BENEFIT CORPORATIONS – FUTURE OR FRONTIER OF THE SOCIAL ECONOMY?

Regarding article 4(h) of the Framework Law for the Social Economy

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1.
CELEBRATING 10 YEARS OF THE FRAMEWORK LAW FOR THE SOCIAL ECONOMY AND THE FRONTIERS OF THE SOCIAL ECONOMY

In 2023, the Framework Law for the Social Economy (hereinafter LBES)[2] will celebrate 10 years since its entry into force. Developing the legal-constitutional framework on the cooperative and social sector[3], the first framework law dedicated to the social economy establishes "the general frameworks of the legal regime of the social economy, as well as the measures to encourage its activity according to its own principles and purposes" (article 1 of the LBES).

This diploma issued by the Assembly of the Republic in no way exhausts the legislative framework applicable to the social economy; on the contrary, each of its "frameworks" depends on further legislative intervention by the Government[4]. Simultaneously, the LBES indelibly changed the existing legal system through the characterisation of the social economy (article 2), the identification of the entities of the social economy (article 4), the guiding principles of the social economy (article 5), the other "frameworks" and the requirement of the necessary "legislative development" (article 13 of the LBES).

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2 Law no. 30/2013, of 8 May.

3 See Deolinda Meira, "A Lei de Bases da Economia Social portuguesa: do projeto ao texto final", *CIRIEC-España. Revista Jurídica,* nº 24/2013, p. 4, et seq., on the legal-constitutional framework applicable to the cooperative and social sector.

4 J. J. Gomes Canotilho/Vital Moreira, *Constituição da República Portuguesa anotada*, vol. II, Artigos 108.º a 296.º, 4.ª ed., Coimbra: Coimbra Editora, 2010, p. 62.

In these 10 years, much has been done and other projects are in the process of being implemented. By way of example, consider the approval of the Cooperative Code (Law no. 119/2015 of 31 August), the Mutual Associations Code (Decree-Law no. 59/2018 of 2 August), the renewal of the Statute of Social Solidarity Private Institutions (Decree-Law no. 172-A/2014 of 14 November), the satellite accounts of the social economy for the years 2016, 2013 and 2010 (article 6(2) of the LBES). Other developments of the LBES are announced and in progress. I am talking about the satellite account of the social economy that will aggregate data for the years 2019 and 2020[5] and the preparation of the permanent database of social economy entities (article 6(1) of the LBES).

Statistical data, on the one hand, highlight the economic and social impact of these organisations and, on the other, confirm that the political-legislative decision that created the LBES was the right one. The Satellite Account of the Social Economy for 2016 shows that "the Gross Value Added (GVA) of the Social Economy represented 3.0% of the GVA of the economy, having increased 14.6% in nominal terms compared to 2013. This growth was higher than that observed in the economy as a whole (8.3%) in the same period. The Social Economy accounted for 5.3% of total remuneration and employment and 6.1% of paid employment in the national economy. Compared to 2013, total remuneration and employment in the Social Economy increased by 8.8% and 8.5% respectively, showing greater dynamism than the total economy (7.3% and 5.8% respectively). By groups of Social Economy entities, the Associations for altruistic purposes stood out in terms of number of entities (92.9%), GVA (60.1%), Remuneration (61.9%) and remunerated employment (64.6%)"[6].

The imposition of legislative development, typical of every framework law, and consecrated in article 13 of the LBES represents, essentially, a commitment to the future of the social economy in Portugal. 10 years after the publication of the LBES, the political-legislative decisions that will be taken cannot and should not ignore the hybrid or "dual mission" corporate entities presented as "vehicles" of "responsible capitalism". Both in the USA and in Europe, the "triple bottom line", consisting of *planet, people and purpose*, assigns to companies the mission of saving the planet and being an agent of positive impacts on the community. This trend takes the form of multiple expressions, such as corporate social responsibility, corporate purpose, ESG (which stands for Environmental, Social, and Governance) or steward ownership.

[5] For further information, see https://www.cases.pt/cses4/ (accessed 6 February 2023).

[6] https://www.cases.pt/contasatelitedaes/ (accessed 6 February 2023).

The benefit corporation - born and moulded in the USA experience and "transplanted" into various European legal systems - is presented as one of the promising "vehicles" of "responsible capitalism" or, in another expression, of "firm altruism". As we are currently preparing the permanent database of social economy entities[7], in compliance with the provisions of article 6(1) of LBES, it is opportune to ask if, in these reinvention movements, the benefit corporations shall be the future or frontier of social economy entities. The Portuguese legislator should not ignore the *convergence* movement that has propitiated the international dissemination of this hybrid figure, aimed at combining the profit motive with collective benefits, both general and specific group benefits.

2.
ARTICLE 4(H) OF THE LBES AND POROSITY OF THE SOCIAL ECONOMY'S FRONTIERS

The *social economy* is legally defined as "the set of economic and social activities, freely undertaken by the entities referred to in paragraph 4 of this law" (article 2(1) of the LBES). To this characterisation based on the "socio-economic" activity and the *nature of the entities*, the LBES adds the vector of *purpose*. The activities of the social economy "are intended to pursue the *general interest of society*, either directly or by pursuing the interests of its members, users and beneficiaries, when socially relevant"[8]. Deolinda Meira concludes that "the legislator intended to highlight that the activity developed by Social Economy entities does not have a for-profit purpose, but rather the purpose of satisfying the needs of the members, through their participation in said activity (mutuality) or the satisfaction of community needs"[9].

It is accepted that there is not full identification between the legal-constitutional delimitation of the cooperative and social sector (article 82 of the CRP) and the perimeter of social economy entities (article 4 of the LBES). Rui Namorado recalls that there are entities that are outside of this sector and that are part of the social economy sector, as is the case with associations that, having a social purpose other than social solidarity, develop an economic activity (or have a corporate nature), foundations

[7] At the moment, the Permanent Database of Social Economy Entities (BDPEES) is not yet concluded, despite the preparatory initiatives that have taken place. See the news available at https://www.cases.pt/base-de-dados-das-entidades-de-economia-social-bdees/ (accessed 6 February 2023).

