The public interest of Brazilian mixed-capital company: approach to US benefit corporations*

O interesse público na sociedade de economia mista brasileira: aproximação com a benefit corporation do direito norte-americano

*Mario Engler Pinto Junior***

ABSTRACT

The paper compares benefit corporations in the US with mixed-capital corporations in Brazil, in order to point the similarities and differences between both corporate structures. The paper also intends to shed light on the rationale of the governance solutions adopted in each case. The paper restates the concept of company's interest and highlights it as a key

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* FGV Direito São Paulo, São Paulo, SP, Brazil. Email adress: mario.engler@fgv.br.
Professor and Coordinator of the Professional Mastership (FGV Law SP). PhD in Commercial Law (USP). State Attorney of São Paulo (retired). Member of Câmara de Arbitragem do Mercado da BM&FBovespa (São Paulo/SP — Brasil).

legal reference for assessing the legitimacy of business decisions. Different readings of this concept are likely to translate into markedly different positions, from holding that the idea of interest refers solely to the purpose of profit maximization on behalf of shareholders to affirming the need to simultaneously accomplishing non-financial goals interests. The challenges and solutions concerning corporate governance also vary according to the extent of the corporation's scope. Benefit corporations in the US seek to simultaneously attain some goal of public interest and make profit for its shareholders. The existence of a broader scope allows questioning the suitability of their institutional design to deal with conflicts that are inherent to this new corporate type. Their structure invites a comparison to State owned enterprise (SOE) in Brazil. According to Brazilian Law, a company controlled by the State is invested with a public mission while needing to assure proper return to shareholders' investment. The paper concludes that some measures adopted by Brazilian Law No. 13.303/2016, for strengthening the corporate governance of Brazilian SOE's are similar the U.S. Model Benefit Corporation Legislation (MBCL) concerning benefit corporations.

KEYWORDS

Company interest — benefit corporation — state-owned enterprise — mixed-capital company

RESUMO

O artigo faz um paralelo entre a figura da *benefit corporation* do direito norte-americano e a sociedade de economia mista brasileira, com o propósito de apontar semelhanças entre as duas estruturas societárias e lançar luzes sobre a racionalidade das soluções de governança adotadas em cada caso. A reflexão resgata inicialmente o conceito de interesse da companhia, destacando sua relevância como referencial jurídico para se aferir a legitimidade das decisões empresariais. Observa-se ainda que o entendimento sobre o tema varia conforme a abordagem teórica adotada, podendo se resumir na maximização dos lucros para partilha entre os sócios, ou combinar o atendimento a outros interesses não financeiros. Por sua vez, os desafios e soluções em matéria de governança corporativa também variam em função da amplitude do escopo atribuído à companhia. A *benefit corporation* procura combinar a consecução de

algum objetivo de interesse público com a manutenção da finalidade lucrativa. A existência do escopo mais amplo permite questionar a adequação do desenho institucional para lidar com os conflitos inerentes ao novo tipo societário. Além disso, propicia uma análise comparativa com o modelo de sociedade de economia mista no direito brasileiro, que também está imbuída de uma missão pública, cuja consecução não afasta a necessidade de remunerar adequadamente o investimento acionário. Conclui-se que algumas medidas contidas na Lei nº 13.303/2016, para fortalecer o controle e gestão das empresas estatais brasileiras, guardam simetria com o tratamento aplicável às *benefit corporation* no direito norte-americano.

PALAVRAS-CHAVE

Direito comparado — interesse da companhia — *benefit corporation* — empresa estatal — sociedade de economia mista

Introduction

The theoretical dispute to define the objectives that can or should be pursued by a business society is old. Conceptual approaches and solutions proposed vary according to the social, economic and ethical values meant to be prioritized. The practical importance of the theme stems from the fact that the company interest (or social interest) serves as a legal reference to assess the legitimacy of the decisions made by managers or controlling shareholder.

In the institutionalist view, the company has its own interest, which transcends the simple generation of value for the benefit of the partners. The company must also seek to meet the wishes of related parties, being considered so all those who are in some way affected by the business activity, including the public good. Considering the contractualist perspective, the society is equivalent to a partners' private business and, therefore, its only goal should be the maximization and sharing of profits, regardless of the impact on other actors or on the environment, as long as the action is developed within the limits of the law.

The definition of a clear mandate limits the scope for corporate managers discretionary action, making it easier to repress dysfunctional behaviors

caused by agency problem[1]. Consequently, it ends up better protecting investors of the stock market, even if by means of the sacrifice of third parties' interests.

On the other hand, the expansion of the company's scope makes it more difficult to control the legitimacy of business decisions, increasing the risk of misconduct to the detriment of all shareholders. This model can also distort incentives and make the company less efficient economically. In contrast, it holds a stronger ethical appeal.

The movement inspired on the idea of conscious capitalism has been pushing corporate societies to take on commitments with broader interests, in opposition to the priority objective of maximizing profits. It refers to the interests of consumers, workers, creditors, investors and the local community, and may also evolve to serve public interests, not directly related to the company's activity[2].

In this context emerges in the US Law the conciliatory figure of the *benefit corporation*, that can and shall pursue other interests, notwithstanding the assurance of adequate remuneration to shareholders. The multiplicity of objectives of the new type of corporation raises challenges in terms of institutional design and corporate governance whose confrontation leaves room for innovative legal solutions.

To a certain extent, under Brazilian law, the mixed capital company is subject to the same dilemmas, since it combines the profitable purpose with the pursuit of the public interest that justified its creation. The corporate treatment provided for by the recent Law No. 13.303/2016 (Law of state companies) seems to adopt solutions that are comparable to those provided

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1 The mismatch between managers' performance and shareholders' will is worsen due to strong informational asymmetries between the two sides. The administrators have extensive information about the social businesses, which are not accessible to shareholders to the same extent, making it difficult to monitor and evaluate performance, as well as to know the company's real wealth. This is the situation described by the specialized literature as agency problem, that can be summarized as the misalignment of interests or motivation conflict between two categories of actors: (i) the agents (self-interested managers of other people's assets), and (ii) the main ones (shareholders and final beneficiaries of the assets managed by the agents) (cf. PINTO JUNIOR, Mario Engler. *Empresa estatal*: função econômica e dilemas societários. 2. ed. São Paulo: Atlas, 2013. pg. 63)

2 In this sense, it is worth noting the open letter released by Business Roundtable, an organization that groups CEOs of the largest US corporations, defending the need that business decisions take into account their impact on the different groups of interest, and not only pursue the objective of maximizing profits for the exclusive benefit of shareholders (cf. FINANCIAL TIMES. FT Series. *The company of the future*: profit and purpose. 27 Sep. 2019. Available at: <www.ft.com/content/c998cc32-d93e-11e9-8f9b-77216ebe1f17>).

by the US law for *benefit corporations*. That is the reason why the analytical parallel between the two models can shed light on issues that are sensitive to the improvement of the control and management of Brazilian state companies.

