boss> (last time consulted: 23/03/2019). Ultimately, Delaware's main threat and competitor in making corporate law is the USA Federal Government. Indeed, Mark J. Roe, one of the most important authorities on this matter, claims that the US Federal Government can easily displace State corporate law, and, consequently, "*(...) Delaware players have reason to fear that if they misstep, they will lose their lawmaking business*". See ROE, M. (2005), *Delaware's Competition*, *Harvard Law Review*, 588. Available on <https://www.questia.com/library/journal/1G1-13377271/delaware-s-politics> (last time consulted: 29-04-2019)

⁵⁵ After analysing an eleven-year data set of mergers (from 2001 to 2011) these two legal scholars found that "*financial markets place no economically consequential value on Delaware law relative to that of other states*". For more information, see ANDERSON, R.; MANN, J. (2014), *The Delaware Delusion*. *North Carolina Law Review*, Forthcoming. Available on SSRN: <https://ssrn.com/abstract=2500465>

⁵⁶ After analysing an eleven-year data set of mergers (from 2001 to 2011), the authors found that financial markets placed no economically consequential value on Delaware law relative to that of other States.

necessarily serve the interests of corporate clients⁵⁷. They denote the existence of a default-to-Delaware mentality in which “(...) *Lawyers appear to turn to Delaware because it is the law they are most familiar with*” while assuming markets value Delaware law and regard it as a “(...) *safe default that does not trigger pushback from corporate managers*”.

Regarding the stakeholder’s role in Delaware incorporated companies, Lenore Palladino, Senior Economist and Policy Counsel and Kristina Karlsson, a Program Associate at the Roosevelt Institute, criticize the fact that stakeholders of corporations chartered in Delaware, such as employees or creditors, have no political voice in the creation of Delaware corporate law. They also condemn that Delaware corporate law is solely dependent on the political will of the Delaware voters, whose population composed of less than one million people, is “(...) *fewer in numbers than the total number of hourly employees at Walmart*”. Their comparison is a clear critic on the dominant position concerning corporations’ resolutions that such a small American State holds.

Lastly, the improper⁵⁸ ruling in *Shawe v. Elting*⁵⁹, in which the Delaware Supreme Court held that the Court of Chancery properly exercised its equitable powers under Delaware’s custodian statute when, upon finding the presence of shareholder and director stalemate, appointed a custodian to sell a massively profitable corporation to a third party⁶⁰. According to Dershowitz⁶¹, this decision set a new and dangerously

⁵⁷ Both Anderson and Manns regard it as a disservice to clients, in the macro sense. Since the markets do not care about corporate law, it makes little difference where the company is incorporated in the micro sense. Thus, lawyers are not really harming individual clients by choosing Delaware. Nevertheless, they consider that these micro-level decisions lead to an overall dysfunction that harms all businesses, and indeed society as a whole by undermining competition. For more information, see ANDERSON, R. and MANN, J. (2015), *The Delaware Delusion*, Columbia Law School’s Blog on Corporations and the Capital Markets. Retrieved from <http://clsbluesky.law.columbia.edu/2015/08/03/the-delaware-delusion/> (last time consulted: 23-02-2019)

⁵⁸ 77 Md. L. Rev. 900 (2018). The court trivialized the irreparable harm requirement of Section 226(a) (2) and declined to holistically review the case law cited by the Court of Chancery in support of its proposition that irreparable harm may be deemed to encompass damage to “(...) *a corporation’s reputation, goodwill, customer relationships, and employee morale.*” The court also failed to recognize the unprecedented nature of a custodial sale absent stockholder consent and instead made a sweeping determination, without due consideration of less intrusive and incremental alternatives, that the Court of Chancery correctly concluded that whole sale was the only viable way to “excise” *Shawe* and *Elting*’s dysfunction. For more information, see SAMAHA, S. (2018), *Shawe v. Elting: The Imperfect Sale of TransPerfect Global, Inc.* Maryland Law Review, Volume 77. Available at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3796&context=mlr> (last time consulted: 07-02-2019)

⁵⁹ 157 A.3d 152 (Delaware, 2017). In *Shawe v. Elting*, the Delaware Supreme Court held that the Court of Chancery properly exercised its equitable powers under Delaware’s custodian statute when, upon finding the presence of shareholder and director deadlock, it appointed a custodian to sell a massively profitable corporation to a third party.

⁶⁰ In the litigation that ensued, the Court of Chancery found that the deadlock between *Shawe* and *Elting* satisfied the threshold requirements of Section 226 of the Delaware General Corporation Law (DGCL) and appointed a custodian to force a sale of the multi-million dollar corporation to a third party, despite *Shawe*’s objections.

⁶¹ For more information, see DERSHOWITZ, A. (2017), *Should Your Company Incorporate In Delaware? Not So Fast*, Forbes. Retrieved from <https://www.forbes.com/sites/janetnovack/2017/10/27/should-your-company-incorporate-in-delaware-not-so-fast/#1dcf51eb723d> (last time consulted: 03-02-2019)

disruptive precedent that corporate America ought to view with concern. Since, for the first time ever, the Court of Chancery, the no-jury “business court”, has ordered the forced sale of a privately held, thriving corporation over the objections of shareholders who own half of the company. This action has brought a great damage to Delaware’s supremacy as America’s capital of incorporation, and it may seem that unless this situation is remedied by legislation, corporations may have to think twice before incorporating in Delaware, especially “(...) if they want predictability, fairness and justice”.

Despite these challenges, most corporation’s and their lawyers continue to consider Delaware the most significant U.S. state with respect to corporate law⁶², the State of Delaware continues to be a leading domicile for USA and international corporations and Delaware preeminent position will not change in the near future. For that reason, it is clear that the most significant recognition of the mission-driven PBC as a viable and capable vehicle for social and environmental impact was its acknowledgment by the state of Delaware.

⁶² Corporate lawyers and businesses that seek access to capital and public markets look to Delaware for well-established case law, a modern statute, and a pro-business legislature. For a comprehensive discussion of Delaware’s prominence in corporate law, see BLACK, L. (2007), *Why Corporations Choose Delaware*, Delaware Department of State, Division of Corporations. The author remarks that there is no doubt that Delaware has the most complete and most responsive legal regime for corporate entities, whether publicly traded or not. Thus, when the decision to incorporate or reincorporate is made and the lawyer faces the question of where is the most complete, responsive and least ambiguous set of rules for the entity, Delaware becomes the rational choice, which is why Delaware is so dominant.

2. The Delaware Public Benefit Model

In July 2013, Delaware enacted Sections 361-368 of the Delaware General Corporation Law (DGCL), providing for the incorporation of socially and environmentally conscious public benefit corporations. Most significantly, on 1 August 2013, the amendment to the Delaware General Corporation Law became effective, permitting entities to incorporate as a Public Benefit Corporation, allowing companies to commit themselves to more than revenue generation. The section 362 of the DGCL states that a Public Benefit Corporation is a for-profit entity “*intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner*”. The statute name of the entity must include either Public Benefit Corporation or PBC. However, Delaware decided not to adopt B Lab’s model statute and, as a result, this decision led to some sensible variations from B Lab’s model. One important difference is the entity’s title, while B Lab (and the majority of the American states) use the term “Benefit Corporation”, Delaware employs the term “Public Benefit Corporation” (term in use during this thesis when referring to any kind of Benefit Corporations).

As Michael B. Dorff remarks, Delaware already had a “(...) *successful formula before adopting PBC legislation*”⁶³. As a result, the question as to why did Delaware felt the need to adopt this type of benefit corporation statute may well arise. According to Dorff, the two purposes for Delaware Governor Jack Markell passing the PBC legislation were “(...) *to allow corporations to institutionalize a social purpose, thereby helping the public, and to fill the market for a form of business organization that permits this*”. Moreover, Delaware Corporate Statutes, unlike most legislation, often originates with a committee of the Delaware State Bar Association: the Corporation Law Council of the Corporation Law Section. PBC legislation followed this pattern with the “Council” concluding that Delaware ought to offer businesses the flexibility to adopt social goals⁶⁴.

Furthermore, some members of the Council believed that benefit corporations could influence all corporations to operate more sustainably and responsibly. This is evidenced by the fact that, unlike every other corporation in Delaware, under which it is a matter of common law development, Delaware PBC statute provides an articulation of directors’ duties. It states that the “(...) *board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary*

⁶³ As stated by Dorff, “(...) *Delaware already had a successful formula before adopting PBC legislation: it was the leading state for corporate law and the state of choice for incorporations, especially for public companies*”. For more information, see DORFF, M. (2017), *Why Public Benefit Corporations?* Delaware Journal of Corporate Law (DJCL), Vol. 42, Forthcoming; Southwestern Law School Research Paper No. 2016-10. Available at SSRN: <https://ssrn.com/abstract=2848617>. P. 11

⁶⁴ See the “Council” views in Dorff, *supra* note, at page 13.

*interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or benefits identified in its certificate of incorporation*⁶⁵.

Another reason for the adoption of the PBC legislation by Delaware is the need to keep the Delaware General Corporation Law updated with the most recent Company Law Models. The adoption of the PBC Model not only demonstrated Delaware willingness to update its legal framework with the most recent trends but also granted Delaware a renewed attractiveness allowing the State to capture demand from impact investors and stockholders who champion ideals beyond simply profit maximization, and for whom the mission of the company is one of their main concerns. These factors are of most importance if Delaware wants to strengthen its position as a leader regarding company's incorporation.

2.1. Becoming a Benefit Corporation

In order to become a Benefit Corporation, the shareholders of the company must vote in favor of becoming a Benefit Corporation and change the articles of incorporation so that the company will pursue the purpose of creating general public benefit. In the event the company pursues a specific public benefit, this additional information may be included in the articles of the incorporation. They do not require any type of specific certification from B Lab or other third party.

In short, changing the status of the Company to a Benefit Corporation that holds itself accountable to its stated public good requires both a top-down and bottom-up focused effort resulting in clearly expressed and measurable goals that are shared in such a transparent way that clients and employees understand how the changes affect their everyday work. The shareholders of the benefit corporation can later vote to terminate the benefit corporation status (by a 2/3 supermajority vote) and if the company fails to show a commitment to working towards these public goals, it can lose its public benefit status.

2.1.1. Differences from other types of companies

⁶⁵ DGLC, 363, section a.

Despite the more social focus of a PBC, in every other manner, the structure of a Delaware Public Benefit Corporation mirrors the organization of the other Delaware traditional for-profits corporations. Additionally, many other types of companies already commit some of their profits to charitable events and endeavors, without being legally considered a benefit corporation. Consequently, the main difference is that, despite those companies contributing with charitable donations in a voluntarily basis, their financial commitment can change from year to year depending on the shareholders decisions. Whereas through the Public Benefit Corporation they will be committed to dedicating their resources, funds or both toward its chosen public benefit, and shareholders cannot halt or reduce the commitment from year to year. Nonetheless, in a PBC, management should regularly refer back to the company's identified public benefit purpose and assess how the company is pursuing mission.

To sum up, Delaware Public Benefit corporations have, as stated by former Delaware Governor Jack Markell⁶⁶, “*three unique features that make them potential game changers*”. Concerning corporate purposes, it ensures that public benefit corporations “*serve the best long-term interests of society while it creates value for its stockholders*”. On the accountability, PBCs are “*required to meet a tri-partite balancing requirement consistent with its public benefit purpose*”. Finally, on the transparency issue, they are obliged to “*report on their overall social and environmental performance, giving stockholders important information*”, that provides assistances to investors in order “*to aggregate capital more easily as they are able to communicate more effectively the impact, and not just the return, of their investments*”.

2.1.2. Non-Profit Corporation vs Public Benefit Corporation

⁶⁶ For more information see: MARKELL, G. (2013), *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, *Huffington Post*. Retrieved from https://www.huffingtonpost.com/gov-jack-markell/public-benefitcorporation_b_3635752.html?guccounter=1 (last time consulted: 26-05-2018)

In spite of the fact that the public may often consider that nonprofit companies and Public Benefit Companies are comparable or even identical, there are several differences between them. To begin with, the core difference consists on the ownership factor, while there are no owners or shareholders in a nonprofit company, contrary, a benefit corporation has shareholders who own the company. The formation process differs and as I previously wrote, contrary to nonprofit organizations, PBCs do not have any type of tax exemptions (but compared to traditional corporations, they do not have to pay any additional taxes for being a PBC). There are also fundraising differences, the reporting on progress⁶⁷, the structure of the companies, the stock certificates, etc. Additionally, the fact that, regardless of the purposes, a public benefit corporation is a for-profit corporation, in other words, regardless of the benefit that the company seeks to bring to the society, it will continuously keep trying to obtain more profits.

The differences between these two types of companies does not mean that they should oppose each other in relation to their ultimate goals and the ways to accomplish it. As in the opinion of Alicia E. Plerhoples⁶⁸, nonprofit organizations could eventually start using Public Benefit Corporations to their advantage, mainly for its branding as a company required to produce a public benefit. It would also protect them from unrelated business income tax or from the risk of tax-exemption revocation, by using PBCs to house the commercial operations of the nonprofit parent organization.