[8] The italics are not in the original.

[9] Deolinda Meira, "A Lei de Bases da Economia Social portuguesa: do projeto ao texto final", *CIRIEC-España. Revista Jurídica* nº 24/2013, p. 9.

that develop an economic activity (or have a corporate nature), commercial companies which shareholdings belong to entities integrated in the "cooperative and social sector", among others[10].

Article 4 of the LBES delimits the *entities*, "provided they are covered by the Portuguese legal system", that integrate the perimeter of the social economy. The list is completed by an *open provision*[11] that covers "other entities endowed with legal personality that respect the guiding principles of the social economy, provided for in article 5 of this law and are included in the social economy database" (article 4(h) of the LBES)[12] . This is a *complex norm*, not only from the point of view of legislative technique but also of the heterogeneity of the entities it covers.

The legislative technique used in article 4 of the LBES evidences that in 2013 the legislator realised that the perimeter of social economy entities is *evolving* and that it was therefore necessary to create space for organisations that do not correspond to the so-called traditional families (i.e. cooperatives, mutual associations, associations and foundations)[13].

It is in relation to this *open enumeration* that it is of interest to question whether the so-called *benefit corporations* met the conditions to comply with the guiding principles of the social economy, defined by article 5 of the LBES. In Portugal, this is a merely academic exercise for the time being because benefit corporations *are not foreseen in the Portuguese legal system*. We cannot ignore an international *convergence* movement that, starting in the USA, has produced legislative "transplants" that create hybrid figures that *dilute* the frontiers between the profit-making nature and the pursuit of the general interest of the community.

This convergence is driven by several driving forces that can be condensed into the trilogy *planet*, *people* and *purpose*. Underlying this trilogy are concerns about sustainable development, respect for human rights throughout the value chain of companies and the *purpose* of companies. A word difficult to translate into Portuguese - perhaps "desígnio" is the most appropriate term[14]-, the

[10] Rui Namorado, "Renovar os quadros jurídicos da Economia Social?", Oficina do Centro de Estudos Sociais, n.º 293, Faculdade de Economia da Universidade de Coimbra, 2007, p. 10-11.

[11] Deolinda Meira, "A Lei de Bases da Economia Social portuguesa: do projeto ao texto final", cit., p. 8, mentions "open enumeration".

[12] Deolinda Meira, "A Lei de Bases da Economia Social portuguesa: do projeto ao texto final", cit., p. 15, mentions "social economy entities "by concession"".

[13] See Deolinda Meira, "A Lei de Bases da Economia Social portuguesa: do projeto ao texto final", cit., p. 15.

[14] Maria Elisabete Ramos, "*Corporate purpose*, sustentabilidade e gestão societária", *VI Congresso Direito das Sociedades em Revista*, 2021, p. 392.

purpose is based on the motto "doing well by doing good"[15]. According to Colin Mayer, the main *purpose* of a company is not to generate profits but to create solutions for problems that affect the community at large, such as poverty, inequality, unemployment and environmental degradation. *Corporate purpose* is translated into the "reason for a company's existence" and therefore, in Colin Mayer's proposal, the "purpose of companies is to produce solutions to problems of people and planet and in the process to produce profits, but profits are not per se the purpose of companies"[16].

It is important to underline that the evolution from *shareholder primacy* to "purpose primacy", proposed by Colin Mayer, does not abdicate the profit-making purpose of companies, does not imply the "asset lock" characteristic of associations, foundations and cooperatives, nor does it demand structural changes in the exercise of economic power within the scope of corporate governance. It is argued, on the contrary, that the world's ills will be solved through corporate decisions taken by company directors who, in the exercise of their *business discretion,* will ponder, consider, bring to the decision-making process, discuss, debate, the interests of *stakeholders,* i.e., interests of non-shareholders affected by the company's activity, be they employees, local communities, etc.

This movement, which seeks to incorporate the interests of non-shareholders in the business decisions of profit-making companies, without penalising directors who favour such interests, has been called "responsible capitalism" or also "stakeholder capitalism". "Responsible capitalism" combines "an economic system that accommodates private ownership and the pursuit of market opportunities while achieving societal goals"[17]. More critical analyses of these proposals, often communicated through catchy and appealing slogans, speak of "strategic philanthropy" that practices "charity not as a duty but as an opportunity"[18]. And they highlight the divergences between virtuous proclamations and discrepant business practices.

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15 Colin Mayer, Prosperity. Better business makes the greater good, Oxford: Oxford University Press, 2018, p. 116.

16 Colin Mayer, *Prosperity*, cit., p. 109.

17 See https://www.ecgi.global/content/responsible-capitalism?mc_cid=8d8a20ccaf&mc_eid=81d3552b02#:~:text=Responsible%20Capitalism%20is%20'an%20economic,market%20exchange%20and%20private%20property (accessed 7 February 2023).

18 See Dana Brakman Reiser and Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, Oxford: Oxford University Press, 2023, p. 79 et seq., who add: : "At our most prominent companies, philanthropy no longer represents a counterweight to the usual profit- maximizing modus operandi but instead becomes part of the core business strategy. Firms— eager to burnish their corporate social responsibility bona fides and to tap capital markets increasingly focused on the environmental and social impact of their

In fact, "stakeholder capitalism" has been the object of several criticisms that question its *sense*, *coherence* and *viability*. It is rightly argued that "stakeholder capitalism" increases the discretion of directors, expands their irresponsibility, as serving several masters corresponds to not being loyal to any of them[19]. The narrative around *purpose*, people and planet does not correspond to any "right of action" that allows *stakeholders* to claim from companies and directors the fulfilment of *purpose,* environmental, social and human rights commitments, etc. Finally, and perhaps most importantly, these proposals that entrust the solution of the world's problems to companies and to the discretionary choices of directors (subjects who lack democratic legitimacy for collective choices) share a private and fragmented vision of what the common good is.