This study aims to show the structural correlation between *benefit corporation* and mixed capital companies, in order to draw lessons from the US experience that can be of use in the Brazilian context. In this sense, the article initially discusses the legal concept of the interest of the company and its theoretical foundations; then it highlights the peculiarities of the corporate model in the *common law* system. From there, it seeks to point out the determining factors for the emergence of the *benefit corporation*. It also explains its basic structure and draws attention to some operational issues, having the organizational theory that synthesizes institutionalist and contractualist views of the corporate phenomenon as background. The comparison with the Brazilian law also presumes an understanding of the idea of the social role of companies and the public mission attributed to the mixed capital company, which will be discussed below.

The article concludes presenting the main comparative elements that reinforce the relevance of the solutions brought by the Law of state companies, that are yet not enough to prevent all possible dysfunctional behaviors to which state-owned companies are subject.

The legal concept of company interest

The identification of the objectives that can or should be pursued by a for-profit business society presumes good understanding of the legal concept of the interest of the company (also called social interest)[3]. Institutional, contractual and organizational theories face the issue from different angles, proposing different legal approaches to the business phenomenon, with relevant application consequences.

Institutionalism refer back to the work of Walter Rathenau, who used his experience as an entrepreneur and adviser to large German companies in the early twentieth century to criticize the inadequacy of the legal model of

[3] The relevance of the concept of interest of the company, as a legitimizing factor for business decisions, is widely highlighted by corporate doctrine. In this regard, see CAMILO JUNIOR, Ruy Pereira. *Direito societário e regulação econômica*. São Paulo: Manole, 2018. pg. 201-209.

corporations current at that time[4]. In Rathenau's assessment, the corporate form was completely dissociated from the economic reality, which required, among other things, the mobilization of the private business sector for the national reconstruction effort, after the end of World War I. To solve the contradiction, Rathenau develops the idea of the company itself (*Unternehmen an sich*), which envisions a typically publicist role in corporations, in the sense of ensuring the attendance of national interest. The company acquires its own interest, not linked to the shareholders' financial satisfaction, whose rights are conditioned to the economic strengthening of the company as a production unit.

Achieving the broader objective attributed to the macro-company presumes the distancing of the board (*Vorstand*) and the supervision board (*Aufsichtsrat*), in relation to the shareholders' will. The management bodies become stable and cohesive, in order to act independently in the protection of interests external to the company. At the same time, there is an emptying of the power of the shareholders gathered in general meeting, who become authentic creditors of the company.

In the concept of company itself, the interest of the company ends up intertwined with the public interest that lacks conceptual delimitation. This inaccuracy leaves room for the abuse of controlling shareholder and managers, to the detriment of other shareholders. The German experience with the institutional model of corporation, inspired by the merely by principle and ill-defined publicism, has not yielded good results[5].

Even before the advent of the new German stock law of 1965, Rathenau's publicist institutionalism is replaced by the so-called integrationist institutionalism, in which the interest of the company starts to reunite the wills of actors directly linked to the business activity, and no longer just the public interest generally considered. The internalization of qualified interests in the corporate structure occurs with the so-called workers' participation laws (*Mitbestimmungsgesetze*), which oblige the equal division

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[4] The booklet published by Walter Rathenau in Germany in 1917 had the original title *Von Aktienwesen (Eine gschaeftliche Betrachtung)*. Later, the text was translated into Italian (RATHENAU, Walter. Le realtà della società per azioni. Rivista delle Società, Milan, v. 5, pg. 921-947, 1960). More recently, Nilson Lautenschleger Jr. presented Rathenau's classic work in the Portuguese version (LAUTENSCHLEGER JR., Nilson. Relato breve sobre Walter Rathenau e sua obra: 'a teoria da empresa em si'. *Revista de Direito Mercantil, Industrial, Econômico e Financeiro*, São Paulo, No. 128, pg. 200-201, Oct./Dec. 2002).

[5] Cf. SALOMÃO FILHO, Calixto. Sociedade anônima: interesse público e privado. *Revista de Direito Mercantil, Industrial, Econômico e Financeiro*, São Paulo, n. 127, pg. 7-20, 2002.

of seats on the *Aufsichtsrat* (supervision board), between representatives of the shareholders and workers, despite the fact that the chairmanship of the governing body was indicated by the former, including the tie-breaking vote[6]. In the German codetermination model, the participation of employees in the main decision-making body of the company means that labor concerns are also part of the social interest, no longer being treated as an external element[7].

In the integrationist system, the different interests represented within the company are not seen as necessarily opposed, since they all aim at maintaining the company and can live in at least some harmony, as long as they are properly organized. On the other hand, managers' duties and responsibilities also need to adjust to the new legal reality, leaving aside the exclusive commitment to the maximization of profits in favor of the shareholders to assume a broader function of a conciliatory character, having as main objective the increase in productive capacity using the resources available. Respect for social interest requires managers to consider adequately the needs of the different groups of interest, being it impossible to predetermine the outcome by means of material rules.

More conservative proposals for good corporate governance seek to fight the characteristic institutionalism of the widely held stock large companies. The ultimate goal becomes the creation of value for shareholders, although tempered by the concern — more theoretical than effective — with the company's long-term sustainability. The move denies managers the ability to arbitrate conflicting interests within the company, emphasizing that their fiduciary relationship is exclusively with shareholders. In other words, corporate managers are committed only to the satisfaction of the shareholders' maximizing interest, while the other agents linked to the business activity must seek protection through normative or contractual means.

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6 Cf. HOPT, Klaus; LEYENS, Patrick C. *Board models in Europe*. Recent developments of internal corporate governance structures in Germany, the United Kingdom, France, and Italy. *ECGI — Law Working Paper*, n. 18/2004; *European Company and Financial Law Review*, pg. 135-168, 2004; *Company & Securities Law Review*, v. 1, pg. 217-245, 2005; GEPKEN-JAGER, Ella; SOLINGE, Gerard van; TIMMERMAN, Levinus (Ed.). *VOC 1602-2004*: 400 years of company law. Deventer: Kluwer, 2005. Available at: <https://ssrn.com/abstract=487944> or <http://dx.doi.org/10.2139/ssrn.487944>.

7 Cf. KÜBLER, Friedrich K. Dual loyalty of labour representatives. In: HOPT, Klaus J.; TEUBNER, Gunther (Ed.). *Corporate governance and directors' liabilities*: legal, economic and sociological analyses on corporate social responsibility. Berlin; New York: Walter de Gruyter, 1985. pg. 433.

This view of the corporate phenomenon finds legal basis in the contractual theory, especially accepted in Italian doctrine[8]. The partnership is considered a result of a contractual relationship and must be treated as a partners' private business. The most elaborate version of contractualism equals social interest to common interest of members as partners (*uti socii and not uti individui*). It is a typical and specific concept, referring to the well-defined objective of generating and distributing profits by exercising the economic activity defined in the corporate purpose. Social interest is not intertwined with the simple sum of the individual interests of partners, who may share other aspirations outside the reason that motivated the society formation (*ex causa societatis*). The true social interest is unattached to any extra-social element, even when it concerns the majority of the partners.

Some contractual perspectivess attribute a certain temporal elasticity to the social interest, though not denying its profile as partners' common denominator. The corporate purpose would not be an immutable data, but data susceptible to adaptation to new circumstances, according to the partners' needs along the different moments of the society's life. Such a concession to the typicality and specificity of the corporate purpose ends up allowing its conceptual broadening to include not only the interests of current partners, but also those of future ones[9].