⁶⁷ At least every two years, a Delaware Public Benefit Corporation must provide its stockholders with a report on the company's promotion of the public benefit specified in its charter and the interests of those affected by the company's actions. The Benefit Report must include the objectives established by the board of directors to promote the identified public benefit and best interests of those affected by the company's actions; The standards adopted by the board to measure progress towards these objectives; Factual information based on those standards regarding the company's success in meeting its objectives; and an assessment of the company's success in meeting the objectives and promoting its identified public benefit. For more information see: <https://www.cooleygo.com/delaware-public-benefitcorporation-now-what/> (last time consulted: 27-05-2018)

⁶⁸ The author states, "*(...) nonprofit organizations might begin to use public benefit corporations to their advantage - i.e., as wholly or partially-owned subsidiaries to house the commercial operations of the parent nonprofit in order to shield the non-profit from unrelated business income tax or the risk of tax-exemption revocation*". For more information on Alicia E. Plerhoples opinions, see PLERHOPLES, A. (2014), *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?* The Regents of the University of California Business Law Journal University of California, Davis, School of Law, Business Law Journal, University of California, Davis, 14 U.C. Davis Bus. L.J. 247. P.8

2.2. Accountability in Public Benefit Corporations

Standard PBCs ensure accountability using three main mechanisms: the Benefit Enforcement Proceeding (BEP), evaluation by a third-party certifier⁶⁹, and the annual disclosure/report. However, Delaware PBC statute is very different regarding accountability. First, it does not require (or even mention) a BEP, although it does allow shareholders to bring derivative lawsuits⁷⁰ on behalf of the corporation itself for failure to balance its stated purpose (State of Delaware, 2016, 367). Secondly, it does not require the use of a third-party standard evaluation⁷¹ and, lastly, Delaware PBCs only require reporting to shareholders biennially and not to the public⁷².

Under the Delaware statute, stockholders of Delaware benefit corporations are permitted (but not obliged) to require the benefit corporation to have its biennial report verified by a third party, to have it made transparent to the public, and/or to have it completed annually. As a result, some scholars⁷³ argue that due to its lenient approach and openness to interpretation, the Delaware statute will have less impact than other PBCs statutes⁷⁴. However, regarding the third-party standard evaluation, as in Krumm opinion, it is likely that legislators did not want to endorse a requirement in the legislation that would require corporations to use the services of the only "established and recognized" provider of such services. In fact, as the fee for B Lab certification ranges from \$ 500 to \$ 50,000, depending on company size, a requirement for a third-party standard evaluation would essentially be imposing a tax on For-Profit Benefit Corporations for a benefit assessment based on B Lab standards.

⁶⁹ Benefit corporation legislation does not require nor provide for a single organization to act as the third-party standard setter, it be within the company's discretion to select the organization that will evaluate the company (Nass, 2014, p. 4). In relation with that, B Lab seems to be the most prevalent third-party standard setter used by Public Benefit Corporations (such as Kickstarter, Patagonia, etc.) to comply with the oversight provision.

⁷⁰ As Frederick Alexander writes, there is however, a minimum requirement for shareholders that wish to sue for violations of the director's balancing duties. To bring such a derivative suit, shareholders have to own, individually or collectively, at least 2 percent of the corporation's outstanding shares or, if the corporation's shares are publicly traded on a national securities exchange such as the New York Stock Exchange or NASDAQ, shares equalling at least two million dollars in market value. For more information, see ALEXANDER, F. (2018), *Benefit Corporation Law and Governance: Pursuing Profit with Purpose*, Berret-Koehler Publishers, Inc. 1333 Broadway, Suite 1000, Oakland CA.

⁷¹ Not only Delaware, other states such as Tennessee do not require the use of a third-party standard for annual benefit assessments. See KRUMM, B. (2017), *Tennessee's For Profit Corporation Act: Will More Regulation Achieve The Desired Results?* Transactions: The Tennessee Journal of Business Law, Inc. 345.

⁷² In fact, according to Nass, not only in Delaware but also in general, "(...) despite the legal requirement to do so, benefit corporations frequently fail to post an annual report on the public portion of their websites". For more information, see NASS, M. (2014), *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, University of Iowa, The Journal of Corporation Law, 39 Iowa J. Corp. L. 875. P.5

⁷³ As an example, Kurland writes, "(...) literature suggests that Delaware statute will be less impactful because it is more open to interpretation". For more information, see KURLAND, N. (2016), *Accountability and the Public Benefit Corporation*. P.6.

⁷⁴ Nevertheless, Kurland argues that, "(...) perhaps because of this leniency, it boasts the largest number of benefit corporations." P.6.

2.3. Protection against hostile takeover and Company Mission

Following Delaware court's holding in *Revlon, Inc. v. McAndrews & Forbes Holdings, Inc.*⁷⁵, corporations have a duty to maximize shareholder wealth by selling shares for the highest possible price. As Lydia Segal claims, the case “(...) raised the prospect that, in a corporate takeover, directors could be sued if they did not accept the highest bidder, regardless whether that bidder shared the values of the company it was taking over”⁷⁶. Consequently, there have been many cases in which socially conscious companies have been forced to sell itself to a buyer and, consequently, abandon its social mission in the process⁷⁷. To prevent this situation, PBCs have the legal authority to reject buy-out offers that would harm their social mission or non-shareholder constituencies such as employees by requiring them to balance these interests with those of shareholders.

Indeed, this protection from liability, that Public Benefit Corporations provide to officers and directors who choose to prioritize a social mission over profit, allows them to operate their companies in accordance with their social values, without worrying that their investors would sue them for sacrificing profit for the social good. In Delaware C-corporations and S-corporations are required to follow the Revlon standard, which establishes the duty of the board of directors to make business decisions based on increasing the short-term financial gains of the company. Public Benefit Corporations, on the other hand, have the flexibility to consider other factors besides whether the offered price and terms maximizes value for shareholders when making a decision of whether to sell the company and to whom, such as how the

⁷⁵ For more information, see BROWNRIDGE, S. (2015), *Canning Plum Organics: The Avant-Garde Campbell Soup Company Acquisition and Delaware Public Benefit Corporations Wandering Revlon-Land*, Delaware Law School of Widener University, Inc. Delaware Journal of Corporate Law, 39 Del. J. Corp. L. 703.

⁷⁶ For more information, see SEGAL, L. (2017), *Benefit Corporations: A step towards reversing capitalism's crisis of legitimacy?* Virginia Journal of Social Policy & the Law. 24 Va. J. Soc. Policy and Law. 97

⁷⁷ Serving as one of the main examples for this type of situations is AND 1, a basketball apparel and shoe company. Before being sold, the company was a socially responsible business that benefited from high employee retention rates, partly due to the company's benefits, like a basketball court in the office, yoga classes, a mother's room, and above market wages, while also giving 10% of its profits to local charities. The company's commitments to its employees also extended to its production facilities in China, ensuring their workers received a living wage and that they were in a safe environment. However, in 2005, the firm was sold to American Sporting Goods, a private footwear company, who within a few months of the sale promptly cancelled all the company's previous commitments to its employees, overseas workers, the environment and the local community. If AND 1 was a Public Benefit Corporation, this situation would not have been allowed to happen, or at least would be delayed until the shareholders of the company's terminated the benefit corporation status of the firm by a 2/3 supermajority vote. For more information on AND 1 story, see Knowledge@Wharton. (2012), *B Lab's Bart Houlahan: Building More Socially Responsible Corporations*. Retrieved from <http://knowledge.wharton.upenn.edu/article/b-labs-bart-houlahan-building-more-socially-responsible-corporations/> (last time consulted: 20-01-2019). See also HONEYMAN, R. (2012), *A Look at the History of the B Corp Movement*, Triple Pundit. Retrieved from <http://www.triplepundit.com/story/2014/look-history-b-corp-movement/41536> (last time consulted: 22-01-2019)

other company treats its employees or its social commitments. This also means that there is less risk of a hostile takeover⁷⁸.

Directors and officers are also legally protected when they balance both financial and non-financial interests and pursue the company's public benefit. However, they have an increased liability due to the duty to consider these social interests and can be sued by the company's stockholders if they fail to pursue those social purposes. Though, since Delaware statute allows corporations to add language in the certificate that any disinterested failure to satisfy the balancing requirement will not count as breach of the duties of loyalty or good faith and can therefore be exempted from liability; this additional risk (of liability) can be eliminated.

The shareholders of benefit corporations have the opportunity to name and enforce the pursuit of one or more specific public benefit purpose and it requires a 2/3 super-majority vote of shareholders to remove these higher standards and specific purposes⁷⁹.

⁷⁸ For more information, see STRACQUALURSI, M. (2017), *The Rise of the Public Benefit Corporation: Considerations for Start-ups*, Boston College Law School's Legal Service Lab. Retrieved from <http://bclawlab.org/eicblog/2017/3/21/the-rise-of-the-public-benefit-corporation-considerations-for-start-ups> (last time consulted: 04-04-2019)

⁷⁹ Delaware Public Benefit Companies have chosen a myriad of specific benefits. Some examples are (i) Nutrition, the delivery of nourishing, organic food to the nation's little ones and raising awareness and advancing solutions for childhood hunger and malnutrition in the United States. (ii) Unemployment, to build healthy communities, create jobs, and combat the social and economic ill effects of chronic joblessness in communities across America. (iii) Education: The Corporation also has a specific public benefit purpose to promote innovation in education and improved access to quality schooling. (iv) Breast Milk: The specific public benefits of increasing access to safe, high quality human donor milk adapted for neonatal clinical and post-discharge settings; increasing breastfeeding rates and the economic empowerment of women; and supporting related research. (v) Developing Countries: Benefit International community development in developing countries. (vi) Environmental Sustainability: Increasing environmental sustainability by fostering and facilitating the reuse of durable goods.

2.4. Issues/Disadvantages concerning Public Benefit Companies

2.4.1. The “Greenwashing⁸⁰” problem

With so many companies claiming to be eco-friendly and socially responsible, it has become more difficult for both consumers and investors to separate a company with high standards of corporate purpose, accountability, and transparency from a good marketer. For that reason, Public Benefit Corporations and the Certified B Corporation movement have the advantage of being marketed as Corporate Models in which “doing good” is actually built-in as part of their for-profit business model.

However, because Delaware Public Benefit Companies do not need to be specific about the public benefit they generate for the society and the environment, there are concerns that PBCs may benefit from that connotation without making an express commitment (especially for marketing reasons of being able to identify as a PBC, improving the company image to the public). Furthermore, negligent policing of Benefit corporations may open loopholes for greenwashing. Therefore, a Delaware PBC could possibly “greenwash” its image to the public by adopting a narrow specific public benefit of a charitable nature while keep marketing itself as a responsible and sustainable business. Such actions could be, for example, as providing help to people in need on the community without further developing what type of need, services or aspects provided, or facilitating purchases of the company’s products while claiming that its purpose is to promote medical and health education. These practices could eventually conflict with the more socially and environmentally oriented clients and shareholders of the company.

Nevertheless, this issue can be easily countervailed by designing the company to conform to the PBC model statute, defining the statute’s statement to operate in a responsible and sustainable manner in the charter, which it to mean providing a material positive impact on society and the environment from the corporation’s operations taken as a whole. In addition, while Delaware statute does not delineate a level of required specificity, providing a specific benefit that is more detailed than a restatement of the general benefit that the statute requires will ensure that corporations receive all the protections provided to PBCs under the public benefit corporation provisions of the DGCL.

⁸⁰ Greenwashing is referred as the corporate practice of making diverting sustainability claims to cover a questionable environmental record. Environmentalist Jay Westerveld coined the term “greenwashing” in the 1980s to describe outrageous corporate environmental claims. When most consumers received their news from television, radio and print media, the combination of limited public access to information and seemingly unlimited advertising enabled companies to present themselves as caring environmental stewards, even as they were engaging in environmentally unsustainable practices. For more information, see WATSON, B. (2016), *The troubling evolution of corporate greenwashing*, The Guardian. Retrieved from <https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies> (last time consulted: 28-01-2019)

2.4.2. Fundraising, Financing and Funding

Another relevant difference that separates PBCs from socially driven non-profit companies is the taxation of PBCs.

Since they are for-profit companies, PBCs do not have the same tax-exempt status of 501c⁸¹ organizations and are treated the same way as traditional corporations. Therefore, since they do not have any tax benefits for also focusing on a social mission, PBCs may put themselves at an economic handicap by not focusing solely on maximizing shareholder value. On the other hand, PBCs generate profits and can distribute them to shareholders, which should make them attractive for investors. Additionally, as a socially minded organization, foundations and nonprofit organizations should be interested in distributing grants and cooperating with these organizations.