This is a debate that goes far beyond the legislative development of article 4(h) of the LBES but which is relevant to this process. It seems to me that it is in this provision that one of the *frontiers* of the social economy in Portugal is played out which is, by force of circumstances, porous, mobile, evolutive and in a permanent process of construction/reconstruction. We cannot ignore the fact that the promise of a "more favourable tax status" (article 11 of the LBES) constitutes an economic incentive for opportunistic behaviours motivated by the extraction of the advantages of tax benefits, without a real commitment to the "general interest of society" (article 2(1) of the LBES).

In this context, it is urgent to question if *benefit corporations*, as "dual mission" entities, would have a place within the perimeter of the social economy, as delimited by the LBES. A question of a strictly academic nature - given that benefit corporations are not foreseen in the Portuguese legal system - that seeks to ascertain if the American *benefit corporation* model meets the conditions to comply with the guiding principles of the social economy.

3.
AMERICAN BENEFIT CORPORATION
AND "EUROPEAN TRANSPLANTS"

3.1.
THE DRIVING FORCE OF THE MODEL BENEFIT CORPORATION LEGISLATION

investments— deploy philanthropic activity as a signal of their commitment to the needs of investors and other stakeholders" (*last cit. doc.*, p. 80).

[19] Dana Brakman Reiser / Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 163.

For many, the solution (or at least a significant part of the solution) to social, environmental and corporate governance failures should be sought in company law, namely *benefit corporations*[20]. In 2010, the State of Maryland adopted specific legislation on *benefit corporations*, but it is the *Model Benefit Corporation Legislation* (*MBCL*), drafted by William Clark and others[21] and integrated into a B Lab project[22], that will influence several legislations in the USA[23]. From its American experience, the *benefit corporation* reaches international irradiation.[24]

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[20] See the recent work Henry Peter/Carlos Vargas Vasserot/Jaime Alcalde Silva (Editors), *The International Handbook of Social Enterprise Law Benefit Corporations and Other Purpose-Driven Companies*, Springer, 2022.

[21] *Model Benefit Corporation Legislation*, available at https://growthorientedsustainableentrepreneurship.files.wordpress.com/2016/07/gv-white-paper-need-and-rationale-for-benefit-corporations.pdf, as Appendix A of the study William H. Clark, Jr., Drinker Biddle & Reath LLP; Larry Vranka, Canonchet Group LLC, *White Paper The need and rationale for the benefit corporation: why it is the legal form that best addresses the needs of social entrepreneurs, investors, and, ultimately, the public,* 2013 (accessed 20 December 2022).

[22] B Lab is a Pennsylvania-based non-profit organisation that "sells" the private *Certified B-Corporations* seal whenever the applicant organisation achieves a certain "score" in the *B Impact Assessment* process defined by B-Lab itself. As Dana Brakman Reiser and Steven A. Dean say, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, Oxford: Oxford University Press, 2023, p. 160, "Organized as a traditional charity, B Lab offers its imprimatur to eligible businesses" (See https://www.bcorporation.net/en-us/programs-and-tools/b-impact-assessment (accessed 28 November 2022). For more on the B-Lab entity, see https://www.bcorporation.net/en-us/movement/about-b-lab (accessed 28 November 2022).

[23] In 2013 the State of Delaware adopted the "public benefit corporation". As stated by Dana Brakman Reiser and Steven A. Dean, Dana Brakman Reiser and Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 161, "When Delaware embraces a new legal entity, the results can be seismic". Most states use the designation "benefit corporation", but differ as to the regime applicable. In Delaware, in the constituent act, a public benefit corporation must (1) identify in the statement of its activity or purpose (…) one or more specific public benefits that the corporation is to pursue (§363(a)(1), where a public benefit means: "a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than shareholders in their capacity as shareholders) including, without limitation, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, measured, religious, scientific or technological nature). According to Guido Ferrarini/Shanshan Zhu, *Is there a role for benefit corporations in the new sustainable framework?,* cit., p. 3, by June 2022 more than 7,704 *benefit corporations* have been created in the USA, most of which are small, closely-held companies operating in various industries, based in the states of Oregon, New York, Nevada, Delaware and Colorado. As of July 2021, the USA registered 4 "publically traded" PBCs, according Jill E. Fisch/Steven Davidoff Solomon, "The "value" of a public benefit corporation", cit., p. 72.

[24] According to B-Lab, "Today, 51 jurisdictions around the world including Italy, Colombia, France, Peru, Rwanda, Uruguay, Ecuador, British Columbia, and Canada, as well as 44 U.S. states, Puerto Rico, and the District of Columbia (Washington, D.C.) have stakeholder governance statutes. The statutes differ based on the degree of stakeholder consideration required. Some demand the triple bottom line of people, planet, and profit; others require a double bottom line of purpose and profit." https://www.bcorporation.net/en-us/movement/stakeholder-governance (accessed 21 December 2022).

In the USA, despite the diversity of state corporate law, we can say that, in general, the *benefit corporation* is a profitable organisation that produces common benefits and acts responsibly and sustainably for the public benefit. According to the authors of the *MBCL*, the raison d'être of this figure lies in the need to overcome the traditional jurisprudential paradigm of the creation of value for the shareholder. It is necessary to contextualise this justification in the panorama of the jurisprudence of the Delaware courts that have built a consolidated orientation in the sense that directors should maximise shareholder value, as results from the famous decisions *Dodge v. Ford Motor Co.*, *Revlon, Inc. v. Mac Andrews & Forbes Holding, Inc.* Although the so-called "corporate constitution statutes" may mitigate this consolidated orientation towards shareholder value, they cannot completely overcome it, since they can only allow the interests of non-shareholders to be weighed by directors, but cannot oblige *directors* to privilege such interests[25].

The mainstays of the benefit corporations are: *a*) the *corporate purpose*, *b)* the *accountability* of the members of the management body, *c*) transparency and *d)* the legal means designed to make the interests of non-shareholders effective. Under section 201(a) of the *MBCL*, the benefit corporation must pursue a common benefit which is specified in § 102: "A material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation". The statutes may stipulate other common benefits exemplified in §102, such as services for low-income employees or communities, environmental protection, improvement of public health, promotion of science and the arts.