The change of focus was necessary to make the contractual theory compatible with the evolution of the stock market, whose concern is not limited to the group of existing shareholders at a certain moment, but covers all potential investors. In this case, the focus is no longer on maximizing profits, but on transforming the valuation of the stock investment, expressed in the stock exchange price of subscribed or acquired shares (*shareholder value*). The corporate purpose gains a long-term perspective and begins to justify business decisions that do not prioritize immediate profitability, in exchange for obtaining qualitatively better results in the future.

Organizational theory, on the other hand, assumes that the company shall function as a legal framework to organize and reconcile divergent

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[8] Cf. JAEGER, Pier Giusto. *L'interesse sociale*. Milão: Giuffrè, 1964. After presenting the various theories, the author emphatically concludes that the Italian legal system does not allow the inclusion of other interests outside the ones of the partners' figure in the social interest (pg. 145).

[9] Cf. JAEGER, Pier Giusto. L'interesse sociale rivisitato (quarant'anni dopo). *Giurisprudenza Commerciale*, n. 1, pg. 804, 2000.

interests[10]. In other words, the conception of company as an organization does not depend on the coincidence of purposes between the partners, nor is the corporate purpose restricted only to the partners' interests. The corporate organization is the legal apparatus aimed at harmonizing the different interests of the partners and third parties linked to the company, to enable the coexistence in the exercise of a certain economic activity. The coordination of reciprocal influence between acts, legal assets and legal subjects presumes that the organization is independent enough to define its institutional purpose, avoiding its capture by any group of interest present there[11].

The emphasis on the organizational aspect of the corporate structure has other application effects. It serves, for example, to justify the limitation of liability in one-person company, when its existence corresponds to a business organization with self-interest and decision-making autonomy. It also serves to justify the disregard of corporate entity apart of the occurrence of fraud, with the purpose of imputing certain legal relationships directly to the partners, whenever the organizational substrate is absent[12].

Peculiarities of the corporate model in *common law*

The US model of *public corporation*, which corresponds to the company with a diluted shareholder base and subject to management control, is also permeated by institutionalist values. The figure of *managerialism* consists of the technostructure formed by professional managers with diverse abilities and specialties, considered essential for the good management of the company, who could hardly be gathered in a single person. This class of managers has its own code of conduct and does not feel subordinate to shareholders.

Shareholders are seen almost as third parties outside the company, whose intervention can even be harmful to the company's businesses. The motivation of corporate bureaucrats is not limited to remuneration for the

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[10] The organizational theory is the result of Calixto Salomão Filho's doctrinal elaboration, being inspired by P. Ferro-Luzzi's work on the associative contract (SALOMÃO FILHO, Calixto. *O novo direito societário*, 2. ed. Reformulated. São Paulo: Malheiros, 2002. pg. 42).

[11] The concept of the company as a conciliatory arena is also defended by Ian B. Lee, who calls attention to ethical considerations in making business decisions, even if this implies a reduction in the profitability of operations and a loss of economic efficiency (LEE, Ian B. Efficiency and ethics in the debate about shareholders' primacy. *U Toronto Legal Studies Research Paper*, No. 15-05, Oct. 2005. Available at: <http://ssrn.com/abstract=778765>).

[12] Cf. SALOMÃO FILHO, Calixto. *A sociedade unipessoal*. São Paulo: Malheiros, 1995. pg. 130-131.

work done, but covers other non-pecuniary purposes, notably the growth of the company with less exposure to risk, even if at the expense of profitability. In this context, the administrators have a reasonable extent of leeway to sacrifice the shareholders' expectations of profit maximization, under the excuse of favoring the related public[13].

This does not mean, however, the abolishment of the shareholders' primacy principle in that country. Rather the opposite, since the beginning, court precedents established that the real purpose of the company is to yield profits and distribute them to shareholders[14]. The principle is based on the ownership interest in the company, as a means of ensuring the legal protection of the capital invested in it. The company is assimilated to the *trust* figure, and the administrators are responsible for managing the shareholders' equity as their *trustees*.

This view suffered later inputs, although never explicitly rejecting the shareholders' primacy doctrine. In this sense, managers were recognized with the right to adopt policies that seem to be contrary to the shareholders' immediate interest, when it is possible to demonstrate the long-term benefit and remove the flaw of mere liberality[15]. The tendency of US precedents is to honor the freedom of judgment of the administrators on the best interest of the company (*business judgment rule*), provided that it is supported by a plausible justification, and the correct procedure for decision making is observed (*i.e.*, no conflict of interest, good faith and regular standards of diligence). Although

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[13] The managerial control was described in detail in the pioneer work of Adolf Berle and Gardiner Means, in the early 1930s, having the North American macro enterprise as background (BERLE, Adolf; MEANS, Gardiner. *The modern corporation and private property*. Nova York: The MacMillan Company, 2000. pg. 396). John K. Galbraith also seeks to explain the revolution resulting from the seizure of corporate power by managers, which had repercussions even on the change in the business strategy adopted by North American macro enterprises (Galbraith, John Kenneth. *O novo estado industrial*. 2. ed. São Paulo: Pioneira, 1983).

[14] The paradigmatic decision was taken in 1919 by the Michigan Supreme Court, in the *Dodge v. Ford Motor Co*. At the time, the argument invoked by the controlling shareholder not to pay dividends to other shareholders, which consisted of the need to retain profits to finance the expansion of activities and allow the production of cars at more affordable prices, was rejected. The Court understood that the main purpose of the company is to remunerate its shareholders, and the directors must make the best efforts to achieve it (FAIRFAX, Lisa M. Doing well while doing good: reassessing the scope of director's fiduciary obligations in for-profit corporations with non-shareholder beneficiaries. *Washington and Lee Law Review*, v. 59, pg. 409, 2002. Available at: <http://ssrn.com/abstract=921072>).

[15] The decision was taken in 1968 by the Illinois Court of Appeal in the *Shlensky v. Wrigley* case, in face of the shareholder question about the company's decision to voluntarily restrict its activities to daytime hours so as not to disturb the peace of the local community. It was comprised that the concern of the administrators in creating community ties was important for the future of the company (Lisa M. Fairfax, Doing well while doing good, op. cit., pg. 437).

not assumed, the flexibility thus recognized leaves room for business decisions aimed at meeting the interests of related parties (*stakeholders*)[16].

More recently, the school of thought concerned with the financial return on equity investment has started to defend the strengthening of the fiduciary relationship of managers with shareholders of diluted capital companies, in addition to recognizing the importance of share activism in favor of the goal of maximizing profits. In the case of companies with a shareholding concentration, the leeway limit of the administrators has always been reduced due to the influence of the controlling shareholder, notably for the adoption of business decisions aimed at meeting the interests of affected third parties[17].

Managers' primordial commitment, in the sense of seeking the well-being of the shareholders, changes substantially in the context of hostile takeover offer of widely held stock company (*hostile takeover*). In this case, the US authors recognize that the normal course of social businesses does not encompass that situation, and then legitimizes the adoption of defensive practices by the administrators, against the unwanted change in the company's command. The reasoning is still paradoxical, as far as the takeover public offering is an exceptional opportunity for the shareholder to maximize immediately the sale price of his shares[18].