However, according to Schmitt, “(...) PBCs end up not being attractive to either nonprofit or for-profit funders”. This author continues to explain, “(...) investors are not as interested in PBCs because they represent a high level of risk for a lower level of potential payoff”. Moreover, he refers that one of the fundamental challenges of PBCs, is not being sufficient well known, which is something that confuses investors because “(...) they straddle the more familiar for-profit and nonprofit scenarios (...)” of either only social impact or purely financial return⁸².

2.4.3. What stops companies from investing in PBCs?

Many factors prevent companies from investing in this type of companies but the more prevalent one continues to be the lack of knowledge/ignorance regarding Public Benefit Corporations. As an example of this lack of information, Schmitt writes that from the eight interviews that the researcher had with executives in the nonprofit and for-profit sectors, it quickly became apparent that there was a significant gap related to the understanding of PBCs. In fact, he even says that foundations did not have the level of understanding necessary to consider investing in PBCs. Despite the researcher pointing out that none of the six foundations he interviewed had funded a PBC, it reinforced the impression that there

⁸¹ In terms of tax incentives, 501c organisations are tax-exempt if within stated purpose.

⁸² See SCHMITT, P. (2016), *Public Benefit Corporations: Pushing the Social Venture Discussion*, The Hubert H. Humphrey School of Public Affairs/Carlson School of Management, University of Minnesota. P. 11-13

is a need to inform investors and entrepreneurs of the PBCs potentials in order for them to grow more familiar with this new company model⁸³.

Another major reason is the lack of case law for Public Benefit Companies, mostly due to their early age. Since these corporate entities are very recent, there is not any noteworthy amount of case law clarifying how courts will interpret the requirement for PBCs to balance their profits with their stated purpose or purposes. This uncertainty, as opposed to the substantial amount of court opinions for other types of companies, especially in Delaware, may be a detractor for investors who fear that potential litigation could not only cost the corporation a significant amount of money, but also hold up funding rounds or exits.

There is also the growth in paperwork required to operate, as PBCs need to be more transparent about their activities and prove that they are adhering to their defined social mission⁸⁴. For companies that do decide to become PBCs, this added paperwork may serve as a disadvantage when competing against other business types that do not have to follow those transparency requirements.

Lastly, Public Benefit Corporations need greater access to startup financing resources because their social value intentions make finding traditional startup funding difficult due to lower projected returns in investment.

⁸³ See Schmitt, *supra* note 81.

⁸⁴ Public Benefit Companies also risk losing their PBC status if it is found clear that they are not following their stated public benefit mission/goal.

3. Kickstarter – A Delaware Public Benefit Corporation

As a leading example that there is a sustainable alternative to the pursuit of profit above all else, in 2015, Kickstarter converted⁸⁵ from Kickstarter Inc. to Kickstarter PBC, a Public Benefit Corporation⁸⁶ (re-incorporated in Delaware). Kickstarter hardcoded its mission into the company's charter, along with commitments to always support art and artists, to operate in accordance with the firm's values, and to donate 5% of its post-tax profits to arts education and organizations fighting inequality⁸⁷. In 2017, eight organizations committed to building a "more creative and equitable world" received the donations, they were Film Society Kids, The Lamp, The Landromat project, Little Kids Rock, NYC Books through Bars, Sylvia Rivera Law Project, Black Girls Code, and the Bronx Freedom Fund.

The company maintains a global crowdfunding platform focused on the mission to "*help bring creative projects to life*" and has reportedly⁸⁸, received more than \$3.7 billion in pledges from 14.7 million backers to fund 404,129 creative projects, such as films, music, stage shows, journalism, video games and technology. As stated by the Kickstarter founders in the company blog⁸⁹, the "(...) *idea of a for-profit company pursuing social good at the expense of shareholder value had no clear protection under U.S. corporate law, and certainly no mandate*". In their opinion, Benefit Corporations are "(...) *obligated to consider the impact of their decisions on society, not only shareholders*". Finally, because of these obligations, "(...) *positive impact on society becomes part of a Benefit Corporation's legally defined goals*".

To sum up, it is interesting to acknowledge that Kickstarter considers in its 2017 Benefit Statement that after becoming a Public Benefit Corporation, they understood that governance was becoming more and more critical, as industry standards failed to consider much more than a company's own self-interest. For that reason, it added several commitments to its charter related with Kickstarter's terms of use, personal data and privacy policies, taxes transparency, and took steps to limit its environmental footprint. In 2017, formed an environmental impact working group to analyze how the

⁸⁵ More than 100 shareholders, including current and former employees, as well as investors, voted to allow Kickstarter to convert to a PBC, giving up their right to legally compel the company to focus on maximizing profitability. For more information on Kickstarter as a Public Benefit Company, see CHEN, P. (2018), *Kickstarter Is a PBC. Here's What That Means and Why It Matters*. Kickstarter. Retrieved from <https://medium.com/kickstarter/kickstarter-is-a-pbc-heres-what-that-means-and-why-it-matters-d90b2389ea6c> (last time consulted: 14-01-2019)

⁸⁶ For more information, see: Kickstarter. Retrieved from <https://www.kickstarter.com/about?ref=global-footer> (last time consulted: 28-05-2018)

⁸⁷ For more information, see Kickstarter. Kickstarter PBC 2017 Benefit Statement. Retrieved from https://d3m1fygrfdi2i.cloudfront.net/181119_PBC_Report_PDF_Master.pdf (last time consulted: 14-01-2019)

⁸⁸ The last data available was retrieved in 30 May of 2018. For more information see: <https://www.kickstarter.com/help/stats> (last time consulted: 30-05-2018)

⁸⁹ For more information, see: <https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation> [Accessed on 04-07-2018]

company's may be able to have more scalable impact given its position as an intermediary, with a plan to roll out new initiatives in that area before the end of 2018.

Chapter III

The Public Benefit Model in Europe

1. Public Benefit in Europe

As we know, in the USA, Benefit Corporations are a recognized legal entity, working alongside traditional for-profits and non-profits companies. In Europe, while Certified B Corps are already present⁹⁰ and already more than 500 companies in continental Europe and the United Kingdom are Certified B Corps, Benefit Company advocates are still working towards obtaining a legal status and ample recognition throughout the old continent. Related with this initiative, B Lab Europe⁹¹, which oversees the growth of the Benefit movement in Western Europe, and B Lab UK⁹² are two of the most important advocates for the Public Benefit Corporation movement, promoting and exchanging the social benefit concept throughout Europe.

In fact, despite its great number of social projects headed for a sustainable social market economy, centralized in the Europe 2020 strategy⁹³ and the Enterprise 2020 Movement⁹⁴, the European Union has failed to integrate the Public Benefit Model on its current strategy. However, with the current relevance of non-profit organizations such as cooperatives, and especially social enterprises⁹⁵ which also

⁹⁰ As of April 2019, B Lab Europe (341) and B Lab UK (172) accounted for 513 of the 2801 Certified B Corps in the world, denoting the importance of Europe and European companies to this movement. For more information on B Lab Total Certified Corporations data, see B Lab Europe and Luis Amado Twitter on B Corps. Retrieved from <https://bcorporation.eu/about-b-lab/country-partner/portugal> (last time consulted: 15-04-2019)

⁹¹ Since B Corp Europe was launched in April 2015, it has been promoting and exchanging views and ideas with various companies. One of those companies is Mondora, in Italy, a company that aims to be a source of inspiration for its clients by spreading the knowledge of the company's "(...) unique approach towards work and software development". Mondora favours local and rural communities, and recruits team members primarily from these areas, granting its employees flexible working hours, telecommuting and job sharing. For more information about Mondora views on what it means to be a B Corporation, see RUFFONI, K. (2015), *Mondora as a B Corporation - What it means and why we do it*. Retrieved from <https://mondora.com/#!/post/91f63b6f0bdac406e1d6c3e1eecf6cd5> (last time consulted: 03-04-2019)

⁹² Lab UK was founded in 2013 by two entrepreneurs, both of whom were founders of B Corps -Charmian Love, CEO of Volans and James Perry, Director and co-founder of COOK Food.

⁹³ A 10-year economic strategy, Europe 2020, goal is to boost European economy and promote a smart, sustainable and inclusive growth, based on a greater coordination of national and European economic policy. The initiative aims to pave the way for the creation of new jobs and a better quality of life, setting a vision of Europe's social market economy for the 21st century and putting forward three mutually reinforcing priorities: Smart growth: developing an economy based on knowledge and innovation; Sustainable growth: promoting a more resource efficient, greener and more competitive economy; Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion. For more information regarding Europe 2020 strategy, see EFESME. *Europe 2020: A strategy for smart, sustainable and inclusive growth*. Retrieved from <http://www.efesme.org/europe-2020-a-strategy-for-smart-sustainable-and-inclusive-growth> (last time consulted: 12-04-2019). See also European Commission. *Europe 2020 strategy*. Retrieved from https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy_en (last time consulted: 12-04-2019)

⁹⁴ As we already approached this topic during the Thesis introduction, the Enterprise 2020 is a European movement for companies committed to developing innovative business practices and working together with their stakeholders to provide solutions to existing and emerging societal needs, addressing sustainability issues that question our current patterns of living, working, learning, communicating, consuming and sharing resources.

⁹⁵ With similar goals to the Public Benefit Companies, Social Enterprises meant, as stated by the Social Business initiative of 2011, "(...) to achieve social impact rather than generating profit for owners and shareholders", using the surplus to achieve the enterprise stated social goals. Following up on those objectives, the Social enterprise is "(...) managed by social entrepreneurs in an accountable, transparent and innovative way, in particular by involving workers, customers and stakeholders affected by its business activity". As corroborated by Carlo Borzaga, Sara Depedri and Giulia Galera, the defining features of

aim to “(...) to effect social and economic transformation which contributes to the objectives of the Europe 2020 Strategy” (The Social Business initiative, 2011, p.4), a question emerges. Does the European Union or the various European countries have a need for this new type of company model?

The 2018 edition of *Smarter, greener, more inclusive? – Indicators to support the Europe 2020 strategy*⁹⁶ validates the need to improve the efforts on employment⁹⁷, showing that although “(...) substantial progress has been made in the areas of climate change and energy, as well as in education”, the “(...) targets on R&D investment, employment and poverty alleviation are still at a distance (...)” (Executive Summary, p. 8). Indeed, despite being generally positive⁹⁸, the publication identifies many issues such as poverty, social exclusion and education, particularly the acquisition of skills such as reading, math and science in which the “(...) progress has taken a step backwards” (Executive Summary, 2018, p. 95). As the publication notes, the success of the Europe 2020 strategy crucially depends on Member States coordinating their efforts, however, much of the eventual “effort” results from company’s actions and that is where the introduction of a Public Benefit Corporation Model could give a welcome assistance, potentially relieving to some extent these issues. This effort from companies should be focused on the small and medium-sized enterprises (SMEs) since, according to the European Commission, they represent “(...) 99% of all businesses in the EU”⁹⁹.

social enterprises are the goals pursued and the production modalities adopted, rather than simply the goods and services they produce. Consequently, a varied and increasing number of initiatives are defined as social enterprises, including those supplying social services, those promoting ethical financing, micro-credit and fair trade, and generally those producing goods and services with goals other than profit. For more information on the main features of Social Enterprises, see European Economic and Social Committee. (2012), *Social Business Initiative*, INT/606-EESC-2012-1292, COM (2011) 682 final. Retrieved from <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/social-business-initiative> (last time consulted: 20-03-2019). See also BORZAGA, C.; DEPEDRI, S. and GALERA, G. (2012), *Compreendendo negócios sociais*. SsiELO. ISSN 0080-2107. Available on http://www.scielo.br/scielo.php?script=sci_abstract&pid=S0080-21072012000300005&lng=en&nrm=iso&tIng=pt (last time consulted: 26-02-2019)

⁹⁶ The 2018 edition of *Smarter, greener, more inclusive? – Indicators to support the Europe 2020 strategy* monitors progress towards the targets and goals defined under the three mutually reinforcing priorities of smart, sustainable and inclusive growth. The data used comes mainly from official statistics produced by the European Statistical System and disseminated by Eurostat. It covers the period from 2002 or 2008 up to the most recent year for which data are available (2016 or 2017). For more information about this publication, see European Commission. (2018), *Smarter, greener, more inclusive? – Indicators to support the Europe 2020 strategy – 2018 edition*. Retrieved from <https://ec.europa.eu/eurostat/web/products-statistical-books/-/KS-02-18-728> (last time consulted: 12-04-2019)

⁹⁷ The Europe 2020 strategy has a set out target of increasing the employment rate of the population aged 20 to 64 to at least 75% by 2020. It has also has set the target of lifting at least 20 million people out of the risk of poverty or social exclusion by 2020 in comparison to the year 2008. For more information, see European Commission. (2014), *Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth*, COM 130 final.

⁹⁸ For instance, the publication reports an increase on employment rates and states that the EU is fulfilling some of the requirements for 2020, such as the greenhouse gas emission reduction target. Despite recognizing that the EU is lagging behind in education (reading, maths and science), it notes a clear and continuous decrease in early school leaving.