As far as directors' duties are concerned, §301(a)(1) of the *MBCL* states that they must attend to the impacts of their decisions not only on the sphere of the shareholders, but also on that of the stakeholders in the company, such as employees, the environment, the public, etc.[26]. None of these

[25] William H. Clark, Jr., Drinker Biddle & Reath LLP; Larry Vranka, Canonchet Group «, *White Paper The need and rationale for the benefit corporation: why it is the legal form that best addresses the needs of social entrepreneurs, investors, and, ultimately, the public,* 2013, p. 9, et seq.

[26] § 301(a)(1) of the MBCL provides that "The directors of a benefit corporation, in considering the best interests of the corporation: shall consider the effects of any action or inaction upon: (i) the shareholders of the benefit corporation, (ii) the employees and workforce of the benefit corporation, its subsidiaries and its suppliers, (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation, (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries and its suppliers are located, (v) the local and global environment, (vi) the short-term and long-term interests of the benefit corporation, including any benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation and (vii) the ability of the benefit corporation to accomplish its general benefit purpose and any specific public benefit purpose".

groups is dominant over another or should be preferred; but the articles of association may state a preference for a particular group.

Transparency is achieved through the disclosure of a "benefit report "on the company's *website* (§401), and members should have access to a copy of this document. The *MBCL* does not require that the information disclosed by the "benefit report" be audited. As regards governance, the *MBCL* admits the figure of the "benefit director," but does not make it compulsory (§§302 and 303).

The most sensitive point of the proposal concerns the legal means granted to the recipients of the benefits. In this regard, the *MBCL* provides the *company* and its *shareholders* with the legal means to make the common benefits effective. On the other hand, the recipients of the common benefit (non-shareholders) are deprived of any legitimacy to oblige the company to comply with the statutory clauses on common benefit. The members of the management body of the benefit corporation have no obligations to third parties.

The enthusiasm around *benefit corporations,* "as a vehicle for *stakeholder capitalism*"[27] coexists with an intense battery of criticism that, in summary, can be summarised as follows: *a*) it is questioned whether *PBC* is the appropriate vehicle in listed companies to insulate the company from investor pressure for profit maximisation[28]; *b) benefit corporations* "do not revise either the power structure or the decision-making apparatus of the traditional corporation "[29]; *c)* vagueness and non-measurability of *corporate purposes*[30]*; d*) potential discrepancies between "purpose statements" and company practices, notably in relation to their employees (e.g. *board* decisions prohibiting

27 Jill E. Fisch and Steven Davidoff Solomon, "The "value" of a public benefit corporation", p. 72.

28 In the sense that existing *PBCs* in the USA do not directly face this issue because they either have a controlling shareholder or have "dual class voting structures that provide a degree of insulation from the interests of public shareholders", see Jill E. Fisch/Steven Davidoff Solomon, "The "value" of a public benefit corporation", cit., p. 74.

29 Jill E. Fisch/Steven Davidoff Solomon, "The "value" of a public benefit corporation", cit., p. 74.

30 See *DGCL* § 362(b). Alessio Bartolacelli, "Modelos de sociedades "especiais" com fim adicional de "benefício comum": benefit corporations dos EUA, società benefit italianas e sociétés à mission francesas (com uma nota anglo-alemã)", *VI Congresso Direito das Sociedades em Revista*, Coimbra: Almedina, 2022, p. 321, who doubts that the legal solution adopted in Delaware gives "absolute guarantees of greater commitment of the directors to the execution of a common benefit programme". Take the case of the famous *Lemonade, Inc*: to "harness technology and social impact to be the world's most loved insurance company." For more examples, all of which are vague and fluid, see Jill E. Fisch/Steven Davidoff Solomon, "The "value" of a public benefit corporation", cit., p. 88 et seq.

unionisation of employees)[31] and "greenwashing" practices may occur[32]*; e*) the lack of criteria identifying the interests to be prioritised by directors[33].

In fact, as has been repeatedly pointed out by doctrine, benefit corporations - particularly in their American experience - do not alter the traditional structures of power and the exercise of power in capitalist societies. The commitment to common benefits is *precarious* because it can be altered at the shareholders' discretion[34].

The lack of legal instruments that make the protection of *stakeholders*' interests effective is very relevant. The management body is only accountable to the shareholders, as happens in traditional companies. In other words, the shareholders' interest is pursued in another way[35]. To solve this problem, the authors suggest the legitimacy of third parties to bring actions against the company, state supervision or even the mandatory constitution of advisory committees composed of *stakeholders* .[36]

Reporting systems have also been questioned/criticised: *a*) lack of auditing; *b*) laws do not identify the methodology that allows measuring social or environmental impacts and companies can choose between various "third party standards"; *c)* costs of compliance with reporting duties; *d)* low compliance rates.

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31 Jill E. Fisch/Steven Davidoff Solomon, "The "value" of a public benefit corporation", cit., p. 78.

32 See news item from Jornal Público online of 18 January 2023: "Banks committed to "zero emissions" lend millions to fossil fuels". Dana Brakman Reiser / Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 164, "doing good often requires economic sacrifice. To avoid this pain but still claim the mantle of blended value, social benefits can be overstated (a phenomenon so common in the environmental context that it has earned the epithet "greenwashing").

33 See J. Loewenstein, 'Benefit Corporations: A Challenge in Corporate Governance' (2013) *The Business Lawyer*, 68(4), 1007-34.

34 See Dana Brakman Reiser / Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 163.

35 Guido Ferrarini/Shanshan Zhu, *Is there a role for benefit corporations in the new sustainable framework?*, cit., p. 6.

36 See Gerald Spindler, "Social Purposes in German Corporate Law and Benefit Corporations in Germany", Henry Peter/Carlos Vargas Vasserot/Jaime Alcalde Silva (Editors), *The International Handbook of Social Enterprise Law. Benefit Corporations and Other Purpose-Driven Companies*, Springer, 2022, p. 588.