It is difficult to justify the managers' resistance in relation to the operation based only on the perspective of greater gains for shareholders in the long run. Strictly speaking, the interest of the company startsto be seen in the broader

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[16] Cf. FISCH, Jill E. The role of shareholder primacy in institutional choice. *Queen's Univ. Law & Economics Research Paper*, No. 2004-03, Oct. 2004. Available at: <http://ssrn.com/abstract=704745>. The author questions the idea that there would be an implicit contract between shareholders and managers, in order to oblige the latter to always act to maximize the financial return of the capital invested in the company. In this sense, it argues that the contractual obligation to generate value for shareholders does not determine specific choices made by managers to impose sacrifices and risks on other constituents.

[17] Cf. GELTER, Martin. The dark side of shareholder influence: toward a holdup theory of stakeholder in comparative corporate governance (March 17, 2008). *ECGI — Law Working Paper*, No. 096/2008; *Clea 2008 Meetings Paper*; *Harvard Olin Fellows' Discussion Paper*, No. 17/2008. Available at SSRN: <https://ssrn.com/abstract=1106008>. Iman Anabtawi e Lynn A. Stout also call attention to the fact that the activism of relevant minority shareholders may counteract the company's best interest (ANABTAWI, Iman; STOUT, Lynn A. Fiduciary duties for activist shareholders. UCLA School of Law, Law-Econ Research Paper No. 08-02; *Stanford Law Review*, v. 60, 2008. Available at: <https://ssrn.com/abstract=1089606> or at <http://dx.doi.org/10.2139/ssrn.1089606>).

[18] For further discussion on the definition of the interest of the company in the context of the hostile takeover offer to control and the interpretation of state laws that seek to legitimize the adoption of defensive practices, in order to protect the interests of *stakeholders*, see BAINBRIDGE, Stephen M. Interpreting nonshareholder constituency statutes. *Pepperdine Law Review*, v. 19, pg. 991-1025, 1992. Available at: <http://ssrn.com/abstract=310261>.

perspective of preserving the ethical values incorporated in it, including the protection of the interests of employees (job loss), suppliers (pressure to accept less advantageous supply conditions), consumers (worse quality products or services availability), and the community (closing of the local business unit)[19].

In order to reinforce the position of the managers of companies threatened by hostile takeover, several US state laws started adopting specific provisions (*constituency statues*), which made it impossible to make acquisition offers considered harmful to third parties' interests (*stakeholders*), even if advantageous to shareholders from a purely financial point of view. It is not by chance that the state of Delaware has always been refractory to this law solution[20], never adopting it.

The advent of *benefit corporation*

The *constituency statues* do not represent an isolated counterpoint to the American legal culture, centered on shareholder's supremacy as a reference for the administrators' fiduciary duties. There are also leading academic studies proposing the adoption of innovative governance models, such as emphasis on the diversified composition of the board of directors, to ensure the companies compliance with the corporate purposes contracted by the government to provide services in sensitive areas, like Health and Education. To avoid that shareholders' financial expectations are met at the expense of sacrificing the quality of the service provided, the suggestion is the creation of a special committee within the scope of the board of directors, made up of directors who are not dependent on executive officers or shareholders. However, instead of acting according to the shareholders' interests, monitoring

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[19] Cf. Lisa M. Fairfax, Doing well while doing good, op. cit., pg. 445 and the following. The most paradigmatic case involves Warner Communications, Inc.'s attempt to take over Time. Inc. Time negotiated with Warner the integration of activities, which contained conditions designed to maintain the Time journalism culture, known for prioritizing independence, even at the expense of financial interests. In view of the competing offer from Paramount Communications, Inc., Time's managers made use of defensive measures to prevent shareholders from accepting the financially better conditions proposed by Paramount. The Delaware Supreme Court considered the measure valid, since it was not a control alienation case, but a corporate reorganization. In addition, it recognized the legitimacy of the reason invoked by the administrators to oppose to Paramount's offer, that is, the preservation of the Time culture (pg. 451-454).

[20] Cf. AMERICAN BAR ASSOCIATION. Other constituencies White Paper: potential for confusion. *Business Lawyer*, v. 45, pg. 2253-2261, 1959.

the executive officers and ensuring the accuracy of the financial reports, the special committee is responsible for ensuring that the corporate purpose in the activity performed by the company is met[21].

From 2010 on, American law and legal practice began to experiment the dissemination of a new corporate type, which presupposes the execution of a profitable business activity, however, it is combined with meeting public interest objectives previously defined in the articles of incorporation. This is the *benefit corporation*, already provided for in the law of about 30 federal states, inspired by the basic model proposed by the private entity B Lab.[22] In 2016, nearly 3,600 companies are estimated to have been incorporated in the United States in the form of *benefit corporation*, and at least 500 of them with head office in the state of Delaware, known for its specialization and conservatism in corporate matters[23].

The wave that favors the adoption of the new model has been driven by the growing feeling about the importance of ethical, social and ecological values (regardless of the existence of regulatory determination or legal assertion), when deciding to undertake, invest, consume and accept employment. These are consumers who are willing to pay an additional price for products whose manufacture and marketing comply with the highest standards of business conduct; entrepreneurs motivated to contribute to the improvement of social well-being, even at the cost of reducing the profit margin; investors satisfied with lower financial returns for socially responsible ventures, and also talented people who prioritize job opportunities in companies that are both sensitive to social demands and concerned with the environment, even accepting lower remunerations[24].

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21 Cf. FAIRFAX, Lisa M. *Achieving the double bottom line*: a framework for corporations seeking to deliver profits and public services. Heinonline, 2003-2004. Available at: <http://heinonline.org>.

22 V. Model Benefit Corporation Legislation (MBCL), available at: <http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf>. Accessed on: 8 Oct 2016. B Lab is a non-profit private entity, created with the purpose of promoting the figure of the *benefit corporation*. Further information can be obtained on its official website: <www.bcorporation.net/>. The American Bar Association (ABA), through its committee on corporate law, proposed adjustments to the MBCL prepared by B Lab (AMERICAN BAR ASSOCIATION. Benefit corporation White Paper. *The Business Lawyer*, v. 68, p.pg. 1083-1109, Aug. 2013).

23 Cf. MURRAY, J. Haskell. An early report on benefit reports. *West Virginia Law Review*, v. 118, No. 25, 2015. See also ALEXANDER, Frederick H. The capital markets and benefit corporations. *Business Law Today*, July 2016.

24 Cf. CLARK JR., William H.; BABSON, Elizabeth K. How benefit corporations are redefining the purpose of business corporations. *William Mitchell Law Review*, v. 38, No. 2, pg. 817-851, 2012.

This trend has been called conscious capitalism and its characteristic feature lies in overcoming the corporate ideal based on the concept of shareholder's supremacy and guided exclusively by the objective of maximizing profit or valuing stock investment, within the limits of the law (*shareholder model* or *property model*). On the other hand, there is room for business decisions to also take into account the collective interest and that of affected third parties (*stakeholder model* or *entity model*), even when this is not justified from an exclusively economic point of view[25].