⁹⁹ To see the definition, and what factors determine the distinction of a company as a SME, see European Commission. *What is a SME?* Retrieved from https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en (last time consulted:13-04-2019)

We will now see more specifically what type of response has the United Kingdom given to the “social benefit trend” and in what way has the recent Italian experience brought some urgently needed responses about how the PBC Model could be implemented in Europe. Finally, we will try to understand in what manner can the PBC Model function in the Portuguese company’s legal framework, analyzing the existing Portuguese companies and, with the support of interviews with five distinct Portuguese companies, present a brief analysis over the matter. Thereby, this approach may well be an important element to further comprehend how the Delaware PBC Model could work in a national and European perspective.

2. The United Kingdom Social Enterprises

Not only is the United Kingdom one of the most important places of incorporation, especially for companies in Europe, its social economy is seen as one of the world's most developed. In fact, according to the United Kingdom Department for International Trade, "(...) *more companies locate their businesses in the UK than anywhere else in Europe*"¹⁰⁰, and it appears that "(...) *both the UK Government and industry are keen to cement the UK's position as a global center for the social economy*"¹⁰¹. As a result, it was most expected that the UK would introduce changes in its legal framework with respect to the general increase regarding concerns with the social and environmental issues.

Certainly, within the past years, there have been several notable statutory developments in the UK that have sought to widening the amount of options that investors and consumers may consider when making business decisions. In fact, the United Kingdom jumped into the hybrid corporation area with the introduction of the Community Interest Company (CIC) in 2004, and has created incentives such as the Social investment tax relief (SITR)¹⁰² to encourage individuals to invest and support social enterprises. Moreover, the Social Enterprise UK (SEUK), a national membership body for social enterprises, has many ongoing programs that strive to support social enterprises, such as the Buy Social Corporate Challenge (BSCC)¹⁰³, which looks for CICs that are able to supply products or services to SEUK corporate partners.

¹⁰⁰ For more information, see: UK Department for International Trade. Retrieved from <https://www.gov.uk/government/publications/why-overseas-companies-should-set-up-in-the-uk/why-overseas-companies-should-set-up-in-the-uk> (last time consulted: 08.09.2018)

¹⁰¹ For more information on the UK position about developing social economy, see HM Government. *Social Investment: the UK as a global hub 2016 International strategy*. p.6. Available on https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/507060/6.1806_CO_HMG_International_strategy_FINAL_web__3_.pdf

¹⁰² Social investment tax relief (SITR) is the government's tax relief for social investment, which seeks to encourage individuals to support social enterprises and helps them access new sources of finance. For more information on how investors benefit from it, the requirements needed to be eligible and other information, see GOV.UK. (2016), *Social investment tax relief*. Retrieved from <https://www.gov.uk/government/publications/social-investment-tax-relief-factsheet/social-investment-tax-relief> (last time consulted: 08-09-2018)

¹⁰³ Launched in 2016 by Social Enterprise UK, the BSCC goals are to help large businesses go beyond their typical Corporate Social Responsibilities and diversity their core operations, while allowing social enterprise suppliers to grow their revenues and impact. For more information regarding the Buy Social Corporate Challenge, see DALY, A. (2019), *CICs and their relationships with corporate partners*, Blog Community Interest Companies, GOV.UK. Retrieved from <https://communityinterestcompanies.blog.gov.uk/2019/04/11/cics-and-their-relationship-with-corporate-partners/> (last time consulted: 19-04-2019)

As a further matter, the Social Enterprise: Market Trends 2017 report¹⁰⁴ key findings seem to be generally positive towards Social Enterprises (SEs)¹⁰⁵ activities. The Government report accounts an estimated 471,000 UK social enterprises, made up of 99,000 social enterprises with employees and 371,000 social enterprises with no employees, employing approximately 1.44 million people (Social Enterprise: Market Trends 2017, p. 8). It identifies 22 per cent of the UK small business population (1.21 million enterprises) as socially oriented SMEs¹⁰⁶, which have social/environmental goals but do not use surplus/profit chiefly to further these goals and that may be referred to as mission-led businesses. The most important aspect of the report is the expectation for growth over the next years and the fact that Social Enterprises are more likely to innovate than SME employers. Finally, while the report also considers the perceived obstacles for their success¹⁰⁷, it seems to place SEs in a very good position regarding investment, and prospects for the future.

On the other hand, although the UK includes companies that obtain external certification as B Corps as part of the “social sector organizations”¹⁰⁸ (Social Investment, 2016, p. 10), it does not have a

¹⁰⁴ The report included 1300 businesses owners and managers as respondents, and was commissioned jointly by the UK Department for Digital, Culture, Media and Sport and the Department for Business, Energy and Industrial Strategy. While claiming that social enterprises “appear more vulnerable to changes in the public sector”, the report traces a positive image for social enterprises, especially when compared with small and medium-sized enterprises (SMEs). According to Alice Sharman, the report found that social enterprise employers tend to be more sustainable and more dynamic businesses in certain respects, with nearly all social enterprise employers having generated surplus/profits in 2016, compared to three quarters of small and medium-sized enterprises (SME) employers. It also revealed that social enterprise employers were more likely than SME employers to try and access information on day-to-day operations or strategic advice to help grow the business. In fact, 35 per cent social enterprises did this compared to 21 per cent SME employers. For more information, see SHARMAN, A. (2017), *There are 471,000 social enterprises in the UK, government report finds*. CIVILSOCIETY. Retrieved from <https://www.civilsociety.co.uk/news/there-are-471-000-social-enterprises-in-the-uk-government-report-finds.html#sthash.AizPrVNI.dpuf> (last time consulted: 12-04-2019) and the report in Department for Digital, Culture, Media and Sport; Department for Business, Energy and Industrial Strategy. (2017), *Social Enterprise: Market Trends 2017*. Available on https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644266/MarketTrends2017report_final_sept2017.pdf

¹⁰⁵ The criteria used by the Report to identify Social Enterprises follows the aspects related with the (i) company’s income: Share of income from trading/commercial activities at least 50 per cent; (ii) Use of surpluses/profits: Rules/restrictions to use surpluses/profits chiefly to further social/environmental goals or past surpluses/profits are chiefly used to further social/environmental goals; (iii) Organization goals: Type of social or environmental goals that the organisation/business has and whether social/environmental goals are of greater or equal concern compared to financial goals; (iv) Charitable status & legal form: Using the standard SBS questions asking for charitable status and legal form. For more information, see the Annex D – Index Approach to Identifying Social Enterprises, on page 67 of the Report.

¹⁰⁶ The report identifies SMEs as enterprises within the small business population that are neither traditional non-profits nor social enterprises.

¹⁰⁷ Similar to SMEs (with a few exceptions), the report states that the top three reported obstacles for social enterprise employers are competition in the market (61 per cent), regulations/red tape (58 per cent), taxation (49 per cent) followed by recruitment/skills (39 per cent), workplace pensions (28 per cent) and the UK exit from the EU (28 per cent). Social Enterprise: Market Trends 2017. p.9.

¹⁰⁸ As defined by the Social Investment: a force for social chance 2016 strategy, social sector organizations are a range of organization types that have a firm commitment to achieving and measuring their social impact. This includes organisations which have an external body that oversees that commitment (such as charities, community interest companies and community benefit societies) as well as businesses that make that commitment in other forms, such as through their governance, business model or external certification (public service mutual or B Corps). For more information, see HM Government. *Social*

Public Benefit Corporation Act or even seems to be considering adopting such a type of Model on the near future. In spite of that, the UK has two corporate forms, the Community Interest Company and the Company Limited by Guarantee, that, due to the features and limitations placed on them, are considered as the category of companies directed for socially minded investors that wish to incorporate in the UK. However, should they be considered as similar answers for companies as the American PBC Model who certifies companies that strive to promote a public benefit while operating in a responsible and sustainable manner? We shall now examine them to see the answer.

Investment: a force for social chance 2016 strategy. Available on https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/507215/6.1804_SIFT_Strategy_260216_FINAL_web.pdf

2.1 The Community Interest Company

As the result of an “innovative legislation”¹⁰⁹, Community Interest Companies (CICs) are businesses whose primary focus is on social good or improving the welfare of the community rather than maximizing profits. They are nonprofit companies, specifically designed for social enterprises and generally associated with typical UK charities¹¹⁰ but with fewer limitations¹¹¹. They are part of the UK Social Enterprises, which includes a range of legal forms that have external regulators such as the already mentioned CIC (regulated by the Office of the Regulator of Community Interest Companies) and the Community Benefit Societies (registered with the Financial Conduct Authority). This company form has its assets locked (generally through regulatory limitations on distribution of assets and/or profits) to prevent the extraction of profits¹¹².

Similar to Public Benefit Corporations, Community Interest Companies have a stated mission, known as the “community interest statement”, a clearly defined set of activities, with the main requirement being the submission of the annual Community Interest Report and, like Delaware PBCs, they are “(...) *quick, easy and inexpensive to set up*”¹¹³. However, CICs community benefit report is open to public scrutiny as well as the transparency of directors' remuneration and use of the company's assets, while being also subject to ongoing regulation by the CIC Regulator, which is far harsher than what the PBC Model demands to companies. In fact, Delaware benefit corps are not even required to report publicly or against a third party standard.

As for the continuity of its benefits to the community, once a CIC is incorporated, it continues to provide benefits to the community until it is dissolved or converted into a charity, and if it goes under

¹⁰⁹ The British Council considers that the work of successive UK governments to support the growth of the social economy resulted in innovative legislation such as the creation of the Community Interest Company. For more information, see British Council. (2016). *UK launches international social investment strategy*. Retrieved from <https://www.britishcouncil.org/society/social-enterprise/news-events/news-uk-international-social-investment-strategy> (last time consulted: 09-09-2018)

¹¹⁰ While discussing the advantages and disadvantages of a community interest company (CIC), Johnathan Korchak compares them mostly with charities. See KORCHACK, J. (2018), *Advantages and disadvantages of a community interest company (CIC)*, Inform Direct. Retrieved from <https://www.informdirect.co.uk/company-formation/community-interest-company-cic-advantages-disadvantages/> (last time consulted: 10-09-2018)

¹¹¹ To give an instance, CICs have a lower level of ongoing governance company than a charity, they are regulated by the CIC Regulator, with the main requirement being the submission of the annual Community Interest Report. Meanwhile Charities are more strictly regulated by the Charity Commission (in England and Wales) or the Office of the Scottish Charity Regulator (in Scotland) and have stricter reporting requirements than CICs.

¹¹² A CIC must reinvest any generated revenue to support its local community and furthering its mission. This prevents demutualisation and windfall profits being paid to directors and members without the balances and checks of mutuality and charitable status.

¹¹³ CICs require a single consolidated application to form the company made to Companies House, which they and the CIC Regulator separately review. See Plummer Parsons. *Features of CICs*. Retrieved from <https://www.plummer-parsons.co.uk/not-profit/community-interest-companies-cics/features-cics> (last time consulted: 10-09-2018)

insolvency, any residual assets, after satisfying its creditors, are to be transferred to another asset-locked body, such as a charity or another CIC.

2.2. Company Limited by Guarantee

Companies Limited by Guarantee (LGBs) are an alternative type of corporation used primarily for non-profit organizations that require legal personality. This type of company does not usually have a share capital or shareholders, instead it has members who act as guarantors, which have the responsibility to contribute a nominal amount (typically very small) in the event of the winding up of the company.

While a LGB generally does not distribute profits and cannot be formed as a company limited by guarantee with a share capital, surprisingly, it can distribute its profits to its members, if allowed to by its articles of association¹¹⁴. Although doing that would make the company illegible for charitable status¹¹⁵, it means that there is nothing preventing to set up this type of company to run a profit-making business in which the guarantors will keep the profits. Therefore, it is entirely possible to have an LGB company as a profit-making venture limited by guarantee with a customized charter attached that can dictate how it is managed. Still, a limited by shares structure simply makes more sense for that purpose¹¹⁶.

2.3. Vernova Healthcare and Bath: Hacked - CICs

¹¹⁴ For more information on the UK company structure and governance, see HANNIGAN, B. (2012), *Company Law*. Oxford University Press; 3rd edition.

¹¹⁵ Charities in the UK are required to be LGBs

¹¹⁶ See 1st Formations. *About Companies Limited by Guarantee*. Retrieved from <https://www.1stformations.co.uk/about-companies/company-limited-by-guarantee/> (last time consulted: 10-09-2018)

Vernova Healthcare was established in 2007 as one of the first Community Interest Company healthcare providers and Bath: Hacked became a CIC in 2015. Both companies chose the CIC Model to better serve the communities in which they work. For Verona, it was also to “ (...) ensure that every pound Vernova earned from providing services would be used for the benefit of the local community”¹¹⁷, whereas Bath decision to establish as a formal business entity also meant to enable them “ (...) to seek grant funding, sponsorship, and other forms of revenue to help make the project sustainable”¹¹⁸. They share similar goals, with Bath: Hacked aiming to help improve the lives of local residents through a better understanding of the local area, and Vernova to improve the health of the population and, when care is required, to provide it in the community, avoiding the need for hospital care wherever possible. As we can see, even though the two companies work with the community is quite impressive, their model is very similar to the US non-profit model and not with traditional for-profit companies, which is the main objective of the American and Delaware PBC model.