It is also noted that the *benefit corporation* has been much sought after, not for its intrinsic merits or genuine decision to promote common benefits, but rather for opportunistic reasons related to lack of control and rigorous standards.

This has the perverse consequence of eroding the *signalling effect* that *benefit corporations* seek to produce. This, according to some, makes *benefit corporations* completely unnecessary, creates a dangerous dichotomy between "benefit" and "business corporations", suggesting that the latter should not take on social missions[37]. And finally, some authors understand the benefit *corporation* as a means of facilitating the privatisation of the public interest and the transfer of responsibility for the common good to the private sector.[38]

3.2.
ITALIAN SOCIETÀ BENEFIT

The *società benefit*, incorporated into the Italian legal system by *Legge* 208/2015[39], is a company which for-profit purpose must be combined with activities of common benefit[40]. The law characterises it as a company "which, in carrying out an economic activity, in addition to the objective of sharing its profits, pursues one or more objectives of common benefit and operates in a responsible, sustainable and transparent manner towards persons, communities, territories and the environment, cultural and social assets and activities, bodies and associations and other stakeholders"[41].

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37 In this sense, see Alessio Bartolacelli, "Modelos de sociedades "especiais" com fim adicional de "benefício comum": benefit corporations dos EUA, società benefit italianas e sociétés à mission francesas (com uma nota anglo-alemã)", cit., p. 365 et seq.

38 L. Baudot, J. Dillard, N. Pencle, 'The emergence of benefit corporations: A cautionary tale' (2020) *Critical Perspectives on Accounting*, 67–68, 102073.

39 L. 28 dicembre 2015, n. 208, art. 1, commi 376-384. Sobre a experiência italiana, see Elisabetta Codazzi, "Società benefit (di capitali) e bilanciamento di interessi: alcune considerazioni sull'organizzazione interna", *Orizzonti del Diritto Commerciale*, 2/2020, p. 589, ss. Sobre as influências do *Delaware General Corporation Law* na *societá benefit* italiana, see Alessio Bartolacelli, "Modelos de sociedades "especiais" com fim adicional de "benefício comum": benefit corporations dos EUA, società benefit italianas e sociétés à mission francesas (com uma nota anglo-alemã)", cit., p. 329.

40 Alessio Bartolacelli, "Le società benefit: responsabilità sociale in chiaroscuro", *Non profit Paper*, 2017/2, p. 256, considers that it is a new social name, but not a new social type. Which differs from the social enterprise, incorporated since 2006 in the Italian legal system, because the discipline of the social enterprise prevents profits from being distributed by the shareholders, being applied in the company's activity.

41 Paragraph 376 of *Legge* 208/2015.

The common benefit is "the pursuit, in the exercise of the economic activity of the benefit corporations, of one or more positive effects, or the reduction of negative effects, on one or more categories referred to in paragraph 376"[42]. As the common benefit is decided by the shareholders, it is compulsorily included in the statutory clause on the corporate purpose and, consequently, determines that the management body respects it, in its business decisions.

This has implications for directors' duties and responsibilities. Paragraph 380 provides that "The benefit corporation shall be managed in such a way as to balance the interests of the members, the pursuit of the objectives of common benefit, and the interests of the groups indicated in paragraph 376, in accordance with the provisions of the articles of association." And paragraph 381 of the Law prescribes that failure to comply with the duties under the law or to combine the profit interests of the shareholders with the purposes of common benefit, may expose the directors to liability action for non-compliance. The law mandates the application of the rules of the *Codice Civile* relating to the civil liability of directors, in each of the corporate types (paragraph 381). Stakeholders are not recognised any legal instrument allowing them to act against directors in case of failure to pursue "common benefit" activities.[43]

As regards transparency, the directors of the *società benefit* shall prepare each year a document providing information on the pursuit of the common benefit. This report must be attached to the balance sheet and, in the case of companies that have one, must be published on their website. In this report, stakeholders may find information on the activity carried out by the company during the financial year, information on the measurement of the impact by application of impact measurement standards (see paragraph 378(d) of the Law), and a forward-looking vision that identifies the objectives that the company should achieve in the following financial year.

[42] Paragraph 376 of *Legge* 208/2015 states: "Le disposizioni previste dai commi dal presente al comma 382 hanno lo scopo di promuovere la costituzione e favorire la diffusione di societa', di seguito denominate «societa' benefit», che nell'esercizio di una attivita' economica, oltre allo scopo di dividerne gli utili, perseguono una o piu' finalita' di beneficio comune e operano in modo responsabile, sostenibile e trasparente nei confronti di persone, comunita', territori e ambiente, beni ed attivita' culturali e sociali, enti e associazioni ed altri portatori di interesse".

[43] Alessio Bartolacelli, "Le società benefit: responsabilità sociale in chiaroscuro", cit., p. 270, admits the hypothesis of third parties using the *class action* provided for in *Codice del consumo*.

The mention "società benefit" or the abbreviation "SB" is purely optional[44]; it will only be clear from the object whether the company is a benefit corporation. According to paragraph 384, in the event of non-compliance with the "common benefit", the penalties provided for in the Consumer Code or relating to misleading advertising shall apply.

3.3.
SOCIÉTÉ À MISSION

The influence of *benefit corporations* is also felt in France in the regime of the *société à mission* which was introduced into the French legal system in May 2019 by the *Loi PACTE (*acronym meaning *"Plan d'action pour la croissance et la transformation des entreprises")* which enshrined it in article L. 210-10 of the *Code de commerce*[45].

The "société à mission" depends on the following requirements: *a*) its *raison d'être*[46] must be specified in the articles of association together with one or more social and environmental objectives that the company must pursue as a mission in the performance of its activities[47]*; b*) a *mission committee*, distinct from other governing bodies and including at least one employee, must be established, which will be responsible for monitoring the implementation of the social/environmental mission and for submitting an annual report attached to the management report and verified by an independent third party body; *c*) the modalities for the monitoring of the execution of this mission by a *mission committee*; *d)* the achievement of the mentioned social and environmental objectives is subject to verification by an independent third party body; *e)* the

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44 Paragraph 379 states that "The benefit corporation may introduce in the corporate name, the words: "Societá benefit" or the abbreviation: "SB" and use this name in the securities issued, in documentation and in communications to third parties".