The fact is that the prevailing understanding in US court precedents makes the legitimacy of the company's management's action subject to conditions related to its potential to generate value to shareholders, even in the long term and with considerable discretion. In other words, it is not admitted that the company's decision has as its only basis meeting any interest disconnected from the profitable purpose[26]. This legal framework has become inadequate to accommodate more progressive entrepreneurial visions, which not only seek to ensure the business sustainability over time, but also wish to simultaneously exercise some kind of social or ecological activism, imposing on the company and its shareholders the resulting cost.

For this, it is necessary to institutionally recognize that the company can assume a parallel mission (in addition to generating value to shareholders), to clearly define its outlines and motivate corporate managers to adequately weigh conflicting interests. On the other hand, consumers, workers and investors willing to share the additional burden want to be sure that the company does really committ to pursuing the officially stated purposes of public interest. It is worth mentioning that this is not simply a marketing discourse, without greater commitment or legal effectiveness (*enforcement*)[27].

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[25] Cf. MACKEY, John; SISODIA, Rajendra. *Liberating the heroic spirit of business*: conscious capitalism. Harvard Business School Publishing Corporation, 2013.

[26] Cf. William H. Clark Jr. and Elizabeth K. Babson, How benefit corporations are redefining the purpose of business corporations, op. cit. The authors mention the cases *Dodge v. Ford*; *Unocal Corp. v. Mesa Petroleum Co.*; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*; *eBay Domestic Holdings, Inc. v. Newmark*, keeping in mind that the most important judicial precedents in the formulation of the concept of interest of the company are considered, based on the idea of maximizing the shareholder financial return. The interest of the company thus defined becomes the benchmark for assessing the legitimacy of the managers' conduct and the fulfillment of the respective fiduciary duties.

[27] It refers to the strategy known as *greenwashing*, in which the business speech favorable to meeting social and ecological values is not accompanied by the effective practice. V. MONTGOMERY, John. Mastering the benefit corporation. *Business Law Today*, July 2016.

The *benefit corporation* arises precisely with the purpose of filling the legal gap, in order to exempt with the use of hermeneutic construction to expand the concept of company interest and legitimize the adoption of positions that do not maximize returns to shareholders, when justified in face of the interest of the collectivity and third parties linked to the business activity. The invocation of the benefit to shareholders in the long run, to assess the fulfillment of administrators' fiduciary duties, has its limits and may become artificial in certain contexts. The inclusion in the *benefit corporation* framework allows the company to maintain its profitable purpose and, at the same time, ostensibly pursue other non-financial objectives.

It is interesting to note that encouraging the use of the new corporate form in the US business environment does not result from any more favorable tax treatment. Strictly speaking, the traditional company and the *benefit corporation* are subject to the same tax regime[28]. The main reason for adopting the model lies in the flexibility of objectives or diversity of purposes, combined with the maintenance of the ability to remunerate adequately managers and investors. As for the typical *non-profit entity*, although enjoying tax advantages, it is prevented from distributing profits or returning portions of the equity to its founders, associates or managers.

US reality seems to contradict the academic prediction, spread in the beginning of the 21st century, that the corporate governance model guided solely by the generation of value to shareholders would be the culmination of institutional evolution or, more precisely, the end of the corporate law history[29]. The dissemination of the *benefit corporation* suggests that the evolution is still going on, and may be surprising due to the ability to devise innovative legal solutions to meet concrete demands from economic agents.

Despite the existing variations between state laws that deal with the *benefit corporation*, three basic points seem to be common to all of them: (i) the need for statutory provision of at least one general public interest, possibly combined with specific interests of related parties, whose service must be mandatorily considered by the company managers; (ii) expansion of fiduciary duties, to cover the achievement of public interest objectives formally set out, together with the satisfaction of the shareholders' financial aspirations; (iii)

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[28] Cf. LOWE, Kimberly. The use of benefit corporations by charitable organizations. *Business Law Today*, July 2016.

[29] Cf. HANSMANN, Henry; KRAAKMAN, Reinier. The end of history for corporate law. *Yale Law School Working Paper*, No. 235, Jan. 2000. Available at: <http://ssrn.com/abstract=204528>.

periodic disclosure of information about the benefits actually produced by the company[30].

Jurisdictions that are closest to the Model Benefit Corporation Legislation (MBCL) include concrete mechanisms to ensure the fulfillment of the social mission undertaken by the company. There are, for example, state laws that require a director specifically charged with assessing the company's performance in pursuing the public interest that it has committed to pursue (*benefit director*). Periodic certification by an independent specialized entity may also be necessary, attesting the accuracy and consistency of the information contained in the social report released by the company[31].

In order to give legal effectiveness to the broader fiduciary duties of corporate managers, the legal framework of some states authorizes the filing of lawsuits (*derivative suits*) by shareholders holding a certain interest in the share capital (*e.g.*, 5%), in the event of deliberate omission in pursuing the public interest incorporated by the company, or for failure to comply with the obligations of transparency and disclosure of information. Such behavioral deviations, however, do not generate an obligation to pay monetary indemnities, but only the issuance of judicial decisions of mandatory nature.

Delaware legislation, on the other hand, preferred to relax the requirements to qualify for the *benefit corporation* category, (i) restricting the freedom to choose the statutory public interest to one or more items on a predefined list, (ii) admitting the fulfillment of managers' fiduciary duties, when they simply make informed and disinterested business decisions, considering the multiple interests incorporated in the company, regardless of the option adopted or the result produced; (iii) exempting the existence of the *benefit director*; (iv) reducing the mandatory frequency of disclosure of the social report to biannual periods; (v) making optional the certification by an independent entity[32].

The *benefit corporation* of Delaware is conceptually close to the figure of the *flexible purpose corporation*, also provided for in some state laws. The *flexible purpose corporation*'s bylaws shall provide for a public interest to be pursued by the company, but on an optional basis only. In that case, managers are authorized (and not required) to consider such an objective in their business decisions. Consequently, they can ignore the statutory public interest, without

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30 Cf. William H. Clark Jr. and Elizabeth K. Babson, How benefit corporations are redefining the purpose of business corporations, op. cit.

31 Cf. ibid.

32 Cf. John Montgomery, Mastering the benefit corporation, op. cit.

causing any breach of fiduciary duties. Nor does the social performance of the *flexible purpose corporation* need to be assessed. The annual disclosure of a simplified report without quantifications together with the annual financial statements[33] are enough.

Delaware's more flexible legal policy, creating room for the exercise of private autonomy, imposes a *trade-off* in terms of credibility and signaling to the external public. It is not enough for the potential investor to verify that the company is a *benefit corporation* incorporated in the state of Delaware to be sure that the administrators are effectively committed to achieving the announced public interest. A more in-depth analysis of the content of the statutory provisions and the company's governance structure will also be necessary. There is a greater risk of frustration in expectations[34].

It is not hard to imagine the challenges in terms of corporate governance for the good functioning of the *benefit corporation* model. Because of this, the new corporate type has also been a target of mistrust and criticism by academics and legal professionals, especially with regard to (i) the difficulty in reconciling conflicting interests within the company; (ii) the risk of arbitrary action by the managers to the detriment of the shareholders; (iii) the adoption of adequate incentive and control mechanisms; (iv) the measurement of the effective fulfillment of the statutory public interest; (v) the consistency of the reports disclosed[35].