2.4. CICs and LBGs - Assessment

From the fact that Community Interest Companies have stricter regulation, more transparency requirements and their assets locked, one can immediately see a clear distinction between this type of company and the Delaware Public Benefit Model. There are no doubts that, as a type of entity with a clear commitment to social goals, CICs are closer to the American low-profit limited liability Company, or L3C, with both falling under the larger umbrella of what is referred as “social entrepreneurship”. Regarding Companies Limited by Guarantee (LBG), they can be used for profit seeking companies and are allowed to define their set of values that can follow a commitment to a social purpose, which actually positions them, closer to PBCs than CICs.

Nevertheless, when comparing it with the Delaware Public Benefit Corporation, a Company Limited by Guarantee still has many limitations (such as the impossibility to have shares, hence no shareholders) that the Delaware Model does not have. Although both Community Interest Companies and

¹¹⁷ For more information on Verona Healthcare decision to become a Community Interest Company, see KEARNS, P.; JOHNSON, J. (2019), Vernova Healthcare CIC – A new model for NHS Services, Blog Community Interest Companies, GOV.UK. Retrieved from <https://communityinterestcompanies.blog.gov.uk/2019/03/28/vernova-healthcare-cic-a-new-model-for-nhs-services/> (last time consulted: 19-04-2019)

¹¹⁸ For more information regarding Bath: Hacked as a Community Interest Company, see MCCONNELL, J. (2015), *What is a community interest company, and why have we become one?* Bath: Hacked. Retrieved from <https://www.bathhacked.org/organisation/what-is-a-community-interest-company-and-why-have-we-become-one/#> (last time consulted: 19-04-2019)

Limited by Guarantee companies are powerful engines of social change and success in their communities, they should be regarded as considerably distinct from the Delaware PBC or the typical American Public Benefit Corporation Model. Indeed, none seems to be an ideal solution for a socially minded investor who wishes to invest in a company that is both a for-profit and actively pursues a specific social mission while being obliged to operate in a responsible and sustainable way and without being constrained by limitations placed on profit seeking and/or the social goals.

Lastly, there seems to be a great number of United Kingdom Small and Medium-sized Enterprises that could potentially benefit from the creation of a Public Benefit Corporation status. For the twenty-two per cent enterprises (1.21 million) that identify themselves as socially oriented SMEs, it could allow them to strengthen their social/environmental commitments and report it to the community with increased rigor and transparency. For the remaining two thirds of UK small business population (3.65 million enterprises) which identify as commercial SMEs with a focus on their commercial and financial goals but no predominant social/environmental goals¹¹⁹, this could be the needed opportunity/incentive to change their companies main purpose or start engaging in behaviors that seek to bring more social benefits their community.

¹¹⁹ The data was retrieved from the Social Enterprise: Market Trends 2017 Government report.

3. The Italian *Società Benefit* (SB)

Although adapted to the European and Italian physiognomies, the most similar model with the American PBC Model is, as Pelatan and Randazzo report¹²⁰, the *Società Benefit*. It was the first 'Benefit Corporation' created in a civil law legal system and the second one created in history (after the Public Benefit Corporation Model in the USA). Being the first 'Benefit Corporation' created in a civil law legal system is particularly remarkable, due to the hardships in "transferring" models that have been created in a common law system to a civil law system. Conversely, with current European jurisdictions treating social enterprises as the alternative to traditional charities, the *Società Benefit* statute departs from the historical European narrative and converges closely with the American approach.

The *Società Benefit*²¹ was created on 15 December 2015 by the Italian Parliament, through a diverse coalition, with a completely different legal and social context than the PBC Model in the USA, mostly because in Italy, as in many other civil law countries, directors may take into consideration stakeholder interests. Consequently, the concept of a shareholder primacy doctrine is weaker in Europe than the American equivalent. As a result, the European Benefit Corporation was not created to protect directors, but to promote a completely new model of conducting business, which seeks to equally pursue an economic and a social purpose.

In fact, another main difference in the Italian approach was that the Italian legislator did not create a new form of corporation but provided for that any company can change its statutes¹²² and become a *Società Benefit*. The European Social Enterprise Law Association (ESELA)¹²³ describes the objectives of this new model as "(...) *to promote a new business model in Italy to achieve an effective and innovative way to achieve the dual goal of profit and not-for-profit entrepreneurship, drawing strength from the benefits that characterize both types of business*". Within this paradigm, the social dimension is no longer

¹²⁰ For more information, see Pelatan, A. and Randazzo, R. (2016), *The First European Benefit Corporation: blurring the lines between 'social' and 'business'*, ESELA. Retrieved from <https://www.bwbllp.com/file/benefit-corporation-article-june-16-pdf> (last time consulted: 11-07-2018)

¹²¹ The *Società Benefit* is active as a new corporate legal form in Italy since January 2016 in the 2016 Stability Law (Law No. 208) and the regulation is present in Sections 376-384 of its Article 1. For more information, see the official website on the Italian benefit companies, in *Società Benefit. Cosa sono le Società Benefit?* Retrieved from <http://www.societabenefit.net/cosa-sono-le-societa-benefit/> (last time consulted: 22-07-2018)

¹²² *Companies have to amend their articles of association including in the object clause, the aims of common benefit that they intend to pursue. This means that they will not only pursue the traditional purpose of profit, but also the specific purpose(s) of common benefit that companies have to insert in their articles of association.*

¹²³ ESELA is a global network of lawyers, advisors, academics and entrepreneurs that work, with a European focus, to create sustainable economy that promotes positive social impact. The network is mainly interested in social impact law, impact investing, not for profits, co-operatives and other social causes with the aim of promoting a better understanding of the law on these areas and to support the development and growth of social impact law for the benefit of society. For more information regarding ESELA goals, motivations, and current events promoted by the organization, see ESELA. *About ESELA*. Retrieved from <https://esela.eu/about-esela> (last time consulted: 26-10-2018)

marginal to the company, but a key component of the value chain. The notion of *“(…) value production is extended to pursue long-term sustainability with every tool, including collaboration, sharing and relationship with the community”*. Lastly, they add that it can *“open new opportunities in terms of the corporation’s ability to renew both itself and the social and economic fabric”*¹²⁴.

As stated by Pires, it *“(…) was necessary to introduce a law permitting the possibility to include a benefit purpose in the corporate acts”*, because, like in the USA, the country’s Civil Code referred that the objective of the company was the pursuance of profits¹²⁵. As so, the Italian Stability Act of 2016 describes the *Società Benefit* as a company that *“(…) aims at the distribution of profits, but, at the same time, purposes one or more common benefit goals in favour of other stakeholders in the business, including people, communities, territories and the environment, cultural heritage, social activities, entities and associations, by working in a responsible, sustainable and transparent manner”*. Moreover, the *Società Benefit* is obligated to list the specific benefit purposes of the company, act in the best interest of stakeholders and, like the Benefit Corporation Model legislation, publish an annual benefit report.

Indeed, the approach taken in Italy is not meant to be a replica of the US benefit corporation, mainly because the *Società Benefit* is the product of a very different legal, social and historical background. For example, as Joseph Liptrap denotes, in Italy, directors are not obliged in considering the interests of non-shareholder constituencies as much as in the USA. Liptrap¹²⁶ follows by writing that the differences in Italy meant that *“(…) shareholder primacy is not as pronounced relative to the US position”*, and as such, *“(…) the creation of the Società Benefit was not underpinned primarily by a motivation to give directors more flexibility to look after the interests of non-shareholder constituencies”*. Quite the opposite, *“(…) the advent of the Società Benefit is treated as an innovation which was necessary to bring Italian conceptions of corporate law into the twenty-first century”*.

3.1 The Italian *Società Benefit* – Features of the Model

¹²⁴ For more information, see Benefit Corporation – the new B Corporation and “doing business” in Italy Today. (2016), ESELA. Retrieved from <http://esela.eu/news/benefit-corporation-seminar-new-b-corp-legislation-business-italy-today/> (last time consulted: 27-12-2018)

¹²⁵ See Pires, supra note 1, P. 5.

¹²⁶ For more information, see LIPTRAP, J. (2017), *The Legacy of B Lab: Italy’s Società Benefit*. Retrieved from <http://www.ecclblog.law.ed.ac.uk/2017/03/31/the-legacy-of-b-lab-italys-societa-benefit/> (last time consulted: 21-12-2018)

As we can see, the Italian *Società Benefit* shares some common features with the American PBC Model, and in a general way, the Italian law has implemented the three fundamental characteristics of a regular American Public Benefit Company Model while diverging from the Delaware PBC Model.

The Italian Stability Law of 2016 describes a *Società Benefit* as available to for-profit and low-profit businesses (does not restrict it to traditional corporations). Registering as a *Società Benefit* entails the pursuit of economic activity through a blending of profit maximization with the realization of one or more common benefits. A common benefit is interpreted as a positive effect or the reduction of a negative effect on one or more of the following categories: people, communities, territories, the environment, cultural heritage, social activities, public or private organizations or associations and other stakeholders. In this way, the list seems to be non-exhaustive through the wording of “and other stakeholders.”

A *Società Benefit* must also operate in a responsible, sustainable and transparent way. Additionally, the SB must alter the corporate purpose provision(s) of its constitution, to specifically include a list of the common benefits that will be pursued. Equally, its directors have an obligation to consider non-shareholder constituencies' interests¹²⁷. The Stability Law of 2016 also identifies relevant non-shareholder communities as employees, customers, suppliers, lenders, creditors, government and society. Like the requirements of the American PBC, a *Società Benefit* must draft an annual benefit report (still different than the Delaware PBC that only requires reporting to shareholders biennially and not to the public).

¹²⁷ The item 381 of the Italian Stability Law mentions that the failure of achieving the company's purposes (discussed on item 380) can make managers liable in the same way as directors are liable regarding their general responsibilities in "traditional" corporations: “*The breach of obligations under paragraph 380 above, may be deemed as a breach of the duties imposed by the applicable laws and the by-laws upon the directors of the company. In the event of breach of the obligations under paragraph 380 above, the relevant provisions of the Civil Code regarding directors' liability shall apply*”. For more information, see the Italian benefit corporation legislation, Law 28 from December 2015, No. 208, article 1, paragraphs 376 to 384. Retrieved from <https://www.sistemab.org/wp-content/uploads/2016/02/Italian-benefit-corporation-legislation-courtesy-translation.pdf> (last time consulted: 02-15-2019)

3.2. Differences between the American and Italian Approaches

Despite the similarities between the two models, there are four major areas where the American and the Italian approaches significantly diverge.

First, the *Società Benefit* must list in the statutes the specific benefit activities (in order to ensure that the social purpose is respected) and specify how the directors aim to achieve them. It is considered that this might better combat corporate greenwashing, since it forces *Società Benefits* to operate both in a responsible, sustainable and transparent way and pursue one or more explicit common benefits. Neither the US standard PBC Model nor the Delaware PBC Model require a benefit corporation to explicitly list a specific public benefit purpose in the articles of association.

Secondly, contrary to the American approach, Italy has entrusted the Competition Authority (AGCM) with the competence of controlling the actual pursuit of the common benefits and the power to fine the Benefit companies that fail to accomplish it. This means that if a *Società Benefit* fails to pursue the stated common benefit(s), the company is subject to the provisions of the Italian Consumer Code rules on misleading advertising, which is policed by the Competition Authority. The American PBCs (including Delaware) do not contain any such enforcement mechanism, aside for shareholders' power to bring a benefit enforcement proceeding. Regarding this issue, Liptrap claims that "(...) *the available reporting data is clear that US benefit corporations' pursuit of a specific public benefit purpose has thus far been unsatisfactory, and shareholders remain the only constituency with a right of action against the directors of a benefit corporation if they fail to do so*". For the researcher, this situation "(...) *might suggest that, in the US, the social purpose aspect of a benefit corporation is still only secondary to profit maximization*"¹²⁸.