45 On the changes introduced by the *Loi PACTE* in the *Code Civil*, see Maria Elisabete Ramos, "Corporate purpose, sustentabilidade e gestão societária", cit., p. 385 et seq. Note that the *Loi PACTE* added a second paragraph to article 1833 of the *Code Civil*, which reads as follows: "La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité". Which, according to Pierre-Henri Conac, "Le nouvel article 1833 du Code Civil Français et l'integration de l'intétêt social et de la responsabilité sociale d'entreprise : constat ou revolution », *Orizzonti del diritto commerciale*, 2019, 3, 500, means the emergence of "un droit des sociétés sociétal".

46 On the meaning of the "raison d'être", see David Hiez, "The Suitability of French Law to B Corp", Henry Peter/Carlos Vargas Vasserot/Jaime Alcalde Silva (Editors), *The International Handbook of Social Enterprise Law. Benefit Corporations and Other Purpose-Driven Companies*, Springer, 2022, p. 579 et seq.

47 The *Loi PACTE* also added a segment to article 1835 of the *Code Civil*, under which "Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité".

company declares its quality of *société à mission* to the commercial court, which registers it in the trade and companies register[48/49] .

As for the loss of the *société à mission* status, article 210-11 of the *Code de Commerce* provides that if the conditions for qualification are not met or when the opinion issued by the independent body concludes that the social or environmental objectives are not met, the public prosecutor or any interested person may request the president of the commercial court to order the company to remove the designation "société à mission" from all documents, acts and electronic media.

The regime of the "*société à mission*" does not contemplate specific rules on the liability of directors. French doctrine observes that one of the significant differences between the French legal system and the American experience resides in the circumstance that in France there are no cases of civil liability of directors based on the pursuit of interests other than the distribution of profits[50].

There seems to be no basis for stating that the *société a mission* is a new corporate type. In fact, these are companies which object is tinged with environmental or social concerns and the structure is adapted (through the *comité à mission*)[51]. This does not correspond to democratic governance structures - as are characteristic of certain social economy organisations - nor does it imply structural changes in the exercise of power of the societies that voluntarily seek this legal qualification.

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48 See *Code de commerce*, article L 210-10. See also S. Schiller, 'L'évolution du röle de sociétés depuis la Loi PACTE', *Orizzonti del diritto commerciale*, 3 (2019), p. 517-532. For information on figures regarding existing *sociétés à mission*, see *Baromètre de l'Observatoire des Sociétés à Mission*, available at https://www.observatoiredessocietesamission.com/barometres-infographies/ (accessed 8 January 2023).

49 One example of a "société à mission" is *La Poste,* which adopts the following "raison d'être": "au service de tous, utile à chacun, La Poste, entreprise de proximité humaine et territoriale, développe les échanges et tisse des liens essentiels en contribuant aux biens communs de la société tout entière". To this end, *La Poste* makes four essential commitments: *a*) contribute to the development and cohesion of territories; *b)* favour social inclusion; *c)* promote ethical, inclusive and frugal digital technology; *d*) work to accelerate the ecological transition for all. https://www.lapostegroupe.com/fr/actualite/le-groupe-la-poste-devient-entreprise-a-mission (accessed 12 January 2022).

50 David Hiez, "The Suitability of French Law to B Corp", cit., p. 577.

51 David Hiez, "The Suitability of French Law to B Corp", cit., p. 582.

3.4
COMMON BENEFIT AND INTEREST CORPORATIONS (SPAIN)

In Spain, on 29 September 2022, Law 18/2022 of 28 September on the creation and growth of companies - known as the "Create and Grow Law" - was published to enter into force on 19 October 2022. The additional tenth provision of this law recognises, with a very general wording, the figure of "Common Benefit and Interest Corporations". These are capital companies that *voluntarily* decide to include in their by-laws: *a*) the commitment to explicitly generate positive social and environmental impact through their activity; *b*) submission to higher levels of transparency and accountability in the performance of the aforementioned social and environmental objectives.

The law does nothing more. Instead it refers to regulatory development for the provisions on this new business concept[52].

4.
THE TESTED BENEFIT CORPORATION MODEL IN THE LIGHT OF THE GUIDING PRINCIPLES OF THE SOCIAL ECONOMY

Benefit corporations are for-profit entities which combine the selfish interest of the shareholders with the *positive impacts produced in the sphere of stakeholders*. As has been underlined by legal doctrine, the legal-positive previsions of benefit corporations, either in their American origins or in the "European transplants", leave untouched the traditional power structures in force in companies. And these power structures are based on the investment of the partners, on the economic and legal power that this investment grants and, furthermore, on the appropriation of profits by the shareholders.

We must not ignore that article 10(2)(c) of the LBES imposes on the public authorities, in the context of the mission to foster the social economy[53], the task of "facilitating the creation of new social economy entities and supporting the diversity of initiatives specific to this sector". We may question if benefit corporations are adequate to the purpose of fostering the social economy and,

[52] About this legal figure see Sara González Sánchez, "La sociedad de beneficio e interés común en la Ley 18/2022 y su regulación en el Derecho comparado", *Revista de derecho de sociedades*, nº 66, 2022, p. 1-25.

[53] On the purpose of fostering the social economy, see Deolinda Meira, "A Lei de Bases da Economia Social portuguesa: do projeto ao texto final", cit., p. 22 et seq.

consequently, if the Portuguese legislator, under its legal-constitutional task of developing the LBES, should welcome these entities into the Portuguese legal system. It should be remembered that the Portuguese legislator has resisted international convergence on *benefit corporations* and has not provided for it in the Portuguese legal system.