The *benefit corporation* figure seems to be based on organizational theory, which puts the organizational aspect of the corporate form in the foreground, correlating social interest to the organization's ability to compose the wills of the different interest groups that maintain formal and informal relations with the company (shareholders, workers, creditors, suppliers, consumers and the community).

The social role of companies in Brazilian law

Brazilian law emphasizes the contractual nature of the company, as can be inferred from the old and the new Civil Code. While the revoked Article

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[33] Cf. MAC CORMAC, Susan; HANEY, Heather. New corporate forms: one viable solution to advancing environmental sustainability. *Journal of Applied Corporate Finance*, v. 24, No. 22, Spring 2012.

[34] Cf. John Montgomery, Mastering the benefit corporation, op. cit.

[35] LOEWENSTEIN, Mark. Benefit corporations: a challenge in corporate governance. *The Business Lawyer*, v. 68, pg. 1007-1038, Aug. 2013.

1.363 alluded to the combination of efforts to achieve common purposes, the current Article 981 mentions the partners' personal contribution to the exercise of a certain economic activity, with the subsequent sharing of results. Despite the lack of express reference to the common purpose, it can be inferred from the wording of Article 981 that this objective is still present, although reduced to the sharing of the profits made due to the exercise of the economic activity.

In Brazil, the opening to institutionalism came with the enactment of Law No. 6.404/1976 (Law of Corporations), which attributed to the controlling shareholder and to the administrators the broader duty of taking care of other interests that gravitate around the business activity, besides simply satisfying shareholders' financial expectations. Decisions of those responsible for directing and managing social businesses have become permeable to considerations on their impact on workers, the local community, the national economy and the public good.

The possibility of considering the impact of business decisions in the interests of third parties arises from the idea of the social role of companies, which is expressly ratified in Brazilian corporate law (cf. Article 116, sole Item; Article 117, Item 1, *a*; and Article 154). The social role is used as a counterpoint to the understanding of the company solely as an instrument to generate and share profits. It is a fact, however, that adequate protection instruments did not accompany the legal statement in favor of community and national interests. It follows that the institutionalism of the Brazilian corporate law comes down to a statement eminently related to principle, devoid of legal effectiveness[36].

Everything contributes to transform social role of companies into a mere authorization for social managers to sacrifice profitability in order to serve the interests of related parties, as is the case with the *flexible purpose corporation* (and unlike the *benefit corporation*, in which the practice would be mandatory). In this context, the social function spontaneously fulfilled, even with the imposition of additional burdens on the company, does not characterize abuse of power control nor breach of diligence and loyalty duties by the managers. However, it is necessary for the beneficiary to maintain some factual or legal link with the company, including the environment and the community in which it operates. The company would hardly be able to

[36] Cf. COMPARATO, Fábio Konder; SALOMÃO FILHO, Calixto. *O poder de controle na sociedade anônima*. 4. ed. Rio de Janeiro: Forense, 2005. pg. 384-385.

justify spontaneous expenses dissociated from its business context only by claiming to materializethe public interest generally considered.

Nor would it be right to reduce the social role of companies to the sponsorship of welfare projects. The same applies to the granting of benefits to employees, in addition to that required by labor law or resulting from a collective agreement. In the latter case, it is a personnel policy aimed at concrete results in the interest of the company itself, such as increase of productivity by motivating the workforce, reduction of costs related to *turn over* and retaining of talents.

In short, social role is everything the company does aiming at social inclusion and environment protection, without any legal obligation, specific compensation, immediate or future expectation of economic advantage. The real effects, resulting from the legal principle of the social role of companies, apply equally to any type of company, be it restricted, for not having access to the stock market, or opened, with shares traded on an organized stock exchange or OTC market.

The social role of companies should not be conceptually distinguished between companies with exclusive participation of private shareholders and companies under direct or indirect control of a public entity. Both private and state companies have exactly the same social function, the invocation of which can justify corporate decisions aimed primarily at serving the interests of related parties, albeit at the expense of sacrificing profitability[37].

In this regard, the idea of social function allows the company to achieve objectives similar to that of the US *flexible purpose corporation*, but with an important difference: in Brazilian law, the social role of companies has a vague and changeable meaning over time, admitting a greater margin of leeway of administrators and controlling shareholder in choosing the non-equity interests to be prioritized. In the case of *flexible purpose corporation*, the legal systems that adopt the model require the statutory explanation of the general or specific public interest to be possibly pursued by the company, together with the interests of the group of shareholders. The common point between both institutional solutions lies in the optional character of managerial performance in favor of a given public interest or that of third parties potentially affected by the business activity.

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[37] Cf. Mario Engler Pinto Junior, *Empresa estatal*, op. cit., pg. 334.

Still according to the Brazilian legal system, it would be possible for the company to provide for, in its statute, the commitment to seek concomitantly the achievement of an objective of community nature, as long as it is comprised in the concept of the social role of companies. The explanation of such reference does not imply the mischaracterization of the legal type of corporation, since the profitable purpose would remain preserved, although with some mitigation. The Brazilian company Natura, which has shares traded on the São Paulo stock exchange and became known for its good corporate governance practices, seems to have adopted this solution, by making its commitment to promoting social and environmental well-being explicit in its bylaws, what granted it the B Lab certification of *benefit corporation*[38].

The public mission of the state-owned company

Another peculiarity of Brazilian corporate law is the recognition that the company subject to state control, even when it has private minority shareholders (also called state-owned enterprise — SOE), is imbued with a public mission, which does not mean the elimination of the profitable purpose. This theme has gained prominence in national legal circles and has already produced abundant legal writing by both scholars of public administrative law and private corporate law, notably after the advent of the Law of state-owned companies[39].

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[38] Article 3 of the company's bylaws, which defines its corporate purpose, contains the following explanation: "Sole Item — The development of activities related to the corporate purpose takes into account the following factors: (i) the short and long-term interests of the company and its shareholders, and (ii) the economic, social, environmental and legal effects, in the short and long term, related to its employees, suppliers, partners, customers and other creditors, as well as to the communities in which the company operates locally and globally".

[39] V. Mario Engler Pinto Junior, *Empresa estatal*, op. cit. Several other studies followed, some of them reproducing the same society approach about the mixed capital company (cf. STEINDORFER, Fabriccio. *Minoria acionária versus sociedade de economia mista.* Curitiba: Juruá, 2016; JUSTEN FILHO, Marçal (Org.). *Estatuto jurídico das empresas estatais*. São Paulo: Revista dos Tribunais, 2016; ARAGÃO, Alexandre Santos de. *Empresas estatais*: o regime jurídico das empresas públicas e sociedades de economia mista. Rio de Janeiro: Forense, 2017; FIDALGO, Carolina Barros. *O Estado empresário*. São Paulo: Almedina, 2017; NORONHA, João Otávio de; FRAZÃO, Ana; MESQUITA, Daniel Augusto (Coord.). *Estatuto jurídico das estatais*: análise da Lei nº 13.303/2016. Belo Horizonte: Fórum, 2017; TONIN, Mayara Gasparoto. *Sociedade de economia mista e acionistas minoritários*. São Paulo: Quartier Latin, 2018; and VIEIRA, Bernardo Strobel Guimarães et al. (Org.). *Comentários à Lei das Estatais*. Belo Horizonte: Fórum, 2019). Another parallel line of research adopted state participation in private companies as object of reflection. (cf. GUEDES, Felipe Machado. *A atuação do Estado na economia como acionista*

A good understanding of the legal outlines that define the scope of action and the strategic objectives of the state-owned enterprise is the starting point for identifying the public interest that justified its creation, referred to in Article 238 of the Brazilian Law of corporations[40]. According to the Brazilian legal system, the presence of the public interest thus qualified is inherent to any state-owned enterprise, whichever its branch of activity is, unfolding into public policies compatible with the corporate purpose, which may even autonomously justify business decisions that do not maximize the financial return to shareholders.