Third, directors' responsibilities are, at least prima facie, considerably more onerous in a *Società Benefit*. The Model Benefit Corporation Legislation frees directors from personal liability for an act or a failure to act as it relates to the creation and realization of a general public benefit or specific public benefit. In a *Società Benefit*, directors must actively protect non-shareholder constituencies' interests. A SB constitution must also identify an "impact director" responsible for the pursuit and realization of the common benefits. In the annual report, the impact director responsible must describe the specific objectives, methods and actions taken to pursue the common benefits, as well as any circumstances that

¹²⁸ For more information, see VALSAN, R. (2017), *The Legacy of B Lab: Italy's Società Benefit*. Retrieved from <http://www.ecclblog.law.ed.ac.uk/2017/03/31/the-legacy-of-b-lab-italys-societa-benefit/> (last time consulted: 21-12-2018)

might have prevented completion. The annual report also requires the impact director responsible to identify how the specific objectives will be pursued in the following year. A contravention of any of these requirements would constitute a breach of fiduciary duty under the existing corporate law which otherwise governs traditional for-profit businesses in Italy. It would also make a director personally liable¹²⁹ under the already discussed Italian Consumer Code penalties provided for misleading commercial advertising.

Fourth, as it was stated above, the Stability Law 2016 allows for-profit and low-profit businesses to become a *Società Benefit*. In the US, only traditional for-profit corporations can register as a benefit corporation. Consequently, the US approach excludes hybrids and quasi-charitable businesses from becoming a benefit corporation. By virtue of this distinction, the required “SB” or “*Società Benefit*” designation next to a business’ name might be better understood as a creature of legal status, rather than an entirely different corporate form like its US counterpart. In fact, the scope of the law applies not only to for-profit companies, but also to limited-profit companies (co-operatives, limited companies and mutual companies pursuing common benefits with limited profit distribution).

Overall, the Italian *Società Benefit* seems to be stricter on the enforcement of the PBCs stated missions, since, besides other requirements, they are obliged not only to report, but also to measure the impact generated by their activities using an external standard assessment, independent, credible and transparent, taking into account the areas related to corporate governance, employees, environment, etc. Additionally, the attachment 4 of the Italian Stability Law provides that the evaluation shall be carried out by an external and trustworthy entity and comprise the analysis of the company's governance, including its responsibility and transparency towards the social purposes, labor and environmental aspects, and the impact on other stakeholders, like suppliers and community. While it does not mention specific indicators for this assessment, in Pires opinion, it is likely that *Società Benefits* will use recognized standards, such as the Global Reporting Initiative (GRI) and B Lab international standard B Impact¹³⁰.

3.3. The *Società Benefit* – Final Assessment

¹²⁹ The *Società Benefit* must prepare annually a report (to be attached to the yearly financials) where it assesses the impact of its activities on the general public benefit. The report must be published on the SB's website and must include: (i) a description of the ways and actions implemented by the directors to pursue general public benefit during the year and any circumstances that have hindered or delayed its creation; (ii) an assessment of the SB's performance determined taking into account the standards outlined in the EAS; (iii) a section outlining the new goals that the SB wants to achieve in the following year.

¹³⁰ For further reading regarding the differences between the American and Italian approaches on the Benefit Corporation Model, see PIRES, A. (2017), *The fourth sector and the benefit companies: a comparative analysis between the American and the Italian models*. University of Milan. SSRN - Social Science Research Network Available on <https://www.cfllegal.com/uploads/outros/publicacoes/2/4e90980560dc6687d75316cf1d3f0839.pdf> (last time consulted: 12-04-2019)

Although the *Società Benefit* model shares a great amount of features with the American PBC Model, we can say that the SB has chosen a path of its own, with stricter enforcement rules and more requirements for companies who become a SB than a typical Delaware PBC, and a larger accessibility for other company types. While the Italian Model has only been active in Italy since 2016 and is still very much in a period of infancy with very few empirical data to examine with regard to its market reception, the introduction of the SB model in Italy has already led to some positive changes in the Italian corporate environment. There is now an increased concern on the part of executives to demonstrate the aspects of sustainability in their governance. On the other hand, it has also opened an important precedent in the civil law that will pave the way for more conceptual approaches and discussions in relation with how Public Benefit Corporations should function. Additionally, this precedent could lead to more changes, especially in how other European countries see Public Benefit Companies capacity of addressing the same issues that the attempts of “imposing” CSR’s on companies¹³¹ and other types of companies like the Social Enterprise fails to solve, that is to put into effect companies addressing their inherent social responsibilities to their respective communities.

The importance of this Model in Italy is understated, indeed, as it was mentioned above, if the *Società Benefit* Model continues to grow both in the number of Benefit companies and in relation to the public awareness of what is a Public Benefit, this new Italian law could very well inspire similar legislation in other European countries.

¹³¹ In the opinion of Stéphanie Ursula Looser, the scope, purpose, and legitimacy of assumed positive relationship between CSR activities and financial performance CSR is vague, under-researched, and subject to context. For more information on Looser work, see LOOSER, S. (2018), *Intrinsic and Extrinsic Corporate Social Responsibility*, Cambridge Scholars Publishing, Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK 978-1-5275-1374-7.

3.4. Società Benetit as an attractive Model to Companies

Following this model, there are two most important questions that need to be questioned. First, will the *Società Benefit* be an attractive vehicle to social entrepreneurs who are accustomed to the European cooperative model of social enterprise? Second, will more socially minded investors, not so worried about profit maximization, be interested in a blended value business model, which does not feature a profit distribution restriction?

As of July 2018, around 200 companies had adopted this new Italian legal form, and according to Fior and Landini¹³², 52% of the Benefit companies came from business services (35,3%) and management consulting (16,8%) areas. This numbers reinforce the idea that Public Benefit Companies acquire an important competitive advantage in the market, especially in specific market sectors where the customers base their decisions on the expertise and corporate reputation. For these two authors, reporting that the company operates in a sustainable way and that it is concretely committed to maximizing the well-being for its employees and for the surrounding community can be an element of differentiation in the market and an element of attractiveness for new generations, who have a greater sensitivity to the intrinsic quality of work.

The key differences between the Public Benefit Corporation and the *Società Benefit* are set forth below in Table 2, which was done by me with the facts collected during the research.

¹³² For more information, see FIOR, A.; LANDINI, A. (2018), *Quante sono le Società Benefit in Italia?* Fondazione CUOA. Retrieved from <https://www.cuoospace.it/2018/07/quante-sono-le-societa-benefit-in-italia.html> (last time consulted: 10-02-2019)

Table 2: Comparison between the Public Benefit Corporation and the Italian *Società Benefit*

Subject	Benefit Corporations	<i>Società Benefit</i>
Legal Status	A new corporate form available for other firms to incorporate as a PBC	Not a corporate model per se but a legal status that allows companies to adopt and become a SB
Impact Measurement	Impose measurement as a legal requirement, but does not define the indicators to proceed with the measurement	Impose measurement as a legal requirement, but does not define the indicators to proceed with the measurement
Tax regime	No additional tax benefits	No additional tax benefits
Directors Responsibilities	Directors free from personal liability for an act or a failure to act as it relates to the creation and realization of a general public benefit or specific public benefit	Directors personally liable under the Italian Consumer Code with penalties due to misleading commercial advertising
Accountability	Directors required to consider impact on all stakeholders. Some States require that benefit corporations elect a benefit director and a benefit officer (the benefit director may serve as the benefit officer)	Required to identify an “impact director” responsible for the pursuit and enforcement of the common benefits. Must describe the specific objectives, methods and actions taken to pursue the common benefits, as well as any circumstances that might have prevented completion and identify how the specific objectives will be pursued in the following year

Transparency	Must publish public annual (biannual in Delaware) benefit report. In some States it has to include an assessment of the company's overall assessed against a third party standard	Must list in the statutes the specific benefit activities and specify how the directors aim to achieve them. Has to publish a public annual report of overall social and environmental performance assessed against a third party standard
Third-Party authority	Third party standard setters do not have the authority to revoke its benefit corporation status	Third-party standard setters could revoke its Benefit status through a judicial process with a declaratory action for not obtaining the authorizing requirements, observing the principle of contradictory and ample defense.
Performance	Self-reported. In case of failure to perform its stated goals only the shareholders' have the power to bring a benefit enforcement proceeding	If it fails to pursue the stated common benefit(s), the company is subject to the Italian Consumer Code rules on misleading advertising
Availability	Available only to for-profit corporations in 33 U.S. states and the District of Columbia	Available in Italy for low-profit and for-profit businesses, which includes cooperatives, limited companies and mutual companies with limited profit distribution

Cost	State filing fees from \$70-\$200	A fee on registration – Unknown amount.
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3.5. The AFAM - Municipal Pharmaceutical Company of Florence

The Pharmacies Florentine Afam SpA (AFAM) is a very interesting case to look at because it was the first public-private joint-venture company to become a Public Benefit Company in Europe. The fact that this type of company with public participation has become a Benefit Corporation while expressing in its statute its mission to provide services to the people and promote the 'conscious health' could

potentially suggest that in Italy the most suitable corporate model for the pursuit of public benefit, in particular in municipalized companies might be the Benefit Company.

According to the Company home site, the Municipal Pharmacies of Florence changed its corporate form to confirm its social and health commitments, being in line with the new possibility in the Italian corporate system: the Benefit Company. In the words of Florence Mayor Nardella, having become a Benefit Corporation is a “(...) *small revolution*” because the Company “(...) *will no longer have to look only at the aspects of profit and turnover, which are still business objectives, but will have to look to the public benefit that the activity of pharmacy management leads throughout the territory*”¹³³ . Therefore, the change in its statute¹³⁴ expresses the company’s own mission of servicing the community and promoting conscious health, making the pharmacy paradigm evolve.

AFAM included in its statute some specific impact areas of common benefit with which they intended to pursue together with the exercise of their business economic activity, such as (1) the Community, where it made available a range of services to protect people's health guaranteeing continuity, quality of service, and a good number of responsible services. (2) Search Support – The Company committed to integrate with other health institutions and institutions in order to encourage research activities in collaboration with universities, hospitals and other institutions through the facilitation and structuring of care and prevention pathways for the majority of the population. (3) Loose Categories - AFAM vowed to offer dedicated support services for therapies for the most fragile categories through social integration laboratories, voucher for the free dispensation of medicines to vulnerable groups, etc. (4) Sustainability – As their first demonstration of the action taken to improve sustainability, the Company donated two electric cars to Florence Municipality, etc.¹³⁵

Most importantly, AFAM zero-year report from the international standard B Impact Assessment from B Lab (a summary evaluation referring to 2017) clearly demonstrates how the company has incorporated its social and environmental goals while accessing the overall impact since AFAM became a *Società*

¹³³ For more information on AFAM decision to become a Public Benefit Company, see Farmacie Comunali Firenze. Le Farmacie Comunali Firenze diventano Società Benefit: *Una visione di bene comune che va oltre il profitto*. Retrieved from <http://www.farmaciecomunalifirenze.it/it/notizie/le-farmacie-comunalifirenze-diventano-societa-benefit-una-visione-di-bene-comune-che-va-oltre-il-profitto/> (last time consulted: 03-02-2019)

¹³⁴ The article 4 from AFAM's statute denotes the company's commitment as a *Società Benefit*, “*As a Benefit Company, the company intends to pursue multiple purposes of common benefit and operate in a responsible, sustainable and transparent manner towards people, territory, environment and other stakeholders. The guiding principles in providing personal services are: equality, impartiality, continuity and participation*”.

¹³⁵ This are just some of the examples provided. For the complete data, see Città di Firenze. (2018), *Le farmacie comunali diventano società benefit, presentato il cambio di forma societaria di AFAM*. City of Florence. Retrieved from <https://www.comune.fi.it/comunicati-stampa/le-farmacie-comunalifirenze-diventano-societa-benefit-presentato-il-cambio-di-forma> (last time consulted: 03-02-2019)

Benefit. While the company's impact could be higher (the company obtained from B Lab 85.7 points, from a total of 200 points), it is indeed a good prospect for a more responsible future¹³⁶.

¹³⁶ See the full report in Farmacie Comunali Firenze. (2018), *Impact Report Year Zero*. Available on <http://www.farmaciecomunalifirenze.it/it/societ%C3%A0-trasparente#2943> (last time consulted: 03-02-2019)

4. Public Benefit in Portugal –The Portuguese Companies

Although the B Corp Movement is already present in Portugal, since 2015¹³⁷, there are no plans for adopting the American PBC Model in the Portuguese corporate legislation. Despite that, the country already has companies such as Diretório Sector 3¹³⁸, which is a Certified B Corporation obtained through B Lab, and a great number of projects that follow social endeavors. As Rui Dias¹³⁹ states, like the other countries in the European continent, the typical Portuguese corporate structure follows the existence of “control partners” who hold the possibility of actively intervening in the conduct of the company. As so, Public Benefit Companies are not present in Portugal and in accordance with the most recent version of the Portuguese Company Code¹⁴⁰ (Código das Sociedades Comerciais), there are two main types of companies in Portugal: the Sociedade por Quotas (Lda.), or Limited Liability Company, and the Sociedade Anónima (S.A.), or Public Limited Company. Both are traditional for-profit companies with no distinctive arrangement for any kind of social mission.