It seems to me that the answer to the question posed above involves subjecting benefit corporations - as results from the international standard disseminated from the American experience condensed in the B Lab model law or the Delaware legislation - to the test of the *guiding principles of the social economy* set out in article 5 of the LBES. And this test is decisive because, for the purposes of article 4(h) of the LBES, only entities that "respect the guiding principles of the social economy" are eligible.

There is no doubt that benefit corporations carry out economic activities and, simultaneously, if we consider the USA model, pursue activities of a social nature or may have the purpose of pursuing common benefits. In fact, the *common benefit* consists of the "material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation". The statutes may stipulate other common benefits exemplified in §102 of the *B-Lab* Model Law, such as services for low-income employees or communities, environmental protection, improvement of public health, promotion of science and the arts. It remains to be seen whether the aforementioned "common benefits" are sufficient to qualify benefit corporations for entry into the permanent social economy database.

It will certainly not be the requirement of legal personality (article 4(h) of the LBES) that will keep these entities away from the perimeter of the social economy because, in the Portuguese legal system, all commercial and civil companies in commercial form acquire legal personality from the definitive registration of the founding act (articles 1, 3, 4, 5 of the Commercial Companies Code)[54]. And there is also no doubt that the legislator has the legislative power to create companies that exclude the profit motive and to attribute legal personality to these entities[55]. In summary: the legal personality requirement will not be an obstacle to the integration of benefit corporations in the list of social economy entities. And will benefit corporations overcome the test of the guiding principles of the social economy (articles 2, 4(h) and 5 of the LBES)?

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[54] On this regime, see Maria Elisabete Ramos, *Direito das sociedades*, Coimbra: Almedina, 2022, p. 151 et seq.

[55] See . J. M. Coutinho de Abreu, *Curso de direito comercial*, vol. II. *Das sociedades*, 7.ª ed., Coimbra: Almedina, 2021, p. 37 et seq.

In the preamble of article 5 of the LBES it is required that social economy entities are "autonomous". In Portugal, the current legal-corporate regime is *not in a position to guarantee this autonomy*. This design of autonomy is strange to the nature of companies. Private limited companies, joint stock companies and limited partnership companies may be integrated into *groups in law*, through total dominance relations (initial or supervening), subordination contracts or even parity group contracts (articles 481, 488 to 508, all of the Commercial Companies Code). The *exceptional regime* of companies in a group relationship formed by total initial dominance or by means of a subordination contract[56] allows the managing company or the totally dominant company to issue binding instructions, namely unfavourable, to the management body of the subordinated or totally dominated company and the latter is legally bound to comply with unfavourable binding instructions that respect the law (articles 481, 488, 501 to 504, 491, all of the Commercial Companies Code). For these reasons, the autonomy of private limited companies, public limited companies and partnerships by shares is not legally guaranteed. Furthermore, the *chains of holdings* and *shareholder agreements* entered into between shareholders and between them and non-shareholders[57] (for those who admit the latter modality) allow companies, in compliance with the law, to be de facto controlled by non-shareholders. Therefore, admitting that this regime is applied to Portuguese benefit corporations, they will potentially be *non-autonomous*.

Benefit corporations *do not cultivate the primacy of people and social objectives*, constituted as a guiding principle of the social economy, under the terms of article 5(a) of the LBES. Instead, it is the primacy of profit that is tempered with business decisions that may incorporate non-shareholder interests. In a sense, it is the making of profit through other means. The US model of benefit corporations requires directors to "weigh up", "take into account", bring into the decision-making process the debate around non-shareholder interests, but does not require the final decision to privilege the latter interests. Because this is a matter of corporate discretion, it is compatible with the benefit corporation model that the corporate decision that has weighed non-shareholder interests, at the end of the process, privileges the alternative that best serves the for-profit intent[58]. The "lucrative philanthropy"[59] uses the benefit corporation as one of its "vehicles".

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[56] Maria Elisabete Ramos, *Direito das sociedades*, cit., p. 371 et seq.

[57] See article 17 of the CSC. On the issue of whether shareholders' agreements may be integrated by non-shareholders, see Maria Elisabete Ramos, *Direito das sociedades*, cit., p. 53 et seq. and bibliography therein.

[58] Dana Brakman Reiser / Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 163.

[59] Dana Brakman Reiser / Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 79 et seq.

Neither is free and voluntary membership guaranteed through benefit corporations, insofar as the principle of the open door[60] does not work in benefit corporations, or, at least, it does not work with the breadth and importance with which we know the cooperative identity. The open door principle is aimed at guaranteeing that those who meet the objective conditions can be members of the cooperative and, in this way, satisfy their needs (article 2 of the Cooperative Code)[61]. Applied to the social economy, this guiding principle is closely linked to the purpose of the *general interest* characteristic of these entities. The benefit corporations are essentially vehicles through which investors apply their savings and it is the *investment,* and not the needs of the person, that is relevant for this purpose. Benefit corporations can be said to be plutocratic.

Much less is the *democratic control of the respective bodies by their members* present in benefit corporations (article 5(c) of the LBES). Benefit corporations do not include the guarantee that it will be the members who democratically control the bodies; in particular, there is no guarantee that the bodies will be provided by shareholders; on the contrary, the bodies may be composed of non-members and the company does not function in a democratic manner, but rather in a plutocratic manner, through the exercise of voting power. The general partnership, in which the one partner one vote rule (article 190(1) of the Commercial Companies Code) prevails, has no business expression and is a corporate type in total decline.

One of the guiding principles of social economy entities is the "conciliation between the interest of members, users or beneficiaries and the general interest" (article 5(d) of the LBES). Although it is admitted that the Directors of benefit corporations make business decisions that incorporate the interests of non-shareholders, what happens is that this is not the DNA of benefit corporations. Not only do benefit corporations not imply changes in the typical power structures - which is based on the investment of the shareholder and the voting power to be exercised at the general meeting -, but benefit corporations may, at any time, convert into traditional companies. In other words: the commitment to general or specific common benefits is *precarious*, because it can be altered by means of a resolution of the partners. On the contrary, for the social economy entities listed in article 4 of the LBES, the pursuit of the general interest (article 2 of the LBES) *is a founding* and structural *characteristic* and cannot be altered by decision of the members or the founder.