The public policies that can be legitimately practiced by the state-owned enterprise depend on the nature of the activity performed. In the case of public service provision, they are usually associated with the attributes of the service itself (regularity, universalization and constant adaptation). In relation to the state monopoly, there is much room for serving strategic interests. Regarding the exploitation of economic activity subject to free enterprise, public policies are not designed to replace the capitalist system, but seek to counteract the negative effects of entrepreneurial decisions based exclusively on economic logic. Among other things, public policies may serve to promote more balanced economic development.

The need for a clear indication of the peculiar public interest, already in the law authorizing the creation of the state-owned enterprise, was introduced by Article 2, Item 1, of the Law of state-owned emterprises[41]. This law was edited based on Article 173 of the Brazilian Constitution, with the new wording given by Constitutional Amendment No. 19, of 1998, which is why it has national coverage, applying equally to federal, state, district and municipal state companies.

Until then, the general rule was that the authorizing law did not expressly provide for the matter, as in fact occurs with the majority of state-owned

minoritário: possibilidades e limites. São Paulo: Almedina, 2015; SCHWIND, Rafael Walbach. *O Estado acionista*. São Paulo: Almedina, 2017; and SAADI, Mario. *Empresa semiestatal*. Belo Horizonte: Fórum, 2019).

40 Article 238 —The legal entity that controls the mixed capital company holds the duties and responsibilities of the controlling shareholder (articles 116 and 117), but may guide the company activities in order to meet the public interest that justified its creation.

41 Article 2 — The exploitation of economic activity by the State will be carried out through a mixed capital company, a state-owned enterprise, and its subsidiaries. Item 1 — The constitution of a state-owned or mixed capital company will depend on prior legal authorization that clearly indicates a relevant collective interest or a national security imperative, pursuant to the *caput* of Article 173 of the Brazilian Constitution.

companies in operation. The legislative failure to specifically point out the public interest that justified the creation of the mixed capital company does not mean the absence of any public mission, nor does it imply the implicit permission to act with the same maximizing logic of private companies.

On the other hand, the interpretation of the authorizing law must take into account that the public corporate interest has a specific dimension, that is to say, it is not about any public interest (primary or secondary), but only the one that justified the creation of the company. If there is ambiguity, the restrictive understanding must prevail, under penalty of distorting the institutional purposes of the state company.

Despite the object of the state-owned enterprise being subject to the principles of legal reserve and specialization, the public interest contained therein may evolve over time and acquire new connotations as a result of the change in the socioeconomic scenario. A mixed capital companyinitially constituted to grant the supply of a given industrial input or product for popular consumption, under a monopoly regime, must subsequently change its public policies and the way it acts in the market, when it ceases being monopolistic and starts competing with the private sector. The same reasoning applies to the state-owned enterprise that previously operated in the basic infrastructure sector under an unregulated public service regime, and shall now be subject to independent external regulation and to the market dispute with other economic agents authorized to provide the same utility.

Ideally, the explanation of the public interest should be included in the bylaws, although the Law of state-owned enterprises does not contain a direct determination in this regard. Even facing the silence of an authorizing law and of statutory provisions, the information on public policies that the company intends to adopt must be included in the annual letter endorsed by the board of directors, referred to in Article 8, Item I, of the Law of state-owned enterprises[42].

[42] Article 8 — State-owned and mixed capital companies must observe, at least, the following transparency requirements: I — preparation of an annual letter, subscribed by the members of the Board of Directors, with an explanation of the undertakings to achieve public policy purposes by the state-owned enterprise, the mixed capital company and their subsidiaries, in compliance with the collective interest or to the national security imperative that justified the authorization for their respective creations, with a clear definition of the resources to be employed for this purpose, as well as the financial-economic impacts for the achievement of such objectives, measurable through objective indicators.

The Law of state-owned enterpriseshas additional requirements to ensure transparent disclosure of the impacts of public policies on the company's businesses, as provided in Article 8, item VI. According to the legal provision, the explanatory notes to the financial statements shall contain a specific item to disclose the *operational* and *financial data of activities related to the purposes of collective interest or national security*[43]. Additionally, Item 2 of Article 8 considers it necessary to sign a bilateral legal instrument to define the obligations and responsibilities assumed by the state-owned enterprise that exploits economic activity, under conditions that are different from those practiced by private companies[44].

On the other hand, Article 4, Item 1 of the Law of state-owned enterprises reinforces the integration between the public interest and that of the company, by stating that the one shall exercise the power of control *in the interest of the company, respecting the public interest that justified its creation*[45]. It leads to the conclusion that the controlling shareholder is responsible for inducing the mixed capital companyto pursue its peculiar public interest, always within the financial limitations existing at all times. In this regard, the company orientation is no longer a mere faculty of the controlling public entity, as suggested by the wording of Article 238 of the Law of corporations.

At the federal level, the delimitation of the public interest in the bylaws became mandatory under Article 5 of Decree No. 8.945/2016, even when the law authorizing the creation of the state company is ambiguous or simply silent. The rules in the bylaws seem desirable not only to give more transparency to

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[43] Article 8 — State-owned and mixed capital companies must observe, at least, the following transparency requirements: […] VI — disclosure, in an explanatory note to the financial statements, of the operational and financial data of the activities related to the achievement of the purposes of collective interest or national security.

[44] […] Item 2 Any obligations and responsibilities that both the state-owned and the mixed capital company that operate in economic activity assume under conditions different from those of any other private sector company in which they operate must: I — be clearly defined by law or regulation, as well as provided for in contract, agreement or adjustment entered into with the competent public entity to establish them, with attention to the wide publicity of such instruments; II - have its cost and revenues discriminated and disclosed in a transparent manner, including in the accounting plan.

[45] Article 4 — A mixed capital company is an entity endowed with legal personality under private law, whose creation is authorized by law, in the form of a corporation, whose shares with voting rights belong mostly to the Union, States, Federal District, Municipalities or indirect administration entity.

Item 1 — The legal entity that controls the mixed capital company has the duties and responsibilities of the controlling shareholder, established in Law No. 6.404, of December 15, 1976, and shall exercise the power of control in the interest of the company, respecting the public interest that justified its creation

the relationship with the stock market, but also to guide the administrators in preparing the annual letter. In the end, the document is expected to reflect the government's long-term vision of the company purposes, as an integral part of the state administration.