4.1. Portuguese Company Types

¹³⁷ See more about the B Corps Movement presentation in BARBOSA, M. (2015), *B Corps apresentam movimento em Portugal*. Dinheiro Vivo. Retrieved from <https://www.dinheirovivo.pt/fazedores/b-corps-apresentam-movimento-em-portugal/> (last time consulted: 22-04-2019)

¹³⁸ Created in 2009, Sector 3 – Social Brokers is a for-profit sole shareholder microenterprise, which specializes in intermediation services in the social investment market. For more information regarding Diretório Sector 3 B Corp Certification by B Lab, see Sector 3. *Quem Somos*. Retrieved from <http://sector3.pt/> (last time consulted 22-04-2019)

¹³⁹ DIAS, R. (2007), “*Responsabilidade por Exercício de Influência sobre a Administração de Sociedade Anónimas: Uma Análise de Direito Material e Direito de Conflitos*”. Almedina. Coimbra. p.17

¹⁴⁰ Version 50ª (Law n.º 49/2018, of 14/08)

4.1.1. Sociedades Por Quotas (Lda.), or Limited Liability Company

In this type of company¹⁴¹, the capital is divided by quotas and the partners are jointly and severally liable for all the entries agreed in the articles of association, in accordance with the provisions of article 207 of the CSC. Only the corporate assets are liable to the creditors for the debts of the company, except for the provisions on article 198 of the CSC. It needs a minimum of two shareholders (one in sole-shareholder companies), and for its managing body, one or more directors. A priori, a statutory auditor is not required. However, companies that do not have a statutory audit board or a sole auditor must appoint an auditor to audit the company's accounts when two of the following limits are exceeded (for two consecutive years): total balance sheet: €1,500,000; net revenue: €3,000,000; average headcount: 50.

For the name of the company, it requires a chosen name + the reference to the business area + Ltd or the word *Limitada* (Limited)¹⁴². In the case of sole-shareholder companies, which may be either a natural person or a legal entity¹⁴³, the word *Unipessoal* is added after the reference to the business area.

The minimum capital is €2 (€1 in the case of sole-shareholder companies), only through capital contributions (monetary or non-monetary) and the payment of monetary contributions may be deferred for up to five years. In sole-shareholder companies, only 50% of contributions can be deferred.

4.1.2. Sociedade Anónima (S.A.), or Public Limited Company

The S.A. is the other type of corporate structure used by individual investors and companies. In this type of company, the capital is divided into shares and each partner has his liability limited to the value of the shares that he subscribes¹⁴⁴. This company requires a minimum capital of €50,000¹⁴⁵, through capital contributions only (monetary or non-monetary) with a minimum of five shareholders¹⁴⁶ (or one when incorporated by a legal entity).

¹⁴¹ See article 197.º of the CSC (Características da sociedade) and the content of this type of company contract on article 199.º of the CSC

¹⁴² See Article 200.º /n.º 1. of the CSC

¹⁴³ Ibid. article 270.º

¹⁴⁴ Ibid. article 271.º

¹⁴⁵ Ibid. article 276.º /n.º 6.

¹⁴⁶ Ibid. article 273.º

The management structures for the S.A can be either: (i) Board of directors (or sole director, if the share capital does not exceed €200,000) and a statutory audit board (or sole auditor); (ii) board of directors (with an audit committee) plus an auditor; (iii) executive board (or sole director, if share capital does not exceed €200,000) and a general supervisory board in addition to an auditor.

4.1.3. Other Company Types

There are also other types of companies in Portugal, such as the *Sociedade em Comandita por ações ou simples*¹⁴⁷ - SC or Limited Partnership. This company is formed by a minimum of two partners, where at least one must be a general partner and have full liability for the company's obligations (sócios comanditários), while the other one will have limited liability and must deliver capital to the partnership (sócios comanditados).

The *Sociedade em Nome Coletivo - SNC* (General Partnership) is a company formed by more than one partner with subsidiary responsibility in relation to the firm and in solidarity with the other partners¹⁴⁸. They are equally responsible for making decisions in the name of the entity and can manage the company. There is no minimum share capital required for this type of business¹⁴⁹.

4.1.4. The Portuguese Cooperatives – Similar to the PBC goals

Portuguese cooperatives are very similar to Public Benefit Companies concerning their goals. As article 2 of the Chapter I of the Portuguese Cooperative Code (CC) states, they are “(...) *autonomous legal persons, united voluntarily, of variable capital and composition, which, through cooperation and mutual assistance of its members and in accordance with the cooperative principles, aim, without lucrative purposes, to satisfy the economic, social or cultural needs and aspirations of said members*”. Moreover, they are autonomous, self-help organizations controlled by their members, and work for the sustainable development of their communities¹⁵⁰ while being able to carry on any economic activity freely, included the ones practiced by private companies¹⁵¹.

¹⁴⁷ The provisions on both types of *Sociedades Comanditas* (limited partnerships) can be found on articles 456.º to 463.º of the CSC. For the *Sociedade em Comandita Simples*, see articles 474.º CSC to 477.º of the CSC and for the *sociedade em Comandita por Ações*, see articles 478.º to 480.º of the CSC

¹⁴⁸ Article 175.º/n.º 1 of the CSC

¹⁴⁹ The content for this type of company contract can be seen on articles 176.º CSC to 188.º A of the CSC

¹⁵⁰ See Chapter I, article 3 (Cooperative Principles) of the CC.

¹⁵¹ See Chapter I, article 7 (Cooperative Initiative) of the CC

Portuguese for-profit companies follow the traditional path in relation to company's organizations and goals. While many do indeed strive for producing some public benefit and operate in a responsible and sustainable manner in relation to the community and to the environment, their actions are generally not permanent, and their financial commitment can vary from year to year depending on the shareholders decisions, their economic situation or a change of mind in the leadership. Nonetheless, they have the tools for attracting and supporting for benefit initiatives in a larger scale and, as such, the creation of a similar Public Benefit statute as the Italian *Società Benefit* could potentially change their current behavior for the better.

In fact, although Cooperatives are nonprofit companies, they do have a great interest in increasing their profits, since it allows them to increase their sustainability and dimensions, which consequently helps fostering their goals. As so, though Cooperatives are, theoretically, nonprofit companies, in practice they can be comparable to how Delaware PBCs operate regarding the prosecution of social goals while also seeking profits and growth. Nonetheless, and although they could be seen as local partners with the knowledge on working closely with the local community and managing profits, they do not stand on their own if we want a more impactful change on society. That is especially noteworthy if we want to focus on changing the way traditional Portuguese companies see the importance of following a social mission, benefiting their community and addressing their social responsibilities.

4.2. Implementing the PBC Model in Portugal

4.2.1. Considerations from the interviews

Firstly, we should take in consideration that this brief analysis is only meant to be regarded as an early introduction to the subject, and that more studies and debate concerning the implementation of the PBC Model in Portugal should follow.

As so, many considerations were taken from the resulting interviews with the five Portuguese companies¹⁵². Interestingly, none of the companies had heard about the Public Benefit Concept, neither the American Model or the Italian Model, even though one of the companies is a Certified B Corporation by B Lab. Regarding the social benefit mission, two of the companies (both limited liability companies) consider that Portuguese Foundations are mostly used as ways to escape taxes by bigger companies and another one (also a limited liability company) considers that while Cooperatives and Foundations may give response to some of the social issues, there is still a lot to do.

Regarding the implementation of a Public Benefit Company Model in Portugal, the already certified B Company considered that all the Certified B Companies in Portugal have interest in supporting this type of initiatives. In fact, due to the high economic costs (€500 annually paid for receiving the B Certification from B Lab), and the current lack of immediate benefits from becoming a B Corp, the company reported that every effort for the introduction of a Portuguese PBC Model should be promoted.

Finally, even though it could potentially represent an increase in bureaucracy and on the company costs, three of the companies say that they would be interested in becoming a Public Benefit Company. For the other two, one is a cooperative that already follows a social mission, and the other considers that it would not be interested due to the possible costs, claiming that it should be something for bigger companies, with a more significant impact. Nevertheless, it should be noted that the company who replied to not be interested is currently recovering from the last economic crisis and is following a recovery plan for the company, which places some pressures on the amount of money it can spend for reasons besides profit seeking. Still, before introducing this Model to Portugal, the “social benefit”, that companies would be obliged to provide, should be clearly defined, since, for instance, the only company who was not interested in this Model currently offers higher salaries than what other similar companies

¹⁵² Only one was a microenterprise, the rest of the companies were small and medium sized enterprises. Four of them were limited liability companies and the other was a cooperative. One was already a Certified B company by B Lab. For more information, see the Appendices section.

do. Depending on the exhaustiveness of the “social benefit” definition considered in the statute, this could be indeed included as part of the “public benefits” to the community.

4.2.2. The paths for Benefit Companies in Portugal

Although the introduction of such a Model in the Portuguese legal framework is, for now, a distant possibility, there are two likely paths for Benefit Companies to thrive in Portugal.

The first one would be the creation of a hybrid model with characteristics from the Delaware PBC Model and the Italian *Società Benefit* Model, to be applied by the various Municipalities and eventually, the Portuguese government.

This new model would then follow a stated social mission like the Delaware PBC and function as a label such as the Italian *Società Benefit*. It would be available for the various types of companies, functioning as a platform for those companies to report on what type of social benefits they are addressing, how they are realizing them and the positive outcomes from their actions. During my research, and in the meetings with the various companies, it seems that a great number of businesses already benefit at some degree their surrounding community (even if many are only sporadic benefits). However, most of the companies do not make public their “generous acts”. While they are platforms in Portugal that allow companies to support social projects or initiatives¹⁵³, the reasons for the general lack of disclosure of the social benefits that the company’s produce are seemingly complex. Nevertheless, after a considerate analysis, it seems that it mostly occurs because of the inexistence of a platform that allows companies to report their social actions without appearing somewhat superficial or being perceived as companies that are interested in serving the community just for the marketing benefits.

The creation of a Public Benefit label or seal given to companies who engage in the promotion of a specific social goal could theoretically solve this problem. In addition, such a label would then endorse companies to a win-win situation¹⁵⁴, in which companies would compete with each other and be highly encouraged to increase their public benefits and contributions to the society, while being able to publish detailed reports of the ways they benefit the community. This would generate a momentum for more

¹⁵³ There are many platforms and projects that companies can choose to support. Still, many of them are temporary and continue to depend largely on the company’s decision to continue supporting their cause, which would most certainly not happen if the company had the proposed Public Benefit label.

¹⁵⁴ A win-win situation/game is an economics game theory, which is designed in a way that all participants can profit from the situation in one way or the other, generating a mutual benefit to all parties involved. It is the opposite of Zero-sum situations.

companies to adopt for-benefit goals into their statutes and make their contributions permanent, as stopping would risk losing the Public Benefit seal and damage the company's public image. This would then generate an increased concern/effort on the part of companies to demonstrate the aspects of sustainability in their governance while avoiding a complete and costly change on the company activities and traditional goals.

This seal would require an annual evaluation by the Municipality and, as with Delaware PBCs, would have no other third-party evaluation as a requirement since that would oblige corporations to use the services of the few "established and recognized" providers of such services, with the most renowned and already present in Europe being B Lab. In fact, as B Lab certification fees ranges from \$500 to \$50,000, depending on the company's size, a requirement for a third-party standard evaluation would essentially be an imposed tax on for-profit Benefit Corporations for a benefit assessment based on B Lab standards and not the requirements set by the Municipalities.

The second path, and the one who seems most unlikely at the present moment, would be the creation of a Public Benefit statute by initiative of the Portuguese government, but still not as a new company model. I do not believe that an independent PBC Model such as in Delaware would work in Portugal since most companies would refrain from changing their statutes and would prefer to obtain the already referred PB seal, which has the potential to be easier to obtain and more general for all types of companies. This would require a concerted effort by the Portuguese government and would be dependent not only on the government capacity to draft such a statute but also on the existing political will.

To conclude, as long as Portuguese companies measure their results in terms of positive impact on their community and on the environment with the same completeness and rigor adopted for demonstrating their economic and financial results, these two suggested adaptations to the PBC Model would have no issues working in Portugal. Still, the first option could perfectly function as a testing ground for the Portuguese government to see how local companies would perform with the adoption of this status and provide important data to support the initiative before being applied on a broader, preferentially, national scale.

Chapter IV

Final Considerations and Recommendations

1. Should a new European legal framework be the answer?

It is a fact that Europe has already legal forms that address social issues such as the Social Enterprises and the European Cooperative Society¹⁵⁵ that are already present and active in Europe with events to discuss these issues, such as the SME Forum¹⁵⁶. Nevertheless, these legal forms do not have the general approach that a Public Benefit status can have, in the way that as long as the company adopts the requirements to be a Public Benefit Company, every company can become one without changing much of its structure and purpose. In fact, the aims of the Benefit Corporation Model are not as completely altruistic as the Social Enterprises, whose primary objective is to achieve social impact rather than generating profit for owners and shareholders. On the contrary, the Benefit Corporation purpose is complementing one that allows the traditional companies to pursue their traditional goals while producing a public benefit.