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[60] On this principle, see Rui Namorado, "Artigo 3.º - Princípios cooperativos", *Código Cooperativo anotado*, coord. de Deolinda Meira e Maria Elisabete Ramos, Coimbra: Almedina, 2018, p. 27 et seq.

[61] On the legal notion of cooperative, see J. M. Coutinho de Abreu, "Artigo 2.º - Noção", *Código Cooperativo anotado*, coord. de Deolinda Meira e Maria Elisabete Ramos, Coimbra: Almedina, 2028, p. 22 et seq.

The respect for the values of *solidarity*, *equality* and non-discrimination, social cohesion, justice and equity, transparency, shared individual and social responsibility and subsidiarity is the guiding principle of the social economy entities foreseen in article 5(e) of the LBES. It is a principle designed for entities dedicated to the pursuit of broad social interests - as is the case of the IPSS in Portugal. Taking into account their mission, these entities should guide their actions by solidarity (and therefore provide services to people who do not have the resources to pay for them or to pay for them in full). Therefore, social economy entities have to ensure equality and non-discrimination in access, justice, equity among the various recipients, as well as transparency (because the non-financing or not full financing through revenues implies the use of public funding sources, namely), respect for individual and shared social responsibility and a logic of subsidiarity (the action of these entities is justified to the extent that other means of intervention are not available). In summary: the principle stated in article 5(e) of the LBES is addressed to entities that orient their actions towards social solidarity and their services are not or not totally funded by market mechanisms.

Companies (of whatever type), by force of the Constitution of the Portuguese Republic and the law, must practice non-discrimination and equality (articles 12 and 13 of the CRP)[62], but are not geared towards the effective practice of solidarity because they do not abandon the profit-making purpose and the distribution of dividends by shareholders. Although they may perform free acts in the context of social responsibility initiatives, they do not abandon the profit-making purpose.

Companies, under the current legal regime, are also unable to guarantee the "autonomous and independent management of public authorities and any other entities outside the social economy" (article 5(f) of the LBES). In fact, public entities (under certain requirements) and "entities outside the social economy" have the legal capacity to acquire the quality of shareholders by acquiring shareholdings. This result is fully compatible with the corporate legal regime in force but is, it seems, incompatible with the principle of autonomous and independent management of social economy entities.

Companies, whatever the corporate type chosen by the shareholders, are for-profit entities. This statement means that the profits obtained in the company (objective profit) are aimed to be

[62] On the equality principle and the relations between private individuals, J. J. Gomes Canotilho/Vital Moreira, *Constituição da República Portuguesa anotada*, vol. I, 4.ª ed., cit., p. 346 et seq.

distributed by the shareholders (subjective profit)[63]. Beyond the doubts raised by the literal wording of article 5(g) of LBES when referring to "surplus"[64] , it is necessary to note that the current company regime - and also the American *benefit corporation* models - are not compatible with the principle that the profits are obligatorily allocated "to the pursuit of the objectives of social economy entities, in accordance with the general interest" (article 5(g) of the LBES). In fact, benefit corporations - judging by the American models - do not abdicate their profit-making purpose nor do they replace it for purposes of general interest. What does happen is that the benefit corporation regimes allow for the Directors to allocate company resources to the pursuit of non-shareholder interests. It is important to underline that this does not mean the abdication of the profit-making purpose. It should be stated that in Portugal, even if one may admit the lawfulness of certain decisions of profit attribution to non-shareholders[65], the truth is that such decisions must respect the profit-making purpose of the company and will therefore have a marginal, moderate and limited impact[66].

5.
CONCLUSION IN OPEN NARRATIVE MODE

The European legal experiences that are culturally close to us have been permeable to the influence of the *benefit corporation*, moulded on USA models forged in Delaware law or the *B-Lab* model law.

This *convergence* movement - there is no European Union instrument leading this process of approximation of legislations - has not yet reached Portugal. However, in a historical moment in which the permanent database of the social economy is being prepared - which will allow the concretisation of the provisions of article 4(h) of the LBES - it is opportune to question whether "profitable philanthropy" is the path or the frontier of the social economy.

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63 On the dichotomy objective profit / subjective profit as "essentialia elementum" of the concept of company, see Paulo de Tarso Domingues, *O financiamento societário pelos sócios (e o seu reverso)*, 2.ª ed., Coimbra: Almedina, 2022, p. 493.

64 On these doubts, see Deolinda Meira, "A Lei de Bases da Economia Social portuguesa: do projeto ao texto final", cit., p. 18, who argues that the legislator should have used the word "results" and not surpluses.

65 Paulo de Tarso Domingues, *O financiamento societário pelos sócios (e o seu reverso)*, cit. p. 507.

66 Cf. Paulo de Tarso Domingues, *O financiamento societário pelos sócios (e o seu reverso)*, cit., p. 515.

Companies and benefit corporations (as they result from the US model) are not "asset-locked entities"[67]. In fact, the so-called lucrative philanthropy practised by "profoundly wealthy men who did very well before doing good"[68] is still a means of boosting profits for the shareholders, the immutability of the social mission being strange to it. The commitment of benefit corporations to common benefit is *precarious* and non-foundational - there is no obstacle to a benefit corporation becoming a traditional company.

In the hypothetical circumstance of the benefit corporation being accepted in the Portuguese legal system, it cannot integrate the social economy because its structural characteristics are incompatible with the guiding principles of the social economy, as set out in article 5 of the LBES. The possibility of the legislator creating a non-profit company is not excluded. This is in line with the idea of the "neutrality" of the "form" of the company, admitting that it is an instrument to pursue non-profit purposes.[69]

[67] Dana Brakman Reiser / Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 150.

[68] Dana Brakman Reiser / Steven A. Dean, *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, cit., p. 157.

[69] See J. M. Coutinho de Abreu, *Curso de comercial*, vol. II, cit., p. 39.