Once the statutory reform is approved, it will be up to the board of directors to detail the public policies that will be supported by the state-owned enterprise, as long as they are compatible with its purpose. The controlling shareholder 's agreement with the position adopted by the administrators will occur *a posteriori*, upon approval of the financial statements at the shareholders' meeting. On the other hand, the finding that the company is really pursuing its legitimate public interest presupposes the alignment of its business activities with the public policy purposes stated in the annual letter, as prescribed in Article 8, Item 1, of the Law of state-owned enterprises[46].

The bylaws rule, which defines the public interest incorporated in the mixed capital company, also binds the controlling shareholder. The public entity must refrain from guiding the management agencies of the controlled company in disagreement with the parameters established in the bylaws, notably with regard to the content of the annual letter mentioned in Article 8, I, of the Law of state companies. Nor would it be lawful for the controlling shareholder to approve resolutions of the general meeting that may contradict the statutory provisions in this regard, under the invocation of the decision-making sovereignty provided for in Article 121 of the Low of corporations, without first promoting its modification through the appropriate corporate procedure.

The parallel here would be between the mixed capital company and the *benefit corporation*, insofar as both have a dual mandate, combining the achievement of a certain public interest with the need to adequately remunerate the stock investment. In both cases, the public interest is mandatory (and not just optional), unlike the legal provision that alludes to the social role of companies, or the *flexible purpose corporation* model.

With the advent of the Law of state-owned enterprises, the need to specify the public interest peculiar to each state-owned enterprise, preferably in its

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[46] Article 8 — State companies and mixed capital companies must observe, at least, the following transparency requirements: […]

Item 1 — The public interest of the state-owned and mixed capital company, respecting the reasons that motivated the legislative authorization, is expressed by means of the alignment between its purposes and those of public policies, as explained in the annual letter referred to in Item I of the *caput*.

own bylaws, is in line with the prescriptions of the Model Benefit Corporation Legislation.

Once again, organizational theory can contribute to solve the eternal dilemma of the mixed capital company, which presupposes the coexistence of shareholders imbued with different purposes (although not necessarily antagonistic). From the organicist view of the mixed capital company, it is easier to reconcile the service to the public interest resulting from the state-owned shareholding control with the expectation of financial return from private capital. In this regard, divergences are then treated as something normal to corporate life, similar to the clashes that characterize the capital-labor relationship.

The internal organs of the company are responsible for solving the potential conflict by arbitrating the optimal profit, which adequately remunerates the stock investment, without having as a goal the search for maximum profit. On the other hand, considering as equals the one-person state-owned enterprise and an organization with its own interest and with decision-making autonomy can contribute to a better understanding of its relationship with the controlling state, in addition to offering parameters to define the acceptable level of profitability in the absence of private shareholders.In the case of Brazil, the symbiotic relationship between public interest and profitable purpose in the mixed capital company is not based on any hermeneutic construction, but stems from an express legal norm, more specifically from Article 238 of the Law of corporations, now reinforced by Article 4, Item 1, of the Law of state-owned enterprises. The legitimacy of state conduct presupposes its adherence to the interests of the controlled company, comprised in the broadest sense, which also incorporates lawful public policy purposes. Such a solution is peculiar to Brazilian legislation and is not present in the tradition of other countries.

The public purpose of the state-owned enterprise is not to be confused with the individual interest of the state as a controlling shareholder, but is internalized in the company, as an inseparable part of the corporate cause. From the legal point of view, the public interest penetrates into the company. The public interest becomes part of the company interest, which serves as a reference for assessing the regular exercise of the shareholding power control and the fulfillment of the fiduciary duties of the corporate managers. However, it is not a matter of any public interest, but only that which is supported by the law authorizing the constitution of the company and reproduced in the bylaws.

From the legal prescription contained in Article 238 of the Law of Corporations, combining with Article 4, Item 1, of the Law of state-owned enterprises, the dispute between institutionalists and contractualists to define the outlines of the interest of the mixed capital companiesis emptied. Whichever the theoretical line adopted, the public interest will always be incorporated into the social interest. For institutionalists, it is a matter of including in the range of interests covered by the corporate organization another category represented by the public interest in the strict sense, as defined in the law authorizing the constitution of the state-owned enterprise, and now also in its bylaws. As for the contractualists, the achievement of the public interest could be part of the society contract, provided that this has been previously agreed upon by all partners. Regarding the organizational theory, there is no doubt of its application to mixed capital company, not exactly to indicate the final scope to be pursued, but to make possible the interaction with competing expectations of other interested parties, especially private capitalists.

In the mixed capital company with participation of market shareholders, the conflict between apparently disparate objectives (profitable purpose and public mission) is not settled with the abolition of any of them. It is not a question of unconditionally subordinating the profitable purpose to the accomplishment of the public mission, nor of liberating the state-owned enterprise to generate unlimited value to its shareholders (public and private). The way out is to consider normal the coexistence of divergent interests within the mixed capital company, as proposed by the organizational theory. Such interests, in turn, shall be reconciled by the internal governance structures, through the arbitration of the ideal profit margin, not necessarily suppressing or maximizing it.

Since the state is the sole shareholder, it is easier to balance profitability with public policy purposes. The use of a corporate form in this case arises from the convenience of administrative deconcentration to organize the exercise of a certain economic activity. In other words, the company with a single shareholder constitutes a legal technique for organizing the business function of the state. In this scenario, the basic concern is to guarantee the company's long-term financial sustainability.

Conclusion

In Brazilian law, the public mission incorporated in the state-owned enterprise is not reduced to the concept of social role of companies. Every state-owned enterprise has a public policy objective, that justifies its own existence from the legal point of view. The public mission does not coexist with profit objective, and cannot harm the company's financial sustainability in the long run.

As for the social role, it is present in any type of company (state-owned or private) and acts as a counterpoint to the objective of maximizing profits or generating value for shareholders. The social role can be invoked as a legal basis for business decisions that favor the related public, albeit at the expense of reducing the financial return on equity investment.

The figure of the *flexible purpose corporation* is also based on the idea of the company social role, and even preserves the optional character of the management's performance in order to meet the interests of *stakeholders*. In turn, the corporate structure of the *benefit corporation* matches the Brazilian mixed capital company. In this case, the public interest defined in the bylaws shall be pursued mandatorily by the administrators, who are also responsible for weighing up the impact on the shareholders' remuneration.

The dual mandate present in both models of society (*benefit corporation* and mixed capital company) imposes similar challenges in terms of corporate governance. This explains the adoption of comparable institutional designs, with emphasis on three aspects: (i) the need for a statutory provision of the public interest incorporated in the company, whose attendance shall be mandatorily considered by the managers; (ii) redefinition of the fiduciary duties of the administrators to cover the achievement of broader objectives; (iii) qualified disclosure of information about the results obtained by the company in the non-financial field.

The corporate provisions of the Law of state-owned companies present innovations to strengthen the corporate governance of Brazilian state-owned companies, which, to a certain extent, are similar to the solutions adopted for the *benefit corporations* under US law. The most striking differences in treatment can be explained by the risk of political rigging to which state-owned companies (and not necessarily private companies) are exposed.

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