As Michael A. Hacker states¹⁵⁷, the Public Benefit Model “(...) *is a necessary and progressive evolution in corporate law*”, and to recognize and support it as a legitimate model should be one of the European Union measures during its developments of European Company Law. Sadly, the EU already failed to take the lead in the PBC efforts in Europe when it allowed Italy to become the first country, besides the USA, to adopt a Public Benefit Model. However, for all intents and purposes, such a concept as the Delaware Public Benefit Corporation should be pursued by the EU and be followed with subsequent legislation, which would give a noticeable impetus to the Benefit Corporation initiative and be, indeed, a positive response for the future of the movement in Europe.

¹⁵⁵ The European Cooperative Society (SCE) is an optional legal form of a cooperative that aims to facilitate cooperatives' cross-border and trans-national activities. The members of an SCE cannot all be based in one country. To see the main characteristics of the SCE, see the European Commission. *The European Cooperative Society (SCE)*, Cooperatives. Retrieved from https://ec.europa.eu/growth/sectors/social-economy/cooperatives/european-cooperative-society_en (last time consulted: 12-04-2019)

¹⁵⁶ Created in 2010, the SME Forum is a platform for dialogue and understanding between SMEs, social enterprises and financial institutions, to discuss the problems they face and find ways in which they can work together for the future.

¹⁵⁷ For more information regarding Michael A. Hacker writings, see HACKER, M. (2016), “*Profit, People, Planet*” *Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries*, Boston College Law School. Rev. 1747. Retrieved from <http://lawdigitalcommons.bc.edu/bclr/vol57/iss5/7> (last time consulted: 12-04-2019)

2. Should the integration of the PBC Model be left to be gradually and individually introduced by the European Union Member-states?

In my opinion, this would not be the ideal situation. Since the need for creating and testing a new theoretical framework that considers the way in which diverse enterprises pursue their goals, with diverse motivations and the different learning patterns and routines within organizations would probably be an integration that would take much more years than one promoted by a concerted effort of the European Union.

It would still be a solution than would place the Public Benefit initiative in a better position than the current one, with each European country at liberty to adapt the Model to its own requirements and corporations' types, as well as taking into considerations the country's different values and cultural characteristics for companies.

To fully achieve the goals of the Benefit Corporation legislation in Europe, Member-States should enhance the third-party standard setting requirements and allow for greater flexibility in enforcement, consequently reducing the risk of companies incorporating as benefit corporations simply as a deceptive marketing tactic.

3. Conclusions

As we have seen, due to Delaware dominant position on corporate law, the introduction of the Public Benefit Corporation Model in Delaware was considered a great success for the PBC initiative. Nevertheless, due to its features, such as no requirement for the biannual report to be released to the public, the lack of a third-party evaluation requirement and no requisite for companies to be specific about the public benefit they generate, it is clear that compared with the standard PBC Model legislation, the Delaware Model still favors the persecution of profit to the loss of a social mission. On the other hand, the continuity of the Public Benefit Corporation Model in Delaware already has a significantly positive effect for the increasing awareness of this type of companies and the goals they promote. Indeed, despite the fact that Delaware is one of the USA States with the lesser number of requirements regarding PBCs accountability, it is also the State with the largest number of PBCs incorporated. As the number of Delaware PBCs continues to increase, more companies will feel encouraged (in the long run they may even start to be pressured by the public and/or their consumers) to aim for more social benefits to their surrounding community and take further steps at their social responsibilities' efforts.

In Italy, the *Società Benefit* Model is already seen as a new revolutionary step with companies like AFAM Municipal Pharmaceutical Company that by changing its corporate form became the first public-private joint-venture company in Europe to become a Benefit Company¹⁵⁸. Pelatan and Randazzo consider that the next step is to wait for the response of the market. We should thus hope that the *Società Benefit* will become a suitable vehicle for entrepreneurs that want to do business in a sustainable and inclusive way, while also being attractive to investors looking for business models capable of generating both economic gains and social benefits. Finally, if this model thrives in Italy, see if the Italian experience can generate a “domino” effect among other EU Member States.

Concerning the Public Benefit Model, researchers such as Sabeti¹⁵⁹ and Pires have called this new model a part of a new “fourth sector” due to the way it seeks to embrace profit seeking with a social drive. For these authors, Public Benefit Companies would be a welcome increment of the social missions

¹⁵⁸ As mentioned previously, the AFAM Municipal Pharmaceutical Company (*Farmacie Comunali Firenze*), by changing its corporate form, became the first public-private joint-venture company in Europe, as well as the first network of pharmacies in the world, to become a Benefit Company. For more information see <https://www.comune.fi.it/comunicati-stampa/le-farmacie-comunali-diventano-societa-benefit-presentato-il-cambio-di-forma> (last time consulted: 21-07-2018)

¹⁵⁹ Heerad Sabeti refers the growing number of innovators and socially concerned investors that have been pushing against the boundaries that separate for-profits, nonprofits, and governments as the “emergence of the fourth sector”. For more information, see SABETI, H. (2011), *The For-Benefit Enterprise*, Harvard Business Review. Retrieved from <https://hbr.org/2011/11/the-for-benefit-enterprise> (last time consulted: 12-04-2019)

drive in companies, with the new “fourth sector” framework suitable to interpret the emergence and role of nontraditional forms of companies that are not driven by the profit motive and are mainly recognized in the legal forms as cooperative firms, non-profit organizations and social enterprises. However, I disagree on the need to create an entire new sector to include these new types of companies that seek both a social mission and profit. Instead, we should concentrate efforts on increasing company’s emphasis on their social responsibilities and benefit purposes.

As for the PBC impact on the traditional company models, according to Catarina Serra¹⁶⁰, it is clear that the PBC Model could go further than the historical notion and traditional interpretations of the Latin jurisdictions (in which the Portuguese law conforms to) of only for-profit companies. However, the difficulty will be on how to assess the impact of the European Public Benefit Company and how its values/mission would be implemented. That will be indeed the most difficult aspect of a European PBC.

For corporate society, this steady but solid growth of alternatives represents an emerging challenge to the historic dominance of the shareholder-centered incorporated entity and a necessity on the discussion of how to incorporate social value into traditional business operations. As the rise of B Corporations and Public Benefit Corporations demonstrates, corporations can be consistent with a core value of capitalism, generating more returns to investors through enhancing firm value and shareholder wealth with efforts to reform and evolve industry standards, which require changes to the fundamental purpose and legal form of an organization. Even when viewed outside of a short-term perspective, social interests and shareholder interests are often closely aligned. Obviously, corporations do not expect to succeed by consistently neglecting the expectations of their employees, customers, suppliers, creditors and local communities. As such, researchers like Palladino seem to prefer a change in corporate law so that all corporations would be obligated to create a general public benefit. Such measure could at minimum, allow some ability to challenge corporate externalities that have disastrous social consequences but would bring a new set of questions. For instance, how would all the corporations be accessed on the public benefit they create if all of them are supposed to be promoting one? Moreover, if the public only for-profit corporation is no longer the default organizational form for businesses, but rather one of many alternatives, how will managers be prepared to ensure long-term competitiveness?

¹⁶⁰ Catarina Serra focus on this topic in her article “A aplicação do artigo 980.º do Código Civil às sociedades comerciais – Sobre a (remanescente) utilidade da definição de contrato de sociedade para a estabilização da categoria da sociedade comercial” in Nuno Manuel Pinto Oliveira / Agostinho Cardoso Guedes (coord.), *O Código Civil 50 Anos Depois: Balanço e Perspectivas – I Colóquio de Direito Civil de Santo Tirso*, Coimbra, Almedina, 2017, pp. 401 – 404.

Despite the general interest in introducing the PBC model in Europe, some issues still bring concerns about its application in Europe. Because even though Public Benefit Corporations are increasing in the USA, much uncertainty remains as to how the US Benefit Corporation Model will develop in Europe, besides Italy. Another issue will be how to clearly establish a differentiation between Benefit Corporations and other social enterprises in Europe that already follow a social mission and are able to seek profits¹⁶¹, as there is some overlap between Benefit Corporations and the European social entrepreneurship and social enterprises.

Furthermore, a notable aspect of the EU's "Europe 2020" strategy involves an increased focus on social entrepreneurship to further Single Market integration. Particularly, the European Commission (EC) has focused on the conceivable potential of social cooperatives to create more jobs. To this end, the EC has proposed the creation of both a harmonized regulatory regime and a network of regional investment funds to broaden the use of social cooperatives from the national level to the regional level. If these policy suggestions are implemented, will the Italian experience and the Delaware Public Benefit Model proliferate among other EU jurisdictions, and if so, will the European Union respond positively to this development by expanding its goals to account for Benefit Corporations, after the Europe 2020 strategy? If these questions are not positively answered, it might be the case that the Benefit Corporation initiative could be relegated to an inconsequential area of the economy (at least in Europe), and support Schmitt opinion, that PBCs "(...) *only exist to force a discussion around how social considerations should fit into every business*". Although I differ from his idea, I do consider that PBCs have brought an increase on that type of discussion, mostly due to their own merit for allowing typical for-profit companies to pursue something more than just profits. Lastly, even if not supported by the EU, PBCs will continue to be a viable and smart option for companies that wish to distinguish themselves from their competitors and ensure a commitment to a social mission while operating as a for-profit business.

To conclude, I am bound to finish this thesis with the same supposition as Schmitt. That the business world needs to reach a point in which every business, nonprofit or for-profit, operates with social consciousness, and the fact that we are still fighting for these basic social considerations clearly shows how much more room for improvement our business system currently has. Although my considerations about the importance and the future role of Public Benefit Companies are different from Schmitt notions¹⁶²,

¹⁶¹ Like the UK Social Enterprises or the Portuguese Cooperative, although the profit seeking is in a limited degree, they are generally compared due to the social mission requirement.

¹⁶² Schmitt writes that PBCs are not necessary as an entity type and will likely not stand on their own for long. SCHMITT, P. (2016), *Public Benefit Corporations: Pushing the Social Venture Discussion*. P. 27-28.

I do agree with him in regarding the PBCs as representing a very significant step for our society and complement it with the impression that not only are they important, they are also needed.

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V. APPENDICES

Appendix A: Interview One-Pager (sent out in advance)

New to Europe - Public Benefit Corporations

Created in the United States of America, the Public Benefit Corporation is a new corporate form that requires a business to declare, promote, and annually or biannually report an official social purpose, while also allowing the distribution of profit to its owners. Nowadays, there is the American PBC Model, with more emphasis on the Delaware Model, and since 2016, the Italian *Società Benefit* that did not actually create a new company form but a statute that is given to companies that follow the stipulated requirements to be a Benefit Company.

Why are Public Benefit Corporations special?

Public Benefit Corporations, which officially pursue a social purpose and a profit for its owners at the same time, are capable of meeting the goals of both charitable and for-profit investors. While investors with a more social benefit focus can be assured that their social goals will be continuously considered and promoted by the company, for-profit investors can be given ownership in the company and receive distributions from the company's profits.

Appendix B: General results of the Interviews

In order to have more insights on the current situation in Portugal regarding the Public Benefit initiative and how Portuguese companies perceive their social responsibilities, the dissertation author interviewed five companies.

Concerning the companies' characteristics, one is a microenterprise and the other are classified as small and medium sized enterprises. Four are limited liability companies with one of them being a Certified B company by B Lab. The other is a Portuguese cooperative. Their business areas range from public and private construction, machined components, intermediation services in the social investment market, textile materials and cultural projects. Their economic activities are centered in the secondary and tertiary sector.

From the resulting interviews with the five Portuguese companies, it was clear that none of the companies had heard about the Public Benefit Concept, neither the American Model nor the Italian Model.

Regarding the social benefit mission, two of the companies (both limited liability companies) considered that Portuguese Foundations are mostly used as ways to escape taxes by bigger companies and another one (also a limited liability company) considered that Cooperatives and Foundations do not provide sufficient response to the current social issues. Besides the Cooperative (which already pursues a social mission and benefits the surrounding community), two of companies actively help their community, supporting two or more charity organizations.

About the implementation of a Public Benefit Company Model in Portugal, the certified B Company considered that all Certified B Companies in Portugal have interest in supporting this type of initiatives. The company said that the reason for becoming a B Corp was to get international recognition and to persecute the company's social responsibility. Moreover, it pays €500 annually for receiving the B Certification from B Lab, and claims a lack of immediate benefits from being a B Corp. The company considers that every effort for the introduction of a Portuguese PBC Model should be promoted.

When presented with the possibility of potential increase in the company's bureaucracy costs, three of the companies said that they would still be interested in becoming a Public Benefit Company. For the other two, one is a cooperative that already follows a social mission, and the other considers that it would not be interested due to the possible costs, claiming that it should be something for bigger companies, with a more significant impact. Nevertheless, it should be noted that the company who replied to not be interested is currently recovering from the last economic crisis and is following a recovery plan

for the company, which places some pressures on the amount of money it can spend for reasons besides profit seeking.